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Workmen's Compensation

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WORKMEN'S COMPENSATION

I. EMPLOYEE'S COMMON LAW LIABILITY FOR INJURIES TO A FELLOW EMPLOYEE

Williams v. Bebbington[1] and *McNaughton v. Sims*[2] discussed the question of whether section 72-401 of the South Carolina Workmen's Compensation Law, which exempts certain employers and those conducting their businesses from common law liability, applied to the co-employees in these two cases. In *Williams*, the plaintiff and the defendants were employed by E. I. DuPont de Nemours at its Savannah River Plant. On the morning of the accident, the plaintiff was driving to the Savannah River Plant where he was injured at approximately 7:40 a.m. (DuPont did not pay for his travel time or expenses.) After proceeding on DuPont property for five miles, the plaintiff turned into a "pull out area," and stopped his car. As he walked around to the rear of his vehicle, he was struck by the defendants' vehicle. His legs were crushed between the front and rear of the two cars.

The defendants in *Williams* claimed exemption from common law liability under the following provision of the Workmen's Compensation Law:

> Every employer who accepts the compensation provisions of this Title shall secure the payment of compensation to his employees in the manner provided in this chapter. While such security remains in force he or *those conducting his business* shall only be liable to any employee who elects to come under this Title for personal injury or death by accident to the extent and in the manner specified by this Title.[3]

The defendants relied heavily on the language "those conducting his business" as the basis for exemption. The South Carolina Supreme Court had examined this question in two other cases, *Nolan v. Daley*[4] and *Powers v. Powers*.[5] In *Nolan*, the court construed this phrase to mean that a co-employee is

1. 247 S.C. 260, 146 S.E.2d 853 (1966).
2. 247 S.C. 382, 147 S.E.2d 631 (1966).
3. S.C. CODE ANN. § 72-401 (1962). (Emphasis added.)
4. 222 S.C. 407, 73 S.E.2d 449 (1952). For a discussion of the *Nolan* decision and other related cases, see 5 S.C.L.Q. 473 (1953).
5. 239 S.C. 423, 123 S.E.2d 646 (1962).

exempt only if the injury "arises out of, and in the course of, his employment."[6] The injury sustained in *Nolan* was the result of the alleged negligence of a co-employee during the performance of duties on a construction job. *Powers* involved a wrongful death action in which the injury arose out of an airplane accident while the plaintiff's deceased was traveling on his employer's business. The plaintiff asked the court to overrule *Nolan* on the strength of the dissent in that opinion. The court in *Powers* rejected this argument and denied the plaintiff recovery. However, in *Williams*, the court indicated that the factual situation in this case was beyond the scope of work incident to the employer's business. None of the parties were required to do work outside the Savannah River Plant building. The plaintiff had not applied for or received any benefits under the Workmen's Compensation Law. The court affirmed the lower court's judgment for the plaintiff, thus the denying defendants' claim of exemption.

The factual situation in the *McNaughton* case was very similar to that in *Williams*. The plaintiff sustained injuries as a result of an automobile accident which occurred as the employees were leaving the plant parking lot at Springs Cotton Mills. The lower court granted the defendant's motion for a nonsuit on the grounds of the alleged exemption under section 72-401 of the South Carolina Workmen's Compensation Law. Again the supreme court held that in the absence of any suggestion that the parties were performing any work *incident* to the employer's business, the exemption would not attach. The defendants in each of the above cases relied on *Ferrell v. Beddow*,[7] a 1962 Virginia decision. Virginia's Workmen's Compensation Law is very similar to South Carolina's. However, in the *Ferrell* case, though the injury was sustained while en route to the business premises, the employees were charged with a task related to their employment. As the South Carolina court pointed out, the Virginia court recognized the *Ferrell* factual situation as an exception to the general rule that an employee going to and from his place of work is not engaged in any service incident to or growing out of his employment. Thus, these two decisions indicate that the *Ferrell* decision is an accurate statement of the rule in South Carolina.

6. 222 S.C. 407, 416, 73 S.E.2d 449, 453 (1952).
7. 203 Va. 472, 125 S.E.2d 196 (1962).

