Public Law: Workers' Compensation

Alston Johnson
WORKERS’ COMPENSATION

Alston Johnson*

The 1978-79 term of the Louisiana appellate courts contained, as usual, a great number of cases involving workers’ compensation. Many of these were unremarkable, and a few more are worthy only of passing mention. However, there were several decisions that require more extended comment in order to assess the judicial attitudes toward some of the recent amendments to the Louisiana Workers’ Compensation Act.

COVERAGE FOR INDEPENDENT CONTRACTORS

As originally conceived, workers’ compensation schemes were intended to remove the burden of industrial and commercial accidents from injured employees and allocate the cost of these accidents to the consumers of the product or customers of the business which employed the injured worker. The delicate compromise underlying the scheme required that persons who were not employees, or who should not be treated as employees, should not receive compensation for work-related injuries. One of the devices used to assure their exclusion was a practice, common to many jurisdictions, of adopting the common law definition of employee in the absence of any statutory definition, thus excluding any coverage for “independent contractors.”

The obvious difficulty with such a distinction was that it was

*Professor of Law, Louisiana State University.
1. Among the decisions requiring only passing mention is an interesting “threshold” case in which the Fourth Circuit Court of Appeal held that the Louisiana Workmen’s Compensation Act, LA. R.S. 23:1021-351 (1950), covered an injury to a bakery shop employee occurring at a point about midway between the building and the cab from which she had exited. Lyon v. Entringer Bakeries, Inc., 367 So. 2d 1333 (La. App. 4th Cir. 1979). Another decision properly calculated the “average weekly wage” of a worker when overtime is involved. Skinner v. Boise So. Co., 364 So. 2d 223 (La. App. 3d Cir. 1978). Another approved an award of sixteen cents per mile for an employee’s travel expenses in seeking medical attention. Bonnette v. Travelers Ins. Co., 367 So. 2d 1261 (La. App. 5d Cir. 1979). Finally, it was held that a person who contracts to drive a car from one city to another is engaged in sufficient manual labor to be covered under the Act for injuries suffered in carrying out that contract. Timberlake v. Avis Rent a Car System, 361 So. 2d 934 (La. App. 4th Cir. 1978).
3. This observation was made by Judge Lemmon in Evans v. Naihaus, 326 So. 2d 601 (La. App. 4th Cir. 1976).
4. See A. LARSON, WORKMEN’S COMPENSATION § 43.10 (desk ed. 1977).
very often hard to determine whether an injured individual was an employee or an independent contractor. A closely allied problem was the potential for disguising employees as independent contractors so as to avoid liability under the Act.

Louisiana’s approach to the problem was blunt and reasonably effective, though it treated the symptoms rather than the disease. A 1948 amendment to the Act excluded an “independent contractor” from coverage “unless a substantial part of the work time . . . is spent in manual labor by him in carrying out the terms of the contract,” in which case he was expressly covered. This largely obviated the distinction between “employee” and “independent contractor,” since the latter would be covered, regardless of the title given to him, if he satisfied the above definition.

This provision does not create an employment relationship; it simply affords employee’s benefits to the contractor who qualifies under the Act and under the same conditions imposed for an employee’s recovery. Since the amendment, the trend has clearly been to include greater numbers of independent contractors within the coverage of the Act; but even so, there are limits.

If an independent contractor does not spend a substantial portion of his time in manual labor in carrying out the contract, then he is obviously not a person covered by section 1021(5) of the Act and is not entitled to compensation. And even if the independent contractor satisfies the manual labor requirement, it must also be demonstrated that he was performing services “arising out of and incidental to his employment in the course of his employer’s trade,

5. The fact that an individual would spend a considerable amount of time in manual labor in carrying out such a contract is not significant. It is, however, indicative of the real problem, which is that he might not have an independent business enterprise which would regard the chance of injury to himself or his other workers as a contingency to be provided for in advance and included along with the other risks of his undertaking that are computed in fixing the contract price. It also indicates the contract price necessary to cover the cost of injury to himself.

6. 1948 La. Acts, No. 179 (current version at LA. R.S. 23:1021(5) (1950)). This provision provides:

“Independent contractor” means any person who renders service, other than manual labor, for a specified recompense for a specified result either as a unit or as a whole, under the control of his principal as to results of his work only, and not as to the means by which such result is accomplished, and are expressly excluded from the provisions of this Chapter unless a substantial part of the work time of an independent contractor is spent in manual labor by him in carrying out the terms of the contract, in which case the independent contractor is expressly covered by the provisions of this Chapter.

7. This would exclude, for example, the supervising independent contractor vividly described in one case as one who “aloofly directs in clean Sunday clothes.” Welch v. Newport Indus., 86 So. 2d 704, 707 (La. App. 1st Cir. 1956), cert. denied.
business or occupation." This latter requirement, of course, is the one applicable to actual employees and is made applicable to the "working independent contractor" by the definition contained in section 1021(5).

It thus appears that an independent contractor seeking compensation must satisfy both of these requirements, and the failure to meet either of them will result in a denial of compensation. Considering these criteria together indicates the very reasonable basis for the exclusion: a person not satisfying both of these requirements is very likely engaged in a separate business enterprise which should properly bear the cost of his injury.

