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Workman's Compensation

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Pneumothorax as Compensable Injury

In the first case of pneumothorax (collapse of lung) before the Court under our Workmen's Compensation Law, it was held in *Colvin v. E. I. DuPont DeNemours Company*[1] that such an injury induced by strain of employee in opening a heavy door was compensable.

Incidentally, the term "total disability" in compensation law is defined in this case as follows:

> An employee who is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled. *Lee v. Minneapolis St. Ry. Co.*, 230 Minn. 315, 41 N.W. 2d 433, 437. Larson on Workmen's Compensation Law, Section 57.51.

The claimant was held to be totally and permanently disabled, not being able to perform the lifting duties required by jobs of manual labor, the only ones for which the employee was qualified. He was unemployed at the time of the award, and the court found no impingement in a conclusion of total and permanent disability upon the rule of CODE OF LAWS OF SOUTH CAROLINA, 1952 § 72-10:

> The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

Two Successive Accidents

In *Doby E. Gordon v. E. I. DuPont DeNemours and Co.*[2] the question of which of two successive injuries, involving different employers, caused claimant's disability, was resolved in favor of the first employer in the Industrial Commission's exercise of its fact-finding powers upheld by the court.

The results of the first back injury, latent and quiescent until the second injury, were held to have been aggravated or activated by

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1. 227 S. C. 465, 88 S.E. 2d 581 (1955).
2. 228 S.C. 67, 88 S.E. 2d 844 (1955).

the latter injury. The court stated the rule applicable to such cases as follows:

> The rule is well established that where a latent or quiescent weakened, but not disabling, condition resulting from disease is by accidental injury in the course and scope of employment aggravated, with resulting disability, such disability is compensable. *Cole v. State Highway Dept.,* 190 S.C. 142, 2 S.E. 2d 490; *Green v. City of Bennettsville,* 197 S.C. 313, 15 S.E. 2d 334; *Ferguson v. State Highway Dept.,* 197 S.C. 520, 15 S.E. 2d 775. The same principle is equally applicable where the latent, but not disabling, condition has resulted from a prior accidental injury. If the disability is proximately caused by the subsequent accidental injury, compensability is referable to that, and not the earlier, one.

Death of Volunteer Fireman As Proximately Caused by Explosion in Own Shop

The action of the Full Commission in reversing an Award of Single Commissioner and holding death non-compensable was upheld in the case of *Wilson v. City of Darlington*[3]. The court's decision is succinctly summarized in the following syllabus:

> In proceeding to obtain death benefits for death of volunteer fireman, who about a minute after he had caused an explosion with his blow torch while working on a boat in his own shop for his own pleasure, was seen running from building with his clothes aflame, and who, while waiting for ambulance after flames on clothing were extinguished, directed some of the fire fighting but thereafter died, question whether the initial explosion or his engaging in volunteer fire fighting following explosion was proximate cause of death was for the Industrial Commission.

Necessity That Employee's Fatal Fall Arise Out of Employment

The necessity of the injury's arising out of employment as well as in the course of employment was again emphasized in the majority opinion of the case of *Bagwell v. Ernest Burwell,*[4] previously before the court on another question reviewed in this survey. The employee fell (for no explainable reason) while standing at a desk, on his job. Two days later he died without regaining consciousness, the cause of death, according to physicians, being subdural

3. 229 S.C. 62, 91 S.E. 2d 714 (1955).
4. 227 S.C. 444, 88 S.E. 2d 611 (1955).

hemorrhage. The court held that there was abundant evidence that the hemorrhage causing death was brought about by the blow to the head when the deceased fell backwards on the concrete floor, but the question then arose whether such fall and the results thereof were compensable when the cause of the fall was not proven to be related to his employment. The majority opinion concluded that the employment must contribute something to the hazard of the fall and that, in the absence of special condition or circumstance, a level cement floor in a place of employment was not such hazard.

The court reviewed fully the divided authority on compensability of death under such circumstances. Acting Associate Justice Lewis dissented and would have affirmed the Full Commission's reversal of the Single Commissioner's denial of compensation.

Procedural Matters

(1) Forbearance to Proceed for Compensation as Consideration for Contract of Employment:

In *Gainey v. Coker's Pedigreed Seed Co.*[5] the interesting question was raised as to whether an employee could proceed to enforce a contract of employment until he died or reached the age of sixty-five years, whichever occurred first, where the only consideration for the contract was the forbearance of the employee to pursue the provided remedy under the Workmen's Compensation Law. The question being raised on demurrer in a suit by the employee for breach of this contract, the court held such agreement unenforceable as in violation of CODE OF LAWS OF SOUTH CAROLINA, 1952 § 72-121 defining the exclusiveness of remedy of Workmen's Compensation, of Section 72-131, by the terms of which an employer cannot relieve himself by contract of obligations created by the Workmen's Compensation Act; and of Section 72-132 which states: "No agreement by an employee to waive his rights to compensation under this title shall be valid."