II. COURSE OF EMPLOYMENT

Walker v. City of Columbia[8] represents the appeal of a circuit court order affirming an Industrial Commission award for death by coronary thrombosis of a Columbia police officer. Officer Walker was off duty at his home about a half mile beyond the city's corporate limits. About 3:00 in the afternoon, he noticed that a neighbor, who seemed to be intoxicated, was driving out of the driveway and up and down the street in a reckless manner. Walker reported the incident to the highway patrol. When a patrolman and a deputy sheriff arrived and prepared to place the neighbor under arrest, he resisted strenuously. It took all three officers to subdue him. Shortly thereafter, Walker began to feel ill and suffered a coronary thrombosis. He was hospitalized and died within two hours.

The appellants contended that Walker's death was not a result of an accidental injury arising out of the course of employment since he was off duty and outside the city limits at the time of the accident, and was thus without authority to make an arrest. However, as the court pointed out, Walker was not making an arrest. The highway patrolman had called in the county deputy sheriff as the proper arresting party. It was the violent resistance of arrest which necessitated Walker's direct involvement. Evidence and testimony at the trial made it clear that the city police regulations required a police officer to protect and aid a fellow officer under pain of dismissal. "Fellow officer" had been defined by the department to include any officer of the law whether in the city's employ or not. Thus, the court found that Walker was engaged in the performance of his duties as he and his immediate superiors understood them. The court viewed the regulations in the policeman's manual as having the practical effect of conditions of a contract of employment. It seems clear that in cases involving a definition of course of employment, the court, relying on more well-settled principles of contract law, will give great weight to the job definition as the employer and employee conceive it, rather than applying any general test.

8. 247 S.C. 307, 146 S.E.2d 856 (1966).

III. Industrial Commission's Fact Finding and Order In Conflict

Amick v. City of Columbia[9] involved a denial of a city policeman's claim for medical benefits under workmen's compensation. In 1960 the plaintiff had sustained a compensable injury to his back and hips. He continued to have pain and, at the time of the hearing in 1962, was still receiving therapy for this pain. No compensable disability was claimed. The plaintiff sought only medical benefits for treatment based on the contention that his condition resulted from the 1960 accident. Though the Commission found that part of the subsequent treatment was connected with the work injury, it denied the claim in toto. The court recognized this inconsistency and affirmed a lower court reversal of the Industrial Commission's order and remanded the case for an order consistent with the Commission's findings of fact. Though the Commission's findings of fact are conclusive, the court will reverse its order if, as here, the order and the findings of fact are inconsistent.

IV. Procedural Requirements

A. *When Employer Estopped to Assert the One Year Limitation on Filing of a Claim.*

Hucks v. Green's Fuel[10] raised the question of what conduct constitutes a waiver of the one year filing limitation by the employer or his insurance carrier. In *Hucks*, the employee was injured in May of 1962 but failed to file a claim until February of 1964. The South Carolina Workmen's Compensation Law requires that an injured employee give notice of the occurrence of an accident within thirty days, unless the Commission can be satisfied that there was a reasonable excuse for the delay.[11] In addition, the right to recovery under the Workmen's Compensation Law is barred unless the claim is filed with the Industrial Commission within one year after the accident.[12] Appellant-employer had asserted the one year filing limitation as a defense to the claim. Respondent-employee had contended that the employer was estopped to raise this defense. The Commission found that the claimant, through his attorney, was misled,

9. 247 S.C. 254, 146 S.E.2d 860 (1966).
10. 247 S.C. 457, 148 S.E.2d 149 (1966).
11. S.C. Code Ann. § 72-301 (1962).
12. S.C. Code Ann. § 72-303 (1962).

Hoefer: Workmen's Compensation

albeit unintentionally, by the conduct of the employer during negotiation for a settlement and thus failed to file his claim. The attorney had negotiated with an agent of the employer's insurance carrier who, while denying that the injury was compensable, offered a settlement of 500 dollars. This offer was rejected in April of 1963. In August of that year the carrier advised that it was closing its file since the statutory period for filing had expired without a claim being filed. The lower court affirmed the Commission's decision for the employee. The supreme court reversed and remanded.

