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Workmen's Compensation

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WORKMEN'S COMPENSATION

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LIABILITY FOR RESULT OF MEDICAL TREATMENT

In the case of *Whitfield v. Daniel Construction Company,*[1] an employee suffered a compensable head injury and employer's physician administered a barbiturate which, under certain circumstances, has an inebriating effect. The employee's death in an accident caused by his driving a truck off the highway under the influence of such barbiturate was held compensable. Numerous citations are given in support of the rule that the aggravation of an injury by medical treatment necessitated by an original compensable injury, and new injuries resulting indirectly from the original injury, or from inoculation of an employee at employer's request or for his benefit, are compensable.

The CODE OF LAWS OF SOUTH CAROLINA, 1952 Section 72-306 relieves the employer for liability in damages at law for malpractice by his physician or surgeon but establishes the consequence of such malpractice "as part of the injury resulting from the accident" and makes it compensable as such. It is not yet clear, however, whether the Court, in construing this statute, would preclude injuries arising from the malpractice or negligence of the employee's physician and refuse to adopt the rule prevalent in some states as set forth in 71 Corpus Juris, Workmen's Compensation, Section 395:

> "Where the chain of causation is not broken, it is not material that the immediate cause of injury or death is due to the mistake or negligence of attending physicians where they act honestly, even though such malpractice was that of the employee's own physician or surgeon where there was no negligence in his selection."

INJURIES EN ROUTE TO EMPLOYEE'S HOME

Two additional cases were decided in which the Court held under the particular circumstances that the employee's injuries did not fall within exceptions to general rule — that an employee going to and from the place of work is not in the course of employment.

In the case of *Sylvan v. Sylvan Bros.*[2] it was held that the injury

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1. 226 S.C. 37, 83 S.E. 2d 460 (1954).
2. 225 S.C. 429, 82 S.E. 2d 794 (1954).

of an executive who was carrying business papers for work in his hotel room which was his home, and who had a fall on an icy street, was not compensable, where the executive was not paid an hourly wage during the period he was in transit and the employer did not pay the hotel bill. The court concluded that work at the hotel was done for his own convenience. The court alluded to the danger of preferential treatment for professional men who customarily do some work at home over that accorded to the physical laborer who would not ordinarily have such homework, if a rule to the contrary were adopted.

Justice Taylor dissented on the grounds that the place of residence (hotel) had become a situs of employment and that, at the time of the injury, the employee was on his way from one place of business to another.

In the other case, *White v. S. C. State Highway Dept.*,[3] a mechanic fared, legally, no better. He was directed by his superior at Conway where he worked to take a bolt to Sumter for repair or replacement, and was authorized to use the employer's vehicle to remain away over the weekend if necessary, it being understood that he would visit his family at Darlington. Instead of proceeding directly to Sumter, he picked up his family who were visiting at Florence and proceeded to take them home. The injury occurred on the highway between Florence and Darlington. He went out of the way of direct line to Sumter by twelve miles. The court concluded that the employee made a substantial deviation for personal convenience and that this injury in the course of such deviation was non-compensable.

Municipal Powers Affecting Award to Municipal Employee

The compensability of an injury to a janitor in the City Police Department sustained when he was struck by an automobile while on a mission for a prisoner to the prisoner's wife in a distant section of the city was up-held in the case of *Lomax v. City of Greenville*.[4] It was held that, as a policy of the Police Department of many years standing had allowed the use of janitors for messenger purposes to families of prisoners where telephone service was not available, to the end that bail might be promptly arranged, this had become one of the legal duties of such employee.

The court held that, although municipal corporations can only exercise their inherent powers and such as have been conferred upon

3. 85 S.E. 2d 29 (S.C. 1955).
4. 225 S.C. 289, 82 S.E. 2d 191 (1954).

them by the legislature in express terms or by reasonable implication, such corporations nevertheless have some discretionary powers within those spheres of power and that the duties prescribed by the Police Department for the janitor in this case were in the exercise of such discretion.

PROCEDURAL MATTERS

(1) *Anticipatory Award:* The court held in *Keeter v. Clifton Manufacturing Company,*[5] that the Commission could not make an award for partial disability "to project an award into the future by holding, in effect, that if hereafter claimant's wages fell below those earned previous to his injury, he would be entitled to partial disability based on such difference in earnings". The employee was paid the temporary disability to which he was entitled. He resumed employment and was employed at the time of the award making an average weekly wage in excess of that earned at the time of the injury. The definition of partial disability as contained in Code of Laws of South Carolina of 1952, Sections 72-10 and 72-152 was under construction. "Disability" is defined by Section 72-10 as:

> 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.

Payment for partial disability under Section 72-152 is required as follows:

> During such disability a weekly compensation equal to sixty per cent of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter.

The court held that the Commission should issue its order only in accordance with facts existing on the date of the order, the facts in the present case showing no loss of earning power. It is intimated however that in the proper case, on showing of actual incapacity not accurately reflected by the employee's post-injury earnings, the latter would not be conclusive. The danger of injustice where the injury caused diminution in earnings subsequent to the time within which an award may be reviewed under Section 72-359 was referred to as a matter for legislative, and not judicial, attention.

(2) *Employer's Liability Under Award Subsequently Reversed:* In

5. 225 S.C. 389, 82 S.E. 2d 520 (1954).

the case of *Miller v. Springs Cotton Mills*,[6] another case was before the court for construction of the following part of Section 72-356 of the 1952 Code:

> 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 question was whether the employee was entitled to temporary total disability in accordance with the original award of the Commission, "notwithstanding the fact that the said award has been reversed and claimant held not to have sustained an accidental injury."

