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1975 AMENDMENTS TO THE LOUISIANA WORKMEN'S COMPENSATION ACT

The Louisiana legislature adopted several significant amendments to the Louisiana Workmen's Compensation Act¹ during its 1975 regular session.² Before passage of the amendments, the Act contained a woefully inadequate schedule of benefits³ and several dated provisions.⁴ The purpose of this comment is to point out and analyze the major changes made by the recent amendments.

Definitions of Total and Partial Disability

Probably the most significant change made by the amendments is in the definitions of total and partial disability.⁵ Perhaps because benefits were pitifully inadequate, the previous definition of total disability, the inability "to do work of any reasonable character,"⁶ was interpreted broadly by the courts.⁷ For example, the courts construed the definition to mean that a common laborer was totally disabled if he was rendered unable to compete with able-bodied men in the open market for laborers' jobs.⁸ A skilled laborer was considered totally disabled if he was rendered unable to perform his special trade or skill.⁹ The new, substantially more restrictive

1. LA. R.S. 23:1021-1351 (1950) [hereinafter referred to as the Act].

2. The amendments found in La. Acts 1975, No. 583, became effective September 1, 1975.

3. LA. R.S. 23:1202 (1950), *as amended by* La. Acts 1968, No. 25 § 2, providing for the payment of a maximum of \$65 per week for 500 weeks in the case of total and permanent disability.

4. The legislature repealed these sections of the Act, LA. R.S. 23:1036, 1038-43 (1950).

5. LA. R.S. 23:1221 (1950), *as amended by* La. Acts 1975, No. 583 § 9.

6. LA. R.S. 23:1221 (1950), *as amended by* La. Acts 1968, No. 25 § 3.

7. Even if an employee were promoted and received an *increase* in pay following his injury, he could still be considered totally and permanently disabled if he were unable to do the *exact* job he was performing before the injury. *See, e.g.,* Lindsey v. Continental Cas. Co., 242 La. 694, 138 So. 2d 543 (1962); Martin v. Travelers Ins. Co., 200 So. 2d 141 (La. App. 1st Cir. 1967).

8. *See, e.g.,* Lawless v. Steel Erectors, Inc., 254 La. 37, 222 So. 2d 849 (1969); Hughes v. Enloe, 214 La. 538, 38 So. 2d 225 (1948); Lathers v. Schuykill Prod. Co., 111 So. 2d 530 (La. App. 1st Cir. 1959); W. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 275 (1951) [hereinafter referred to as MALONE].

9. *See, e.g.,* Olivier v. Liberty Mut. Ins. Co., 241 La. 745, 131 So. 2d 50 (1961); Ranatza v. Higgins Indus., Inc., 208 La. 198, 23 So. 2d 45 (1945); MALONE § 275.

definition of total disability is the inability "to engage in any gainful occupation for wages."¹⁰ Although the amended definition provides the same standard as that used by the Social Security Administration,¹¹ it should be interpreted independently of the jurisprudence surrounding the Social Security provision, since the regulations under that provision create a presumption that a person is "capable of engaging in a gainful occupation for wages" and therefore is not totally disabled, if he is earning a small amount per month.¹² This presumption, coupled with additional language in the Social Security definition of total disability which is not present in the Louisiana Act, has caused the courts which have interpreted the Social Security provision to take an extremely narrow view of total disability,¹³ and allow recovery only if the individual cannot "engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives. . . ."¹⁴ Since neither the Social Security Act's additional language nor its presumption is present in the

10. LA. R.S. 23:1221(2) (1950), *as amended by* La. Acts 1975, No. 583 § 9: "For injury producing permanent total disability of an employee to engage in any 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 the injury, was particularly fitted by reason of education, training, and experience. . . ." Another amendment specifically provides that the loss of both hands, or both feet, or both eyes, or one hand and one foot, shall constitute total and permanent disability in the absence of conclusive proof to the contrary. LA. R.S. 23:1221(4)(j) (1950), *as amended by* La. Acts 1975, No. 583 § 9.

11. 42 U.S.C. §§ 416(i), 423(d)(1)(A) (1972).

12. *Sanborn v. Weinberger*, 383 F. Supp. 859 (D. Del. 1974); 42 U.S.C. § 423(d)(4) (1972); 20 C.F.R. § 404.1534(b) (1969).