During this term and the preceding one, the Louisiana courts have returned to this knotty problem, with particular emphasis on the latter criterion, i.e., is the claimant performing services incidental to the business of the person from whom he seeks compensation? This was the pivotal issue in Slocum v. Lamartiniere. Defendant had been engaged in the grocery business for over thirty years, and he decided that he needed a new building in which to conduct that business. Rather than hire a general contractor for that purpose, he decided to engage the various craftsmen directly. Among those he hired was plaintiff, a carpenter. Plaintiff was paid by the hour and received a check from defendant at the end of each week; he engaged in manual labor in carrying out the terms of the contract. During his work, plaintiff was injured in a fall from a ladder and sought compensation from defendant.

The trial court had dismissed plaintiff's petition, concluding that his employment was not in the trade, business, or occupation of the defendant. The appellate court reversed in an opinion in which two judges joined and a third filed a concurring opinion. There were two dissents. The majority opinion appears to rest its decision to award compensation on either of two rationales:

Clearly, Lamartiniere was not building his new store as a hobby. Whether the building be regarded as a continuation of the grocery business or a venture into the construction business, it was a commercial enterprise in every respect and those

9. In the preceding term, the Louisiana Supreme Court in Lushute v. Diesi, 354 So. 2d 179 (La. 1978), held that an air conditioning repairman's dependents were not entitled to compensation since air conditioning was not an "essential" part of the restaurant business. See note 14, infra.
10. 369 So. 2d 201 (La. App. 3d Cir. 1979), cert. denied, 372 So. 2d 569 (La. 1979).
11. Judge Watson wrote the majority opinion, in which Judge Cutrer joined. Judge Stoker concurred, while Judges Guidry and Doucet dissented.
employed for the labor are covered by the compensation act. *Speed v. Page*, 222 La. 529, 62 So. 2d 824 (1952); *Doss v. American Ventures, Inc.*, 261 La. 920, 261 So. 2d 615 (1972). Here, as in *Doss*, Lamartiniere undertook to contract the construction of his new store and could be considered engaged in a second trade or business as a contractor.  

The result reached by the majority is probably correct, but the ambiguity of the rationale may cause future problems. There is continued confusion between section 1035 of the Act and section 1061 (old Section Six liability). Section 1035, by virtue of the fact that an independent contractor engaged in manual labor is to be treated as an employee, provides compensation if he is performing services "arising out of and incidental to his employment in the course of his employer's trade, business or occupation." No other portion of the Act is needed to establish coverage, and in fact no other portion is relevant. Section 1061, on the other hand, offers coverage to the employees of a contractor (not the contractor himself) against a principal who has chosen to carry out a part of his own business through the contractor and his employees.

The purposes of the two sections are different. Section 1035 is intended to extend to certain independent contractors the same coverage that would be extended to an employee of the person with whom he contracts. Section 1061, however, is designed to prevent employers from contracting out all or part of their own business and asserting that they have no "employees" and thus no compensation responsibility. The fact that the Act extends certain protections to the employees of a contractor under section 1061 has nothing at all to do with the contractor's own rights under another section.

But the court found it necessary, in mixing the two sections together, to assert that "a building is an essential part of a grocery
Such an assertion is not necessary, or even pertinent, to reach a conclusion of coverage.

The defendant chose to supervise the construction himself rather than use a general contractor. This he had every right to do; he no doubt also considered that he would thereby save himself the general contractor's fee. That fee would necessarily have included not only some profit for the general contractor, but also the cost of workers' compensation coverage that the contractor would purchase and would include in his fee. The appellate court was correct in deciding that the defendant's choice to be his own contractor placed him in the construction business, at least to the extent that he was constructing for himself.

Had the defendant sent a grocery employee (on the regular payroll) to assist in the construction, there would have been little doubt that an injury to him in the process would be covered. Defendant should not be able to avoid a compensation responsibility by choosing instead to "contract" with a laborer to do the same thing and then insist that his "employee" was not injured, only a person with whom he had contracted. It would be unfair to permit such an individual to "save" costs at the expense of injured laborers.

14. 369 So. 2d at 203. The court was attempting to distinguish the recent decision of the supreme court in Lushute v. Diesi, 354 So. 2d 179 (La. 1978). In Lushute, the court merged the provisions of section 1021(5) with those of section 1061 and produced a definition of independent contractor/coverage contained in neither section. The worker in that case was an air-conditioning repairman who probably had a separate enterprise and perhaps should not have been entitled to compensation. But the court concluded that it was necessary for his dependents to establish that the work he had contracted to do was "a necessary part" of the restaurant business of the person with whom he contracted, even though the definition of section 1021(5) makes no such requirement. Finding that air conditioning was not "essential" to the restaurant business, the court held that there was no coverage. Distinguishing this erroneous conclusion led the court in Slocum to make its assertion that a building is an essential part of a grocery store.

15. Such coverage would, no doubt, extend to the contractor's own employees as well as employees of his sub-contractors, to whose claims the contractor might be exposed under section 1061. Thus an owner who was his own contractor might expect in this way to avoid a substantial premium for compensation coverage, in addition to the contractor's own profit percentage.

16. See, e.g., Vicknair v. Southern Farm Bureau Cas. Ins. Co., 292 So. 2d 747 (La. App. 4th Cir.), cert. denied, 296 So. 2d 838 (La. 1974) (compensation for fatal heart attack suffered by plantation handyman while preparing employer's personal camp for hurricane); Jackson v. Lawler, 273 So. 2d 856 (La. App. 2d Cir. 1973) (employee instructed by employer's agent to assist in corralling horses although employed as construction worker; compensation awarded when he was injured while so engaged).