(2) Waiver or Estoppel by Employer:

On the other hand, relief from the filing of claim within the one year statutory limitation was granted the employee in the case of *Poole v. E. I. DuPont DeNemours & Company*[6] on the theory of waiver or estoppel of the employer to insist on such limitation under the following facts:

Employee sustained a back injury which was immediately reported to the employer. Subsequently, for approximately thirteen months

5. 227 S.C. 200, 87 S.E. 2d 486 (1955).
6. 227 S.C. 232, 87 S.E. 2d 640 (1955).

he was treated by employer's first aid and medical department and for approximately sixteen months was paid his regular wages. The claim was filed approximately seventeen months after the injury, within one month after last payment of disability wages, and within approximately four months after last medical services were furnished by the employer.

The court concluded that "the course of conduct of the employer with regard to the injury of the claimant was such as to reasonably give rise to a belief on the part of the claimant that the employer had assumed responsibility for his injury and that the filing of a claim would be unnecessary."

(3) Employers' Liability under Award Subsequently Reversed:

The construction of CODE OF LAWS OF SOUTH CAROLINA, 1952 § 72-356 came before the Supreme Court again in the case of *Bagwell v. Ernest Burwell, Inc.*[7] In this case, involving death of an employee, the Single Commissioner denied compensation in his opinion and award. The Full Commission reversed the hearing Commissioner and held the case compensable, ordering the payment of the sum of $25.00 per week from the date of death, October 12, 1952, for a period of 350 weeks as per the provision of law for death benefit. Notice and grounds of appeal to the Court of Common Pleas were duly served July 17, 1954, and argued September 1, 1954, before the Resident Judge of the Circuit. Respondent's attorneys agreed to extend the thirty days for which an appeal shall act as supersedeas under the Code Section to sixty days. Thereafter, on September 27, 1954, motion was made before the Presiding Judge of the Circuit for an Order requiring appellants to comply with the award. This Order was granted requiring payment of all accrued compensation of the award from date of death to date of the Order.

Appellants then proceeded to have the Order stayed pending a hearing and final decision in the Supreme Court.

The following part of Section 72-356 was in question:

> In case of an appeal from the decision of the Commission on questions of law, such appeal shall operate as a supersedeas for thirty days only and thereafter the employer shall be required to make payment of the award involved in the appeal or certification until the questions at issue therein shall have been fully determined in accordance with the provisions of this Title.

The court held that the language of this section clearly required

7. 227 S.C. 168, 87 S.E. 2d 583 (1955).

that weekly payments ordered in an award continue until the case is "fully determined upon appeal."

The court reasoned as follows as to the legislative intention reflected in the statute:

> Doubtlessly, the thirty day provision is a signal from the Legislature to the litigants, to the Industrial Commission, and to the lower Court to proceed with dispatch in order that the employee may receive prompt compensation and not be a charge on the public. The number of cases appealed to the Circuit Court and not heard within thirty days must be relatively small, and experience will show that of such cases most are affirmed. The benefits to the great number of injured employees obscures the possibility that in an extraordinary situation some employee might gain undeserved benefits as a result of a ruling later made by the Circuit Court reversing the Commission. If the payments are not made in compliance with the statute, the worker will suffer; and if made and the award later reversed, the employer and its carrier will suffer. Therefore, there is no perfect solution, but it can be reasonably assumed that the insurance carrier took under consideration this provision of the Act and the time of determining the employer's premium rate.

It is noteworthy that the court limited its opinion to the payment of weekly amounts set forth in the Award and intimated no opinion as to the applicability of the section to lump sum payments.

Also, as noted in the concurring opinion of Justice Stukes (in which Justice Oxner joined), the opinion in this case is apparently in conflict with that of *Miller v. Springs Cotton Mills*.[8] The award in this case was reversed subsequently to the rendition of the Order with which the instant appeal is concerned, and at the time of the decision an appeal was pending from the judgment reversing the award. The concurring opinion commented thus on this turn of events:

> Therefore, financial hardship may ensue to the employer and the insurance carrier, but I have concluded that a fair construction of the statute as written admits of that result.