13. *See, e.g., Alvarado v. Weinberger*, 511 F.2d 1046 (1st Cir. 1975) (neither state of the economy nor employers' reluctance to hire is relevant in determining if the claimant is disabled); *Gaultney v. Weinberger*, 505 F.2d 943 (5th Cir. 1974) (not inconsistent to say a claimant suffers pain but is not so severely impaired as to meet the stringent test for disability imposed by the Social Security Act); *Hoffman v. Weinberger*, 383 F. Supp. 592 (E.D. Pa. 1974) (disability looks to physical or mental ability to engage in certain activities, regardless of whether the opportunity to do so exists).

14. 42 U.S.C. 423(d)(2)(A) (1972). *See also Lopez v. Secretary of Health, Education & Welfare*, 512 F.2d 1155 (1st Cir. 1975) (court stated that it was not to be concerned with the availability of jobs in the claimant's area to one with claimant's disability, but only with claimant's ability to engage in gainful activity).

Louisiana Act, it would be preferable to interpret the new statutory language independently of the jurisprudence construing the Social Security Act.¹⁵

The definition of partial disability has also been changed by the amendments from "partial disability to do work of any reasonable character,"¹⁶ to "partial disability . . . to perform the duties in which he was customarily engaged when injured."¹⁷ The new definition of partial disability is a legislative restatement of the courts' interpretation of total disability under the old act.¹⁸

When the amended definitions of partial and total disability are read together, the concept envisioned seems to be that if an injured worker can engage in *any* gainful employment, he will not be considered "totally disabled." However, if he is unable to return to the work in which he was customarily engaged at the time of the accident, or work of a similar nature, he will be considered partially disabled, and entitled to the difference between the wages he is *actually* earning at present,¹⁹ and those which he was earning at the time of the accident.²⁰ The intent of these changes is to increase the use of partial disability benefits and restrict the availability of total disability benefits to those cases in which an injured workman is incapable of earning any wages.

The liberalized partial disability benefits²¹ should make the courts willing to carry out the legislature's apparent intent, but several practical problems may have a counterbalancing effect, causing the intent to be thwarted. Probably most serious is that the amended method of computing partial disability benefits will hinder an employer or his insurer from entering into a settlement agreement with the injured employee. Since partial disability benefits are computed as the difference between the amount the employee was earning

15. The new language was not an intentional adoption of the Social Security definition of total disability. Telephone conversation, John Avant, who drafted Act. 583, March 26, 1976.

16. LA. R.S. 23:1221(3) (1950).

17. *Id.*, as amended by La. Acts 1975, No. 583 § 9.

18. Telephone conversation, John Avant, March 26, 1976. See also *Lindsey v. Continental Cas. Co.*, 242 La. 694, 138 So. 2d 543 (1962); *Martin v. Travelers Ins. Co.*, 200 So. 2d 141 (La. App. 1st Cir. 1967).

19. See discussion in text at note 43, *infra*.

20. LA. R.S. 23:1221(3) (1950), as amended by La. Acts 1975, No. 583 § 9.

21. See discussion in text at note 40, *infra*.

at the time of the accident and the amount the employee is *actually* earning at present,²² the parties will be left without a concrete figure for use in computing a settlement amount. The amount to which an employee would be entitled in weekly benefits is subject to change from a switch in current jobs, an increase or decrease in pay, or any other change in the labor market. Therefore, the employee may be forced to accept weekly benefits rather than a lump sum settlement because of the insurer's reluctance to compromise, based on the hope that the employee's position will improve. Or, the employee himself may be reluctant to enter a settlement agreement if he fears that he might lose his present job, or be forced to change jobs or reduce his hours due to the previous work-related injury.