17. To permit him to do that would be to permit him to accomplish the result outlawed for other principals who contract out their work under section 1061.
who contribute to the construction process which will produce economic benefit to the self-styled general contractor.\textsuperscript{18}

In light of the fact that it is clear that the plaintiff did not have an independent business enterprise and apparently did not negotiate for his own accident protection as a part of his "contract" price, the result achieved by the court is laudable. Those who choose to be their own general contractors will, in essence, have to bear the compensation responsibilities that general contractors bear under the Act.

But the alternative rationale (that construction is a part of the grocery business) cannot be approved. Such a conclusion is inconsistent with previous decisions under the Act and, moreover, undermines the previous interpretations of section 1061.\textsuperscript{19} If new construction is a part of any ongoing business, then any person who contracts for such construction must be deemed to have contracted out "a part" of his business under that section. In doing so, that person has a potential compensation exposure under section 1061 against which insurance ought to be procured. Suddenly, all businesses will be exposed to the cost of work-related risks in the construction industry.

This has not previously been the case. A business which entered into a contract for new construction could be confident that this

\textsuperscript{18} This is not to say that the principle needs to be so broad as to include the individual who acts as a general contractor in building a house for his own use and enjoyment. The fact that such a person might some day profit from the sale of the house does not put him in the business of selling houses; such a reading would stretch the definition of "trade, business or occupation" to the breaking point. However, with the existence of compensation insurance, it would not be incomprehensible to assign compensation liability even to such a general contractor. Risks can be spread horizontally, as well as vertically, through marketing of a product. Consider the compensation responsibility of certain groups which do not have a product to sell or a service to render in the ordinary sense. Meyers v. Southwest Region Conference Ass'n of Seventh Day Adventists, 230 La. 310, 88 So. 2d 381 (1956).

\textsuperscript{19} See, e.g., Reeves v. Louisiana and Ark. Ry. Co., 282 So. 2d 503 (La. 1973) (constructing new petroleum coking unit on premises of refining company held not be part of that company's business; tort immunity defense raised by principal under section 1061 rejected); Duplechin v. Pittsburg Plate Glass Co., 265 So. 2d 787 (La. App. 3d Cir. 1972) (construction of additional facility for generation of electric power at plate glass company not part of that company's business; tort immunity defense raised by principal rejected); Moak v. Link-Belt Co., 229 So. 2d 395 (La. App. 4th Cir. 1969), modified on other grounds, 257 La. 281, 242 So. 2d 515 (1971) (construction of new conveyor system at sugar refinery not part of refinery's business; tort immunity defense of principal rejected). See also Hudson v. Aetna Cas. Ins. Co., 299 So. 2d 499 (La. App. 4th Cir.), cert. denied, 302 So. 2d 20 (La. 1974) (summary judgment in favor of principal in tort action set aside; worker was employee of contractor engaged to construct new conveyor system and storage facilities at bulk handling plant operated by principal).
would not be regarded as a part of its business and that any compensation remedy of an injured construction worker would be against his own employer or against the general contractor. And certainly, if new construction is a part of an ongoing business, major repairs must be as well; and this has also not previously been the case.\(^{20}\)

These results are beyond the protections of the Act and are not required by its language. The ordinary construction worker is adequately protected both by his own employment contract and the right to proceed against principals in that same business. There is no need to hold that construction is a part of ongoing businesses in order to protect him. The cost to do so would be substantial.

On the other hand, those who are in business and choose to perform as general contractors may be said to assume the responsibilities of general contractors. It would be unfair to permit them to avoid both the general contractor's fee and any compensation responsibility to those whom they employ or with whom they "contract."

Thus, it is submitted that the rationale of the \textit{Slocum} decision should be limited to its assertion that the defendant had entered the construction business.\(^{21}\) The alternative rationale offered, that new construction is a part of the grocery business, is unnecessary and will prove troublesome in future cases.

\section*{Limitations on Employer's Right to Reimbursement: Uninsured Motorist Coverage}

The employer's right to reimbursement against certain third persons for compensation paid to an employee\(^{22}\) is substantial, but

\begin{footnotesize}

21. For a related case decided during this term, \textit{see} \textit{Hebert v. Gulf States Utilities Co.}, 369 So. 2d 1104 (La. App. 1st Cir. 1979). Plaintiff was employed by a construction company which had contracted with one of the defendants, also in the construction business. It appeared that the defendant wanted a building from which to conduct its business, and it poured a slab for that purpose. Then it engaged plaintiff's employer to construct a metal building. Plaintiff was injured in that work and brought a tort suit against the defendant, which asserted that his exclusive remedy was in compensation. The court held that since defendant was in the construction business and was to use the new building in its business, its construction was "a part" of that business. Thus, under section 1061, plaintiff's exclusive remedy was in compensation.

22. \textit{La. R.S. 23:1101-03} (1950 & Supp. 1976). \textit{La. R.S. 23:1101} (Supp. 1976) provides: When an injury or compensable sickness or disease for which compensation is payable under this Chapter has occurred under circumstances creating in some person (in this Section referred to as third person) other than those persons...}

\end{footnotesize}
not without some limitations. One such restriction involves uninsured motorist coverage. Suppose that the employee, driving the employer's vehicle, is injured by the negligence of a third-party driver, who turns out to be uninsured (or underinsured). After receiving compensation from the employer, the employee sues his own automobile insurer under the uninsured motorist coverage portion of the policy. The employer intervenes, seeking reimbursement of the compensation paid. The uninsured motorist carrier may seek a credit against the amount due under the policy to the employee, based on the policy language reducing any amount payable by "the amount paid . . . on account of such bodily injury under any workmen's compensation law."

