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WORKMEN'S COMPENSATION

WILLIAM H. NICHOLSON, JR.*

Injury or Death Resulting from Effort of Employee to Obtain Relief from Illness or Discomfort

Referring to the conflict of authority as to whether an employee's injury or death resulting from self-medication or medication by others during hours of employment is compensable, and expressly refusing to adopt any general rule for such injuries, the Supreme Court under the particular facts of *Portee, et al. v. South Carolina State Hospital, et al.*,¹ held the death of a State Hospital employee compensable. The deceased employee, suffering with a sore throat, had requested medication of a technician at the hospital and, as had been done on previous occasions, was administered by this technician a shot of penicillin. The needle jammed and the technician was unable to complete the injection. Shortly thereafter the deceased was seized with an attack and died approximately one hour after receiving the shot, cause of death being diagnosed as "acute anaphylactic shock caused by procaine penicillin."

Factors favoring compensability pointed out by the Court were the element of accident in the unexpected result of the shot and the fact that the purpose of the injection was, not only to relieve the personal discomfort of the deceased, but "to ward off any possibility of passing the infection on to the patients." The fact that the technician customarily gave such shots outweighed the argument that by rule of the hospital she was permitted to do so only when directed by one of the physicians, this shot being administered without such direction. Disobedience of the technician to rules or instructions was pointed out as one of the risks of employment. Likewise, the deceased's error of judgment in consulting this technician was held not a bar to compensation, in accordance with the general rule.

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1. 234 S. C. 50, 106 S. E. 2d 670 (1959).

Aggravation of Varicose Veins

In the case of *Richardson v. Wellman Combing Company, et al.*,² the first claim arising from alleged aggravation of varicose veins came before the Supreme Court. The claimant had had the condition of varicose veins for some time, which condition had deteriorated subsequent to his employment with the company against which the claim was filed. Approximately five months after he began working for the company his legs "cramped" and he became disabled and had to undergo surgery. The physician's testimony that it was "possible" that the result was aggravated or accelerated by the employee's standing on the concrete floor was held insufficient. The Court's holding states the rule of aggravation of diseased conditions applied in this state: "their aggravation did not arise from external force but was caused by the natural result of preexisting disease." From reviewing the line of cases on aggravation of diseased conditions, it is not easy at all times to recognize under the circumstances what will be regarded as the necessary "external force." Obviously, the intervening "external force" held absent in this case, if present in another case of varicose veins, could produce compensability as in cases of other diseases.

Compensation or Common Law Liability?

Under this heading in the South Carolina Law Quarterly Vol. 10 No. 1, Fall 1957, the case of *Blue Ridge Electric Cooperative v. Byrd*,³ was discussed, in which the U. S. Circuit Court of Appeals held that a workman's loss of arms in an accident while employed by a contractor hired by an electric power company to extend the company's lines, the company being authorized to do such work and having done such in prior years, was compensable; that the power company incurred workmen's compensation liability, which remedy was exclusive, the extension of the lines being part of the "usual" trade or business of the electric company under the provisions of CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 72-111, 121.

2. 233 S. C. 454, 105 S. E. 2d 602 (1958).

3. 238 F. 2d 346 (4th Cir. 1956).

Subsequently, this holding of the U. S. Circuit Court of Appeals was reversed by the United States Supreme Court on certiorari,⁴ on the grounds that the U. S. Circuit Court should have ordered a new trial to permit the plaintiff to offer his own proof on the question of whether the work in which the plaintiff was injured was a part of the electric company's trade, business or occupation, according to the Court of Appeal's construction of the South Carolina statute and that, notwithstanding South Carolina decisions holding that the question as to whether the electric company is entitled to the immunity accorded by the South Carolina statute is for the court and not the jury, on the new trial this question in the U. S. District Court would be for the jury. The latter holding was based on the following points: (1) that the state court's decision of the question of immunity without the aid of a jury is merely a form and mode of enforcing the immunity—and not a rule intended to be bound up with the definition of the right and obligations of the parties so as to come within the rule of *Erie R. Co. v. Tompkins*; (2) that the federal policy against allowing state rules to disrupt the judge-jury relationship in the federal court should prevail; (3) that, irrespective of the policy of following state rules as nearly as possible in federal courts to assure substantially the same results in federal and state courts, the result would not necessarily differ in this case because of the trial judge's power in the federal system to comment on the weight of the evidence and the credibility of witnesses with discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence.

The case being remanded to the U. S. Circuit Court of Appeals, it was held by that Court,⁵ that the injured employee's acceptance of compensation from his immediate employer was not evidential of the scope of the electric company's activities and thus inadmissible before the jury on retrial of the case. The Court held that this evidence should be admitted by the trial judge only in order that the record show the immediate employer's interest in the suit by statutory assignment of benefits,⁶ unless some other basis is developed for its admission,

4. *Blue Ridge Electric Cooperative v. Byrd*, 356 U. S. 525, 2 L. Ed. 2d 953, 78 Sup. Ct. 893 (1958).

5. 264 F. 2d 689 (1959).

6. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 72-124.

such as a question of credibility, in which event the Court must keep the amount of compensation from the jury and instruct them as to the limited relevance of the compensation award to a present recovery.