The claimant relied on the construction given the Code Section in *Bannister v. Shepherd*.[7] The court in a divided opinion held that under the circumstances the employer was not liable for temporary disability accruing after the thirty days provided by the statute. The award had been affirmed by the Full Commission on May 8, 1953. On June 11th, the employer had served notice and grounds of appeal, the record not being certified to the Court of Common Pleas until June 30th. On July 12th, claimant had given notice of motion for an Order requesting payment of the accrued amount, the motion being heard along with the appeal on July 21st. On August 27th, an order of the circuit court had reversed the award, finding no accident, or if an accident, no relation thereof to employment.

The court's decision was based on the fact that the decision, having been reversed by the circuit court on its merits, there was no "award" to be enforced, together with the fact that under the principle, "a party who has received payment under a judgment subsequently reversed must restore any advantages obtained thereby to his adversary," the employee would be compelled to make restitution in any event.

A forceful dissenting opinion by Justice Taylor, concurred in by Chief Justice Baker, criticized the principal opinion as departing from clear legislative intention. It referred to claimant's position as analagous to that favored position of a wife suing for alimony, *Jeffords v. Jeffords*,[8] wherein a wife may receive temporary alimony even though she may eventually lose the case for permanent alimony

6. 225 S.C. 326, 82 S.E. 2d 458 (1954).
7. 191 S.C. 165, 4 S.E. 2d 7 (1939).
8. 216 S.C. 451, 58 S.E. 2d 731 (1950).

and attorney's fees on the trial of the case on its merits. The dissenting opinion stated further:

> The principle set forth in the leading opinion would encourage 'justifiable delay' in hopes of making restitution convenient to the employer.

The leading opinion was termed a nullification of the statute.

(3) *Time for Filing of Claim:* in the case of *Fox v. Union Buffalo Mills*,[9] an employee was injured on November 26, 1951 whose attorney mailed a letter to the Industrial Commission on November 26, 1952, giving notice of injury and requesting a hearing. The letter itself showed receipt in the office of such commission on December 1, 1952. The court held that the requirement of Section 72-303 of the 1952 Code of Laws that a claim be "filed with the Commission within one year after the accident," was not met. The word "filed" was held to mean "delivered to and received by the proper officer to be kept on file."

It may be noted here that a subsequent legislative enactment of date, May 5, 1955 amended Section 72-303 to provide that a registered letter, if mailed within one year after the accident, would satisfy the requirement of filing.

(4) *Conflict in Medical Testimony:* The case of *Scott v. Havnear Motor Co.*[10] reaffirmed the rule that in cases of conflict of medical testimony, the power rest with the Commission and not the court "to determine which diagnosis advanced by these physicians it would accept." The deceased was sixty-six years old and a mechanic. He suffered in a compensable accident a deep and extensive cut of the forearm, bleeding profusely and suffering shock. He never resumed work, and within two months died of a heart attack. After autopsy, one pathologist thought death was produced by the accident's aggravation of a long standing coronary condition; another pathologist concluded there was no causal connection between the injury and the death. A heart specialist testified that there could have been a causal connection. The circuit judge in error held the evidence insufficient and reversed an award, resulting in the court's re-affirmation of the Commission's fact-finding powers.

(5) *Enforcement of Award in Federal Court:* The United States Court of Appeals, Fourth Circuit, held in *St. Paul-Mercury Indem-*

9. 86 S.E. 2d 253 (S.C. 1955).
10. 86 S.E. 2d 475 (S.C. 1955).

nity v. Sylvan,[11] that the award in *Sylvan v. Sylvan Bros.*[12] subsequently reversed by the South Carolina Supreme Court was not enforceable pending that appeal in a separate action instituted in the United States District Court on the basis of diversity of citizenship and on the theory that the award of Industrial Commission had become a cause of action enforceable in the state courts. The plaintiff relied on the same provision of Code of Laws of South Carolina, 1952 Section 72-356 at issue in *Miller v. Springs Cotton Mills,*[13] providing that in case of appeal from decision of the Commission on questions of law, such appeal shall operate as a supersedeas for thirty days only.

The Court of Appeals cited the *Miller* case in support of its conclusion that this section was not intended to create a cause of action but to "regulate procedure on appeal from an administrative award, the payments therein required being enforceable by the state court as an incident of its jurisdiction on review, not by action in an independent tribunal." The court further referred to Section 72-357 of the Code providing that judgment may be had only with respect to an award "unappealed from" or "affirmed upon appeal." It regarded the intervention of a federal court under such circumstances unjustifiable "under principles of comity prevailing between courts of coordinate jurisdiction."

LEGISLATIVE ENACTMENTS ON WORKMEN'S COMPENSATION

In addition to the amendment allowing the filing of a claim by registered mail within one year of the date of the injury above referred to (Amendment to Section 72-303 enacted May 5, 1955) there were several amendments to Code Section 72-180 enacted May 11, 1955, increasing the allowance for burial expenses from Two Hundred ($200.00) Dollars to Four Hundred ($400.00) Dollars and substituting the word "spouse" for "wife" in the requirement of dependency where the dependents are "in any foreign country."

11. 213 F. 2d 137 (4th Cir. 1954).
12. 225 S.C. 429, 82 S.E. 2d 794 (1954).
13. 225 S.C. 326, 82 S.E. 2d 458 (1954).