It is apparent that the latter claim must first be resolved. If the uninsured motorist carrier is entitled to a credit for the amount of compensation already paid to the insured, it obviously would be completely unfair for that reduced amount to be further decreased by the claim of the compensation carrier. The hapless employee would then see his entitlement under his uninsured motorist

---

against whom the said employee's rights and remedies are limited in Section 1032 of this Chapter, a legal liability to pay damages in respect thereto, the aforesaid employee or his dependents may claim compensation under this Chapter and the payment or award of compensation hereunder shall not affect the claim or right of action of the said employee . . . .

Any person having paid or having become obligated to pay compensation under the provisions of this Chapter may bring suit against such third person to recover any amount which he has paid or become obligated to pay as compensation to such employee or his dependents.

23. Recent Louisiana statutes recognize "underinsurance" as well as the lack of insurance. Revised Statutes 22:1406(D)(1)(a) prohibits the issuance of an automobile liability insurance policy in Louisiana unless it affords uninsured motorist coverage up to the amount of the policy limits for bodily injury liability; the insured may reject the coverage entirely or select lower limits, but must do so in writing. Revised Statutes 22:1406(D)(2)(b) includes in the definition of uninsured motor vehicle any vehicle as to which the applicable liability coverage is less than the damage suffered by persons in the other vehicle and, thus, as to which the vehicle is "underinsured."

24. Williams v. Buckelew, 246 So. 2d 58, 65 (La. App. 2d Cir. 1970). In Williams the following policy language is quoted:

"Limits of Liability"

"(a) * * *

"(b) Any amount payable under the terms of this Part because of bodily injury sustained in an accident by a person who is an insured under this Part shall be reduced by

"(1) * * *

"and

"(2) The amount paid and the present value of all amounts payable on account of such bodily injury under any workmen's compensation law, disability benefits law or any similar law."

Id.
coverage reduced by *twice* the amount of compensation he has been paid. Thus, a preliminary determination of the credit claim by the uninsured motorist carrier is necessary.

It appears that the Louisiana courts reject such a credit, despite rather standard policy language appearing to require it.\(^5\) The argument, quite in keeping with that adopted in other jurisdictions,\(^6\) has been that Louisiana law has required that (unless the insured rejects such coverage) a statutory minimum amount of uninsured motorist coverage must be issued.\(^7\) In light of that requirement, permitting the uninsured motorist carrier to reduce the amount specified by the statute by policy language specifying a credit for compensation paid would allow it to circumvent the policy behind the minimum requirement. While this has been a proper rationale, it is subject to the criticism that the statute which requires minimum amounts of coverage may do so only in order for the policyholder to receive that amount from that source or others, so long as it was available up to that amount.\(^8\)

The Louisiana courts thus appear to have settled the first issue by denying any credit to the uninsured motorist carrier and thus assuring to the employee an award of the full amount of the policy limits for which he has paid, at least where the statutory minimum is involved. This is probably correct since the legislature, by enacting the statutory minimum requirement, presumably had no intent to accord to those policyholders injured in a non-employment setting a greater recovery than those injured in an employment setting.\(^9\)


26. See A. Larson, supra note 4, at § 71.20.

27. For many years, that amount was said to be the minimum amounts specified by the Motor Vehicle Safety Responsibility Law, La. R.S. 32:851-1043 (Supp. 1952 & 1977), which were $5,000/$10,000. Very recently, the statute has been amended to specify (again unless the insured rejects the coverage or selects lower limits) that the amount issued must be equal to the amount of bodily injury liability coverage which the insured has selected for his protection against the claims of third persons. La. R.S. 22:1406(D)(1)(a) (Supp. 1975). All of the Louisiana cases were decided when the bare minimum amounts of $5,000/$10,000 were required; but it does not appear that the change in amount (to the amount of liability coverage selected by the insured) would change the underlying rationale of these decisions. But see text at notes 37-40, infra.


29. If, for example, a motorist who purchased uninsured motorist coverage was in-
But these decisions do not necessarily determine the second question. Should the employer be successful in its suit against the uninsured motorist carrier for reimbursement of the compensation paid? This issue was raised during the past term in *Gentry v. Pugh*, in which the court held that there should be no reimbursement. The employee had been injured in an automobile accident caused by an uninsured tortfeasor. He sued not only his personal uninsured motorist carrier, but the uninsured motorist carrier for the employer’s vehicle as well. The compensation insurer sought reimbursement for compensation paid (some $10,000). Summary judgment in favor of the uninsured motorist carriers was affirmed by the Second Circuit Court of Appeal. The court held that the uninsured motorist carrier was not the type of “third person” envisioned by the reimbursement statute.

This seems correct. There would have been an easier answer if our statute referred to the right to proceed against the “wrongdoer”; by no stretch of the imagination can the uninsured motorist carrier be considered a “wrongdoer.” But our statute simply refers to the creation “in some person” of “a legal liability to pay damages” with respect to the compensable injury. This arguably is the case with the uninsured motorist carrier. Its contract with the injured employee creates the legal liability to pay specified damages when the employee is injured by an uninsured motorist, whether within or without the employment relationship. Theoretically, the Act grants to the employer the right to be reimbursed the compensation paid by “such third person.”


31. The court did not add, but perhaps could have, that the statute permits reimbursement against a person in whom there is created a legal liability to pay “damages,” a term of art which might not include proceeds of an insurance policy.