(4) Appeal from Interlocutory Order of the Industrial Commission:

In the case of *Chastain v. Spartan Mills*[9] the Supreme Court applied the rule in construing the statute allowing appeals from awards

8. 225 S.C. 326, 82 S.E. 2d 458 (1954).
9. 228 S.C. 61, 88 S.E. 2d 836 (1955).

in cases before the Industrial Commission, (CODE OF LAWS OF SOUTH CAROLINA, 1952 § 72-356) that appeals do not lie from interlocutory orders unless such orders affect the merits of the case.

In this case, claimant had first, in 1951, reached an agreement with the employer as to temporary total disability and medical expense. In 1953 a controversy arose as to claimant's right to additional compensation and medical expense. After a hearing, the Single Commissioner issued his opinion and award denying all of the employee's claims and dismissing the case. On appeal to the Full Commission the case was ordered remanded to the Single Commissioner for additional testimony. The latter order was affirmed by the Circuit Court. The Supreme Court being confronted by the question of appealability, concluded:

> The order not being either a final one or an intermediate one affecting the merits or depriving appellants of a substantial right, the circuit court was without jurisdiction, in that state of the proceeding, to consider the appeal on its merits.

Other cases of interlocutory orders, or those not affecting the merits, so as to be unappealable, cited by the court were: one allowing a claimant to amend his claim; one holding the case in abeyance for later determination of disability; one granting both parties the right to take additional testimony; and one granting claimant's petition for introduction of further evidence.

The court found no conflict between this decision and that of *In re Crawford,*[10] which involved the power of the Full Commission to grant a rehearing after it had made its award, or with *Strange v. Heath,*[11] where the Full Commission had made its award without having disposed of appellant's application to take further testimony, or with *Cord v. E. H. Hines Construction Co.,*[12] where an order of the Full Commission affirming an Order of the Hearing Commissioner denying appellant's motion for medical examination of the claimant was held to have deprived appellants of a substantial right in presenting their defense.

(5) Measure of Partial Disability:

In the case of *Utica-Mohawk Mills v. Orr*[13] a Declaratory Judgment under CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-2001 was sought construing an Award of the South Carolina Industrial

10. 205 S.C. 72, 30 S.E. 2d 841 (1944).
11. 212 S.C. 274, 47 S.E. 2d 629 (1948).
12. 220 S.C. 356, 67 S.E. 2d 677 (1951).
13. 227 S.C. 226, 87 S.E. 2d 589 (1955).

Commission as follows:

> It is ordered that the defendants shall pay to the claimant, Curtis Orr, compensation equal to sixty (60%) per cent of the difference between the average weekly wage he earned before the injury and the average weekly wage which he is physically able to earn after the injury for thirty (30%) per cent permanent disability to the body as a whole, not to exceed the compensable rate of Twenty-Five and no/100 ($25.00) Dollars per week.
>
> The pertinent section of the Trial Court's Order was as follows: The Commission has found as a fact that defendant (claimant) has sustained a thirty (30%) per cent disability to the body as a whole. We must therefore arrive at the diminution of wages in dollars and cents as produced by the accident.
>
> The record reveals that at the time of the injury, the Defendant (claimant) was earning Fifty-six and 05/100 ($56.05) Dollars per week; a loss of thirty (30%) per cent earning power (disability) would reduce these wages by $16.815 per week, but the Act (Code Sec. 72-152) allows recovery of only sixty (60%) per cent of this loss or $10.089 per week which fixes Defendant's (claimant's) compensable rate.
>
> The accident having occurred on April 14, 1951, there has accrued to August 6th, 1954, a total of one hundred seventy-three (173) weeks, of which, one hundred twenty-four (124) weeks, have been paid, leaving due as of August 16, 1954, Four Hundred Ninety-Four and 35/100 ($494.35) Dollars, being the compensable rate of $10.089 per week multiplied by fifty (50) (forty-nine interpolated) weeks. The remaining one hundred twenty-six (126) (one hundred twenty-seven interpolated) weeks, which will complete the three hundred (300) weeks from the date of the injury provided under the Act has not accrued, and will be payable only in case no wages are earned by the defendant (claimant) during said time, or if wages are earned, in the ratio such wages reduces defendant's (claimant's) earning capacity as fixed by his compensable wages. 'The disability is to be measured by the employee's capacity or incapacity to earn the wages which he was receiving at the time of his injury.' *Keeter v. Clifton Manufacturing, supra* (225 S.C. 389, 82 S.E. 2d 520).

The Supreme Court upheld the trial court's procedure as proper

under the terms of CODE OF LAWS OF SOUTH CAROLINA, 1952 § 72-153, except that the trial court had failed to allow appellant credit for overpayment of compensation for some weeks where payment was made as for total disability instead of partial.