Any hesitancy to enter into lump sum settlement agreements may also have an adverse effect on claimants' attorneys because of the difficulty of collecting attorney's fees from weekly benefit checks. An attorney may be forced to receive the weekly check and withhold his portion before forwarding the remainder to the injured employee.²³

Because the amount of compensation due to an injured employee who is partially disabled is dependent on a number of variables and can change rapidly, both claimants and employers may want the trial court to keep cases open for periodic review of whether they are entitled to altered compensation because of a change in conditions. Continual review will place an onerous burden on the courts, a burden which is relieved under other compensation statutes by the use of an administrative commission system.²⁴ Perhaps the 1975 amendments have brought Louisiana's compensation law to a point at which a commission system will be necessary. Because of the nature of workmen's compensation claims and the heavy administrative burden these claims present, a

22. LA. R.S. 23:1221(3) (1950), *as amended by* La. Acts 1975, No. 583 § 9.

23. This problem has not been present under our present system because the normal procedure for a claimant who seeks the aid of an attorney is to enter into a settlement agreement. The problem is also not present in the Longshoremen's and Harbor Workers' Act because all attorney's fees are subject to the prior approval of the administrative commission, and the fees are not included in weekly benefit checks.

24. *See, e.g.*, GA. CODE ANN. 114-701 (1920); ILL. ANN. STAT. 48-138.13 (1967); N.J. STAT. ANN. 34:15-89 (1955).

commission system seems to be a logical alternative to the judicial system.²⁵

Compensation Benefits

Another significant change in the Louisiana Workmen's Compensation Act concerns the amount and duration of compensation benefits. Prior to the 1975 amendments, Louisiana's benefits were substantially lower than those found in some of the more progressive states,²⁶ and even the total disability benefits were too low for a family's subsistence.²⁷ The new schedule of benefits is comparable to those schedules found in the compensation acts of some of the major industrial states²⁸ and the Longshoremen's and Harbor Workers' Compensation Act.²⁹

Maximum and Minimum Benefits

The maximum and minimum amounts recoverable under the Act have been changed drastically by the amendments,

25. See, e.g., W. MALONE, M. PLANT, J. LITTLE, *THE EMPLOYMENT RELATION* 452 (1974).

26. Whereas the Louisiana Act provided for the payment of sixty-five per cent of the disabled worker's wages up to a maximum of \$65 per week in case of total and permanent disability, New York's law provided for the payment of sixty-six and two-thirds per cent of the worker's wages up to a maximum of \$95 per week, and Michigan's law allowed recovery of two-thirds of the employee's weekly wages with a maximum benefit from \$64 to \$93 depending on the number of dependents the employee had. Compare LA. R.S. 23:1221 (1950), as amended by La. Acts 1974, No. 12 § 1 with N.Y. STAT. ANN. 64:15(3),(6) (1974) and MICH. STAT. ANN. 17.237(351).

27. For instance, the average weekly wage of all workers subject to the Louisiana Employment Security Law in 1974 was \$164.78. *Employment Wages* (1974).

28. The Louisiana Act now provides for the payment of sixty-six and two-thirds per cent of the permanently and totally disabled employee's wages throughout the period of his disability without limit as to amount after September 1, 1977. The comparable provision under Illinois' statute provides for the payment of sixty-five per cent of the employee's wage with a weekly maximum of \$80.90. Under California law an employee is entitled to sixty per cent of his wages with no maximum amount if he is totally and permanently disabled. Compare LA. R.S. 23:1202 (1950), as amended by La. Acts 1975, No. 583 § 5 with ILL. ANN. STAT. 48:13818(f) (1975) and DEERING'S CALIF. CODES, LABOR 4658 (1959).

29. The Longshoremen's and Harbor Workers' Compensation Act provides for the payment of sixty-six and two-thirds per cent of the average weekly wage of the employee with no limit as to amount or as to the period of recovery. 33 U.S.C. § 908(a) (1956).

and will be effectuated through a step-increase system.³⁰ For injuries occurring between September 1, 1975, and August 31, 1976, the maximum allowable amount is \$85 per week and the minimum amount is \$25 per week. For injuries occurring in the period extending from September 1, 1976, to August 31, 1977, the maximum compensation allowable will be \$95 per week with a \$30 per week minimum. For all injuries occurring on and after September 1, 1977, the maximum weekly compensation will be sixty-six and two-thirds per cent of the "average weekly wage" paid in all employment subject to the Louisiana Employment Security Law,³¹ and the minimum compensation will be not less than twenty per cent of such average weekly wage. The "average weekly wage" will be determined by the Administrator of the Division of Employment Security on September 1 of each year on the basis of wages earned by all employees subject to the Louisiana Employment Security Law during the first quarter of that year.³² This new method of computation provides for a flexible ceiling on the maximum compensation amount payable, thus taking into account changes in the economy without the necessity of periodic legislative revision of benefit amounts.³³ The average injury weekly wage in effect at the time of the employee's injury will be the basis for computing the benefits during the full period of disability.³⁴