33. The appellate court in *Gentry* noted that the carrier’s responsibility was contractual, but it then concluded that such liability would not be included in the phrase “legal liability.” This distinction is probably too fine. The phrase “legal liability” probably ought to include “contractual” as well as “delictual” liability. The reason for denying reimbursement against an uninsured motorist carrier is not that it has no legal liability toward the insured, but that it has no legal liability to the employer. The latter conclusion is reached on the basis of the policies underlying compensation and uninsured motorist insurance.
One should not lose sight, however, of the purposes of the reimbursement action. Regardless of the language actually used in any given statute, its primary purpose is to cast the compensation loss upon a wrongdoer who has caused it, in whole or in part. Under ordinary circumstances, this results in no loss to the compensated employee. But in the Louisiana scheme, this reimbursement already comes from the employee’s total tort recovery. To extend this reimbursement to a fund purchased entirely by the employee for his own benefit would be, indirectly if not directly, to make him pay out of his funds for compensation coverage—something probably prohibited by the spirit, if not the letter, of section 1163.34

The argument favoring the reimbursement action, even against the uninsured motorist carrier, is that “double recovery” by the employee must be prevented. Professor Larson has observed that there are two kinds of “double recovery.”35 One, no doubt that at which the objections have been directed, describes a situation in which the employee is permitted to retain amounts from two sources which will provide recovery beyond his actual damage. The other, certainly much less objectionable, describes a situation in which the employee receives amounts from two sources, the total of which is still less than his actual damage.

Suppose the injured employee is paid some $20,000 in compensation benefits and his ordinary tort damages would be $40,000. Under normal circumstances, he might proceed against the tortfeasor or the tortfeasor’s liability insurer and expect to receive a $40,000 judgment, out of which he would be expected to reimburse the employer the $20,000 in compensation paid. If, however, the tortfeasor is in fact judgment-proof and uninsured, and the employee realizes $10,000 from his uninsured motorist coverage, he now has received $30,000 total recovery for his $40,000 loss. To permit the compensation carrier to extract $20,000 of that amount makes little sense, and it certainly does not cure some objectionable “double recovery” on the part of the injured employee.

34. LA. R.S. 23:1163 (1950) provides:

It shall be unlawful for any employer . . . to collect from any of his employees directly or indirectly . . . any amount whatever, or to demand, request or accept any amount from any employee, either for the purpose of paying the premium in whole or in part on any liability or compensation insurance of any kind whatever on behalf of any employee or to reimburse such employer in whole or in part for any premium on any insurance against any liability whatever to any employee or for the purpose of the employer carrying any such insurance for the employer's own account, or to demand or request of any employee to make any payment or contribution for any such purpose to any other person.

35. A. LARSON, supra note 4, at § 71.20.
Suppose, however, altering the example just a bit, that the same compensation benefits are paid, but that the employee has purchased a substantial amount of uninsured motorist coverage and may receive the policy limits of $25,000 in a judgment against the uninsured motorist carrier. If he in fact receives such a judgment, he now holds $45,000 in total recovery for a loss only amounting to $40,000. One suspects that in this case the uninsured motorist carrier would re-urge its argument that it should be entitled to credit for the compensation paid, distinguishing the earlier cases as involving a statutory minimum clearly satisfied in this situation. One also suspects that the compensation carrier will be urging that justice can be done only by permitting reimbursement of its compensation. It is apparent from the earlier discussion that one cannot agree to both propositions.

Even in the second situation, the Act probably does not envision that reimbursement should take place. It is tenuous to argue that the “circumstances creating in some person . . . a legal liability to pay damages” for the compensable injury include the purchase by the injured employee of an uninsured motorist policy, or for that matter any other collateral sources he may have purchased. But even if that were not the case, the better policy appears to be to deny the reimbursement. The premium structure for uninsured motorist coverage no doubt reflects the present state of the law, refusing to permit the credit against the payable amount for compensation paid from another source. This probably increases the cost of uninsured motorist coverage. The employee has paid this increased cost, for all we know, because he wants the benefit of this coverage (without credit for compensation paid) as an additional protection over and above compensation which might be payable to him. To permit the employer to benefit from this collateral source, to the detriment of the employee who has wholly paid for it, would be unfair.

The end result, presumably, is a slightly increased cost in compensation insurance, since this is a compensation loss not reimbursable, except from the insolvent tortfeasor. But on balance, it ap-

36. There does appear to be an emphasis on the statutory minimum requirement in all of the Louisiana cases; and this may be an appropriate ground of distinction, subject to the considerations discussed later in this portion of the article.
38. Perhaps for this reason, in the only case which appeared to address the issue of reimbursement as opposed to the setoff argument of the uninsured motorist carrier, the compensation carrier conceded that it was not entitled to reimbursement from the uninsured motorist carrier but only from the actual tortfeasors (presumably insolvent). Williams v. Buckelew, 246 So. 2d 58 (La. App. 2d Cir. 1970).
pears better that this loss should fall on the employment enterprise and its patrons rather than on the employee who purchased a private insurance benefit.

However, there is at least one argument in favor of permitting some kind of accounting for the uninsured motorist carrier in the second example. If the employee's total damages are $40,000, and he has received $20,000 from the compensation carrier and $25,000 from the uninsured motorist carrier, it could be argued that the policy language in the uninsured motorist coverage permitting a credit does not violate public policy and should be enforced. The theory would be that there was a clear policy behind the statute requiring those minimum amounts specified in the Motor Vehicle Safety Responsibility Law, and permitting a credit for compensation paid against that rather meagre minimum amount would violate that policy. Where, however, that statutory language has been replaced with language requiring that the uninsured motorist coverage equal the insured's liability coverage and permitting lower limits or rejection of coverage at the insured's option, it is no longer so clear that the legislature has in mind a certain fixed sum of money, available without deduction. At most, it might be argued that the legislature contemplates that respect be accorded the insured's wishes, without regard to a set amount of money available. Such an intent might not be strong enough to limit the uninsured motorist carrier's recognized right to contract.

Thus, in the relatively unusual case in which the combined total of compensation received and uninsured motorist coverage available will exceed actual damages, there is some support for enforcing the statutory language, but with modification. In the example above, a Michigan court chose a principle which would require deduction of the compensation paid from the actual damages, not from the policy limits of the uninsured motorist coverage. Thus, our employee would receive $20,000 from the compensation carrier

40. These cases will be unusual to the extent that motorists purchase uninsured motorist coverage in relatively small limits, as had previously been the case. To the extent that motorists choose to purchase uninsured motorist coverage in amounts close to or equal to the amount of liability insurance which they purchase, which is often substantial, then it is possible that we will encounter numerous cases in which the compensation paid added to the amount of uninsured motorist coverage payable will exceed actual damages. Should that become common, one may see renewed interest in the modified application of the policy language described in the text.
and $20,000 from the uninsured motorist carrier (actual damages of $40,000 less compensation already paid). The compensation carrier is entitled to no reimbursement; the employee is paid a total which equals his actual damages. In those cases in which the combined total of the compensation and the uninsured motorist coverage would be less than actual damage, even this modified application should not be used.

The modified application at least would place the employee on an equal footing with the situation which would have prevailed had the tortfeasor been solvent. In addition to the $20,000 compensation already received, he would have received the actual amount of his damages from the tortfeasor ($40,000); but he would have been required to reimburse the employer for the compensation already paid him. The only difference would be that the compensation carrier or employer gets reimbursed if the tortfeasor is solvent; if insolvent, this loss falls (in the situation in which the combination is greater than actual damage) on the compensation carrier or employer. The minimal reduction received by the uninsured motorist carrier should be reflected in lower premiums for this coverage.

The primary objection to be raised by the employee is probably that the modified application of the policy language appears to permit the uninsured motorist carrier to benefit from a collateral source available to the insured, when the tortfeasor would not have the same right as to a victim. But it can be said that, after all, the uninsured motorist carrier is not a tortfeasor; and it has agreed to provide certain coverage for a certain premium under certain conditions. Unless those conditions violate clear public policy, they probably ought to be enforced. In the case of the combined recovery exceeding actual damage, such a violation of policy is not apparent.

CONFLICT OF LAWS: APPLICATION OF LOUISIANA ACT TO INJURIES OUT OF STATE

As a part of the major amendments to the Act in 1975, a section governing extraterritorial coverage of the Louisiana Act was added, designated Louisiana Revised Statutes 23:1035.1. Prior to the inclusion of this section, the Act did not address itself to the question of extraterritorial coverage; and all the rules governing this question

42. In the situation in which the combination is less than actual damage, and neither reimbursement of the compensation carrier nor credit in favor of the uninsured motorist carrier is permitted, the loss is thus shared by the two carriers, each of which would then be paying more than it would ordinarily have expected to pay, in an effort to compensate the victim as fully as possible short of actual damages.

had been developed in the cases. The 1975 amendments codified a portion of these rules and may have gone beyond the reach of previous jurisprudence.\footnote{44}

Section 1035.1 concerns injuries or death suffered "while working outside the territorial limits" of Louisiana. It provides that if the injury or death would have been compensable under the Act had it occurred within Louisiana, the benefits of the Act are available, whenever it appears that at the time of the injury (a) the employee's employment is "principally localized" in Louisiana, or (b) he is working under a contract of hire made in Louisiana. The section further provides that benefits awarded under another state's workers' compensation statutes do not operate as a bar to an award under the Louisiana Act, but those benefits will serve as a credit against any amount due under the Louisiana provisions.\footnote{45}

During the 1978-79 term, the first decision interpreting these new provisions was reported. In \textit{Stapleton v. Travelers Insurance Co.},\footnote{46} the court dealt with an injury which occurred out of state to

\footnote{44} References to the employment as principally localized in Louisiana might add a ground for extraterritorial application of the Louisiana Act which has been little used in the past, if at all. \textit{Stapleton v. Travelers Ins. Co.}, 359 So. 2d 1051 (La. App. 3d Cir.), \textit{cert. denied}, 360 So. 2d 1176 (La. 1978). See text at notes 46-61, infra.