Measure and Duration of Benefits

Likewise, the measure and duration of compensation due to the employee within the minimum and maximum amounts have been greatly increased.³⁵ If an employee is totally disabled, whether temporarily or permanently, he is entitled to receive sixty-six and two-thirds percent of *his* average weekly wage³⁶ *during the period of disability*, subject, of course, to

30. LA. R.S. 23:1202(1) (1950), *as amended by* La. Acts 1975, No. 583 § 5.

31. LA. R.S. 23:1471-1713 (1950).

32. LA. R.S. 23:1202(2) (1950), *as amended by* La. Acts 1975, No. 583 § 5.

33. Data concerning the present average weekly wage can be found in an annual publication of the Louisiana Department of Employment Security entitled *Employment Wages* (1974). The present average weekly wage in Louisiana is \$164.78.

34. LA. R.S. 23:1202(2) (1950), *as amended by* La. Acts 1975, No. 583 § 5.

35. LA. R.S. 23:1221 (1950), *as amended by* La. Acts 1975, No. 583 § 9.

36. LA. R.S. 23:1021(7) (1950), *as amended by* La. Acts 1975, No. 583 § 1. This figure is the individual employee's average weekly wage, as opposed to the average weekly wage of all employments subject to the Louisiana

the maximum amounts allowable under the step-increase system.³⁷ The law prior to amendment allowed an employee sixty-five percent of his wages during a 300-week period in the case of temporary total disability³⁸ and allowed the same percentage for 500 weeks in the case of total and permanent disability.³⁹ Both time limitations have been eliminated. In the case of partial disability, the compensation payable has been changed from sixty-five percent of the employee's wages at the time of injury⁴⁰ to sixty-six and two-thirds percent subject to the maximum amount of compensation payable.⁴¹ The maximum period during which compensation for partial disability is payable has been lengthened from 300 weeks to 400 weeks for all injuries occurring between September 1, 1975, and August 31, 1976. The maximum period is extended to 425 weeks for the period of September 1, 1976, to August 31, 1977, and after September 1, 1977, to 450 weeks.⁴² The amended statute also changes the method for computing the amount of compensation for partial disability. The compensation due a partially disabled worker is the appropriate percentage of the difference between the amount *actually* earned by the employee while he is disabled and the amount he was earning at the time of the accident.⁴³ Under the statute before the amendment, the compensation due was a percentage of the difference between the amount the partially disabled employee was *able* to earn and the amount he was earning at the time of the accident.⁴⁴ This change seems anomalous, since the section as amended seems to allow a worker to recover full benefits for partial disability even if he is able to work, but simply refuses to do so.

The 1975 amendments eliminate the former 500-week maximum period for compensation payments in case of death,⁴⁵ and the Act now provides that compensation pay-

Employment Security Law, which provides the ceiling for the maximum amount payable.

37. LA. R.S. 23:1202 (1950), *as amended by* La. Acts 1975, No. 583 § 5.

38. LA. R.S. 23:1221(1) (1950).

39. LA. R.S. 23:1221(2) (1950), *as amended by* La. Acts 1968, No. 25 § 3.

40. LA. R.S. 23:1221(3) (1950), *as amended by* La. Acts 1968, No. 25 § 3.

41. See discussion in text at note 30, *supra*.

42. LA. R.S. 23:1221(3) (1950), *as amended by* La. Acts 1975, No. 583 § 9.

43. *Id.*

44. LA. R.S. 23:1221(3) (1950), *as amended by* La. Acts 1968, No. 25 § 3.

45. LA. R.S. 23:1233 (1950), *as amended by* La. Acts 1975, No. 583 § 11.

ments will continue until certain events take place. Benefits continue until death or remarriage of a surviving spouse.⁴⁶ In the event of remarriage, a surviving spouse is entitled to two years compensation payments in a lump sum.⁴⁷ As to a workman's dependent minor child,⁴⁸ the benefits continue until his death, marriage, or eighteenth birthday, unless he attends an accredited educational institution or is physically or mentally incapable of earning.⁴⁹ If the dependent minor is a student, compensation payments continue until he ceases to be enrolled at an educational institution or until he reaches the age of 23 years.⁵⁰ In the case of an incapable child, compensation payments continue so long as the child's incapacity prevents him from earning.⁵¹