\footnote{45} The section does not deal with an injury occurring in Louisiana when the contract of hire may have been made in another state, or when the employment was principally localized in another state. Though a legislative statement on the subject might have been preferable, there is little doubt that application of Louisiana compensation law to an injury occurring here is sanctioned by both Louisiana appellate and United States Supreme Court decisions, even if Louisiana has no other "interest" in the affair. \textit{Pacific Employers Ins. Co. v. Industrial Accident Comm'n}, 306 U.S. 493 (1939); \textit{McKane v. New Amsterdam Cas. Co.}, 199 So. 175 (La. App. Orl. Cir. 1940), \textit{cert. denied}. The section also does not concern itself with the validity of a clause in an employment contract which specifies that a particular state's law should be deemed to control, regardless of the place of injury. This does not frequently pose a problem here, but it is well settled elsewhere that such a clause is unable either to enlarge the applicability of the statute of the state named or to diminish the applicability of the statutes of other states. A. \textit{LARSON}, \textit{supra} note 4, at § 87.70. It is said that the public has a substantial interest in the administration of the compensation remedy, and the matter may not be left entirely to the choice of private contracting parties. A. \textit{LARSON}, \textit{supra} note 4, at § 87.70. Nothing said above, however, should be understood to preclude an insurer from imposing a limitation upon the territorial extent of the coverage it is willing to afford. There is no reason not to respect an agreement between employer and insurer that coverage under the policy shall be limited to claims and benefits payable under the compensation act of a designated state, and the premiums be calculated accordingly. The Louisiana courts have so held on a number of occasions. \textit{Calcote v. Century Indem. Co.}, 93 So. 2d 271 (La. App. 1st Cir. 1957); \textit{Anderson v. St. Paul Mercury Indem. Co.}, 84 So. 2d 878 (La. App. 2d Cir. 1956), \textit{cert. denied}; \textit{Johnson v. El Dorado Creosoting Co.}, 71 So. 2d 613 (La. App. 2d Cir. 1954).

\footnote{46} 359 So. 2d 1051 (La. App. 3d Cir.), \textit{cert. denied}, 360 So. 2d 1176 (La. 1978). The opinion was rendered by a five-judge panel, indicating that there was disagreement
an employee who had spent only about three months of his employment in Louisiana and the rest out of state. The court emphasized that the employee's salary was paid from an office within Louisiana; his work vehicles were registered and licensed here; he received travel expenses from the Louisiana office for his travel to out-of-state work locations; and all of his weekly job reports were filed with the Louisiana office. It reached the conclusion that his employment was "principally localized" in Louisiana.

This broad interpretation of the phrase is probably correct. It is of some significance that the statute uses the word "employment" rather than "business" in speaking of the principal location test. Use of the word "business," or reference to the principal location of the employer's business, would no doubt also have satisfied constitutional requisites. But the emphasis on employment indicates a preference for consideration of the employment relationship as a whole in deciding the question of the applicability of Louisiana law to the controversy.

Some states, principally Minnesota, have used "localization" of the employer's business as a touchstone for application of local law, but even that state eventually broadened its criteria for application of its own law to something which might best be classified as a sufficient-significant-contact theory. Choice of "localization" of the employment in Louisiana, as a determinant for applying Louisiana law to an out-of-state injury, permits a considerable amount of flexibility in the resolution of conflict of law questions; and this concept already had support in Louisiana jurisprudence prior to the new statute and the Stapleton decision.

Consider, for example, the group of opinions in which the conclusion that a Louisiana contract of employment has been formed seems particularly tenuous. In these decisions, an attempt is often made to say that it was the intent, though unexpressed, of the parties that Louisiana law be applied to their agreement, wherever made. An examination of these cases reveals that the factors considered by the court in divining this "intent" parallel closely the fac-

among the first panel of three judges and the decision below was to be reversed or amended. LA. CONST. art. V, § 8(B). The five-judge panel was itself split, with two dissents.

tors considered in other jurisdictions to determine whether the employment relationship exists within a particular state.

The genesis of this line of cases is apparently *McKane v. New Amsterdam Casualty Co.*, which in fact involved a death within the state of Louisiana. In that case, it was argued that Illinois law should be applied because the contract of employment was made in that state. Although the court obviously entertained some doubt about whether the contract could be regarded as a "Louisiana" contract or an "Illinois" contract, it expressed the opinion that, in workmen's compensation cases, this should not be the critical factor. Rather, the court said, the parties' intent should be paramount; and, in determining that intent, one should consider a number of factors, including the place intended for the performance of the contract, the domicile of the parties, and the nature of the work to be done.

This test has subsequently been cited with approval and is similar to that used by other jurisdictions. These jurisdictions also consider the place of the contract itself and the temporary or fixed nature of the work outside the state at the time of injury. The confection of the contract itself within the state would usually be deemed to create the employment relation within that state, and this situa-

---

50. 199 So. 175 (La. App. Orl. 1940), cert. denied.
51. Compare, however, the decision during this term in *Boothe v. Universal Tank & Iron Works, Inc.*, 360 So. 2d 1371 (La. App. 3d Cir. 1978), in which the appellate court reversed the trial court and sustained a declinatory exception to the subject matter jurisdiction when it appeared that a Louisiana domiciliary had gone to Illinois to complete an employment contract and was injured there. The decision was reached on the basis of the law prior to the 1975 amendments. The court felt that Louisiana law could not apply to such an injury, noting that (apart from the fact that plaintiff was a Louisiana domiciliary) the only contact with Louisiana was that plaintiff had placed a brief telephone call from this state to the employer in which he simply sought information about job openings. He then left the state to negotiate further and sign the employment contract. The court said: "There is no indication that either the employer or employee ever intended the contract of employment to be a Louisiana contract." *Id.* at 1373. No doubt this is correct; it might also be said that regardless of whether it was a "Louisiana" contract, the employment was not "principally localized" here.
52. Welch v. Travelers Ins. Co., 225 So. 2d 623 (La. App. 1st Cir.), cert. denied, 254 La. 582, 227 So. 2d 594 (1969); Williams v. Travelers Ins. Co. of Hartford, Conn., 19 So. 2d 586 (La. App. 1st Cir. 1944), cert. denied; Hunt v. Magnolia Petroleum Co., 10 So. 2d 109 (La. App. 1st Cir. 1942), rev'd on other grounds, 320 U.S. 430 (1943). In *Kilburn v. Grande Corp.*, 287 F.2d 371 (5th Cir. 1961), the fifth circuit recognized this line of jurisprudence but determined that the contract in question was in fact made in Louisiana, and apparently deemed it unnecessary to use any other basis to determine whether Louisiana law should apply.
tion would continue until something happens to show that the relationship has been transferred to another state. Under this rubric, all of the present jurisprudence emphasizing Louisiana as the place of the contract could be accommodated, with none of the factual splitting of hairs so characteristic of it.

The new statute governing extraterritorial application of the Louisiana Act thus appears to offer the opportunity to consider, under the concept of where the employment was "principally localized," not only the place in which the contract was made but also other factors, such as:

- the place where the contract is to be performed, if different from the place where it was made
- the domicile of the parties
- the nature of the work outside the state, temporary or permanent

54. A. Larson, supra note 4, at § 87.40.
55. There is ample authority for considering this factor in determining whether to apply Louisiana law, and in truth it must be said that this has been the single most important factor in the pre-statute Louisiana jurisprudence on choice of law.
56. This factor has been considered by the court in applying Louisiana law to an in-state injury in McKane v. New Amsterdam Casualty Co., 199 So. 175 (La. App. Orl. Cir. 1940), cert. denied, and in refusing to apply Louisiana law to certain out-of-state injuries: Grey v. Decker, 229 So. 2d 156 (La. App. 2d Cir. 1969); Cobb v. International Paper Co., 76 So. 2d 460 (La. App. 2d Cir. 1954); Aboud v. Louisiana Oil Refining Corp., 155 So. 484 (La. App. 2d Cir. 1934); Durrett v. Eicher-Woodland Lumber Co., 19 La. App. 494, 140 So. 867 (2d Cir. 1932). It also apparently played a part in the courts' conclusions to apply Louisiana law to out-of-state injuries in Ohlhausen v. Sternberg Dredging Co., 218 La. 677, 50 So. 2d 803 (1951), and Kilburn v. Grande Corp., 287 F.2d 371 (5th Cir. 1961), though in each case the court comforted itself by concluding on close facts that there was a Louisiana contract of hire involved as well. As the court noted in Cobb v. International Paper Co., 76 So. 2d 460, 463 (La. App. 2d Cir. 1954), the two factors do tend to complement each other:

The fact that the employment contemplated not transient work but work at a permanent location in Mississippi adds weight to the conviction that the parties' intention was to have their contract treated as a Mississippi contract where the contract was entered into and where the work was to be performed.
57. This seems clearly to have been a paramount consideration in Babineaux v. Southeastern Drilling Corp., 170 So. 2d 518 (La. App. 3d Cir.), cert. denied, 247 La. 613, 172 So. 2d 700 (1965) (agreeing that Louisiana law could be applied), and Seisler v. Bragmans Bluff Lumber Co., 146 So. 690 (La. App. Orl. Cir. 1933) (applying Louisiana law to out-of-state injuries and death). It probably also played a part in the court's decision to apply Louisiana law in Ryder v. Insurance Co. of North America, 282 So. 2d 771 (La. App. 3d Cir. 1973); Williams v. Travelers Insurance Co. of Hartford, Conn., 19 So. 2d 586 (La. App. 1st Cir. 1944), cert. denied; and Hargis v. McWilliams Co., 9 La. App. 108, 119 So. 88 (Ori. Cir. 1928), cert. denied.
58. Reference is made to this in a number of cases. E.g., Williams v. Travelers Ins. Co. of Hartford, Conn., 19 So. 2d 586 (La. App. 1st Cir. 1944), cert. denied (applying Louisiana law); Hunt v. Magnolia Petroleum Co., 10 So. 2d 109 (La. App. 1st Cir. 1954).
the existence of insurance coverage based upon the wages and rates applicable under the Louisiana Act
any other factor which the court feels tends to establish or refute a legitimate interest which Louisiana has in seeing its compensation scheme imposed.

Consideration of all such relevant factors before making a choice-of-law determination would probably be more in keeping with the approach to conflict of law questions already adopted by the Supreme Court of Louisiana in other areas of the law.61

1942), rev'd on other grounds, 320 U.S. 430 (1943); Abood v. Louisiana Oil Refining Corp., 55 So. 484 (La. App. 2d Cir. 1934) (refusing to apply Louisiana law because "permanent" employment taken up in Mississippi); Hargis v. McWilliams Co., 9 La. App. 108, 119 So. 88 (Orl. Cir. 1928), cert. denied (applying Louisiana law).

59. This factor, while not prominently mentioned in the jurisprudence, would appear to be of some importance in determining whether the Louisiana Act on which the cost of coverage is based should be applicable. See Smith v. Continental Nat'l American Group, 321 F. Supp. 1354 (E.D. La. 1971).

60. Some of these might be the choice of law made by the parties in the contract of hire, or the principal location of the employer's business, since theoretically the burden of compensation would be borne most directly by the community in which the business is principally located. See A. LARSON, supra note 4, at § 86.10; Comment, Louisiana Conflicts of Law—Torts and Workmen's Compensation, 34 La. L. Rev. 835, 843 (1974).

61. In Jagers v. Royal Indemnity Co., 276 So. 2d 309 (La. 1973), and its progeny, the Louisiana Supreme Court abandoned the lex loci delicti rule in tort cases in favor of a form of interest analysis which could take into account the place of the tort, the domicile of the parties, and other relevant factors.