A significant change has been made in situations in which compensation may be due for a wife's death.⁵² Under the former law,⁵³ a husband was entitled to compensation benefits for his wife's death only if he could prove actual dependency upon her⁵⁴ or show that he was mentally or physically incapacitated from wage earning and was living with his wife at the time of her death.⁵⁵ Under the amended version of § 1251, a husband is conclusively presumed to be wholly and actually dependent upon his deceased wife if he was living with her at the time of her accident.⁵⁶

Medical Expenses

The Act now provides that an employer or his insurer is liable, without limit in amount, for the medical, surgical, and hospital expenses of an injured employee.⁵⁷ The former statute provided for a maximum amount of \$12,500 except in

46. *Id.*

47. *Id.*

48. LA. R.S. 23:1021(3) (1950), as amended by La. Acts 1975, No. 583 § 1.

49. LA. R.S. 23:1233 (1950), as amended by La. Acts 1975, No. 583 § 11.

50. *Id.*

51. *Id.*

52. LA. R.S. 23:1251 (1950), as amended by La. Acts 1975, No. 583 § 13.

53. LA. R.S. 23:1251(2) (1950).

54. LA. R.S. 23:1252 (1950).

55. LA. R.S. 23:1251(2) (1950).

56. LA. R.S. 23:1251 (1950), as amended by La. Acts 1975, No. 583 § 13. The wife is also conclusively presumed to be dependent on her husband in the event of his death if she is living with him at the time of his death.

57. LA. R.S. 23:1203 (1950), as amended by La. Acts 1975, No. 583 § 6.

cases of undue hardship.⁵⁸ Also, if an employee refuses to obtain recommended treatment for an inguinal hernia, the responsibility of the employer or insurer is now \$600, instead of \$500, for first aid, medical treatment, or any truss, support, or other mechanical device.⁵⁹

Prescription

The prescriptive periods for filing suit on a claim remain unchanged,⁶⁰ except that in cases of partial disability when voluntary payments have been made to the employee, the prescriptive period is now extended to three years from the date of the last payment.⁶¹ The prescriptive period of one year from the date of the last voluntary payment when total disability payments have been made but stopped is not affected.⁶² The concept of partial disability presupposes that a worker will be working, but at diminished wages, and that workmen's compensation will pay the difference between the diminished wages and the amount he was earning at the time he was injured.⁶³ Thus, an employee whose present wages equal those he was earning at the time of the accident is no longer considered partially disabled. If his current wages drop again, he is once again partially disabled. If, however, the worker is employed for three consecutive years without dropping below his level of earnings at the time of the accident so that within the three year prescriptive period he receives no payments, the legislature apparently decided that the accident is too remote to be the cause of subsequent lost earning power, because his claim will have prescribed.

Coverage

The 1975 amendments broadened the range of employments covered by the Act by removing the requirement that the occupation be "hazardous,"⁶⁴ and allowing it to cover all

58. LA. R.S. 23:1203 (1950), *as amended by* La. Acts 1968, No. 103 § 1.

59. LA. R.S. 1221(q)(iii) (1950), *as amended by* La. Acts 1975, No. 583 § 9.

60. LA. R.S. 23:1209 (1950), *as amended by* La. Acts 1975, No. 583 § 7.

61. *Id.*

62. *Id.*

63. LA. R.S. 23:1221(3) (1950), *as amended by* La. Acts 1975, No. 583 § 9.

64. LA. R.S. 23:1035 (1950), *as amended by* La. Acts 1975, No. 583 § 3.

Several sections of the Act dealing with hazardous employment were repealed as obsolete, La. R.S. 23:1036, 1038-43 (1950).

employments.⁶⁵ This expansion merely brought the Act into line with the case law which effectively had written out the requirement that the employment be hazardous by holding that any employment involving the use of machinery or electrically charged equipment was hazardous.⁶⁶ In addition, the amendments expanded the scope of hazards covered by the Act by changing the definition of an "occupational disease" to "that disease or illness which is due to causes and conditions characteristic of and peculiar to the particular trade, occupation, process, or employment in which the employee is exposed to such disease."⁶⁷ This amendment formally dispenses with the requirement that the disease or illness either be precipitated by an "injury by accident" or that it be one of the enumerated diseases under the section before amendment.⁶⁸ This change is not particularly significant because the courts previously were allowing recovery for "injuries" that technically should have been diseases, by labeling them "accidents" and thereby ignoring the occupational disease section both as to the substantive question of coverage and as to procedural questions such as prescription.⁶⁹

Another amendment⁷⁰ codifies a recent Louisiana Su-

65. This is, of course, subject to the preliminary inquiry as to whether the employee is engaged in the employer's trade, business, or occupation. LA. R.S. 23:1035 (1950), *as amended by* La. Acts 1975, No. 583 § 3.

66. *See, e.g.*, Collins v. Spielman, 200 La. 586, 8 So. 2d 608 (1942); Paige v. Tregre, 283 So. 2d 777 (La. App. 1st Cir. 1973), *writ not considered*, 262 La. 641, 284 So. 2d 335 (1973); Shepherd v. Fort Sherwood Apartments, 270 So. 2d 298 (La. App. 1st Cir. 1972), *cert. denied*, 272 So. 2d 375 (1973); Washington v. Harvey, 164 So. 2d 379 (La. App. 2d Cir. 1964), *cert. denied*, 246 La. 600, 165 So. 2d 487 (1964); Rosenquist v. New Amsterdam Cas. Co., 78 So. 2d 225 (La. App. Orl. 1955).

67. LA. R.S. 23:1031.1 (Supp. 1952), *as amended by* La. Acts 1975, No. 583 § 2.

68. LA. R.S. 23:1031.1 (Supp. 1952), *as amended by* La. Acts 1958, No. 39 § 1.

69. Bertrand v. Coal Operators Cas. Co., 253 La. 1115, 221 So. 2d 816 (1969) (claimant suffering from arteriosclerosis who was disabled as a result of a heart attack was held to have suffered an accident within the meaning of the Act); Burns v. W. H. Patterson Const. Co., 310 So. 2d 675 (La. App. 1st Cir. 1975) (court applied one-year prescriptive period to claimant's action for workmen's compensation, when he claimed disability as a result of pulmonary disease, even though the illness could not be attributed to any accident or specific occurrence); Landry v. City of New Orleans, 266 So. 2d 492 (La. App. 4th Cir. 1972) (court stated that fireman's heart condition was the result of an "accident" within the meaning of the Act).

70. LA. R.S. 23:1035.1 (Supp. 1975).

preme Court decision,⁷¹ providing that recovery of workmen's compensation benefits under another state's laws does not preclude recovery under the laws of Louisiana if the worker is otherwise entitled to draw Louisiana compensation payments.⁷² A set-off will be allowed for all compensation payments and medical expenses paid in the other state when computing the amount due the worker under Louisiana's statute.

Conclusion

The 1975 amendments to the Louisiana Workmen's Compensation Act suggest two dominant concerns of the legislature: first, to allow a severely injured worker benefits sufficient to support himself and his family in an acceptable manner, and second, to restrict the definitions of disability so as to decrease to a minimum the number of claims by malingerers. The first objective should be implemented by the increased amount and duration of compensation benefits. With the exception of the provision dealing with the determination of compensation for partial disability,⁷³ the amended provisions should also accomplish the purpose of restricting unwarranted claims. The restrictive definition of total disability, coupled with the increased benefits, extended duration and liberalized prescriptive period for partial disability, should make it possible for Louisiana courts to apply the distinction between total and partial disability as originally envisioned by the Act.

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71. *Griffin v. Universal Underwriters Ins. Co.*, 283 So. 2d 748 (La. 1973), *cert. denied*, 416 U.S. 904 (1974).

72. LA. R.S. 23:1035.1 (Supp. 1975).

73. See discussion in text at note 44, *supra*.