It is well settled in South Carolina that negotiations may give rise to a waiver of this statute of limitations if the claimant is induced thereby to forego filing a claim. However, in this case, the attorney, acting for his client, rejected a proposed settlement before the statutory period had run. Thus, he still had ample time to file a claim. Apparently the attorney had expended a great deal of time in attempting to collect medical evidence and testimony as to the relationship between the claimant's present condition and his condition prior to the accident. The court inferred that the attorney's decision to negotiate informally was greatly influenced by this evidence problem. This, rather than the conduct of the employer and the carrier, was the reason for failure to file. The court held that the employee had the burden of proving that he was misled into thinking that his claim was compensable and that he should not file a claim. Affirmative evidence established clearly that the carrier had repeatedly denied compensability. The court also held that the attorney was considered to be the respondent's alter ego and that any lack of diligence on his part would be binding upon his client. This case serves as a warning to attorneys who may feel forced to straddle the fence in shaky workmen's compensation cases. Though the court may be more lenient as to the thirty day notice of injury, it will require substantial proof before it invokes estoppel to aid the claimant who is not misled but merely lulled into complacency.

B. *Estoppel; Thirty Day Period for Filing Notice of Accident with Employer.*

The respondent-employee in *Mize v. Sangamo Elec. Co.*[13] claimed benefits for partial and permanent disability arising

13. 246 S.C. 241, 143 S.E.2d 590 (1965).

from an alleged accident during the course of employment. The employer defended on the grounds that the notice of the accident was not filed within thirty days, the claim for compensation was not filed within one year and the accident did not arise out of the course of employment. The Industrial Commission granted an award which the circuit court affirmed. The supreme court centered its attention on the thirty day notice defense. Section 72-301 of the South Carolina Code provides in part:

> [N]o compensation shall be payable unless . . . written notice is given within 30 days after the occurrence of the accident . . . unless reasonable excuse is made to the satisfaction of the Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.[14]

Though the Commission made a finding that the respondent's injury had arisen out of the course of employment, it made no finding as to whether respondent had a reasonable excuse for failing to report the claim within thirty days. (It also made no finding as to whether the respondent had met the one year filing requirement under the provisions of South Carolina Code section 72-303.) The court pointed out that it is the duty of the Commission to determine factual issues. Neither the circuit court nor the supreme court can make factual determinations except as to jurisdiction. Thus, the court reversed and remanded the case for further factual findings.

C. *Unemployment Compensation Recipients May Be Estopped Thereby to Claim Workmen's Compensation.*

Harvey v. Art Metal, Inc.[15] presents the question of whether a claimant's application for and receipt of unemployment compensation bars him from compensation or medical benefits due him under the Workmen's Compensation Law. This is a case of novel impression in South Carolina. In August of 1962, the appellant sustained a compensable back injury. He received medical care and temporary total disability compensation until February of 1963, when he was declared able to return to "light" work. He returned to his job but found it too taxing

14. S.C. CODE ANN. § 72-301 (1962).
15. 247 S.C. 443, 147 S.E.2d 697 (1966).

and was forced to stop work. At that time he applied for unemployment benefits but was rejected because of his history of a disabling physical condition. In March of 1963, the claimant secured a job with Butte Knitting Mills which required even less physical activity. Nevertheless, he continued to suffer pain. In May of 1963, he returned to the hospital for an operation and during that time his employment with Butte was terminated, not because of his absence or disability, but because of a general employee cutback. Four days after his release from the hospital, the claimant applied for unemployment compensation based on his termination at Butte Mills. In his application, he made no reference to his disability and explained that his unemployment was the result of an employee cutback. He indicated his readiness and availability to work as soon as he was needed. His application was approved and he began receiving unemployment compensation in June 1963.

In this action, the claimant sought temporary total disability compensation and medical expenses from February 1963 when payments were discontinued. The single commissioner found that the claimant was entitled to reinstatement of these benefits, minus the eighteen weeks during which he received unemployment benefits. The hearing commissioner ruled that these payments should continue until the claim had reached the maximum medical improvement with no resulting disability. On appeal, the full Industrial Commission held that the claimant was entitled to benefits only until June of 1963 when, as they saw it, he had reached maximum medical improvement. As they put it: "This opinion is based on the *fact* that the employee-claimant started drawing unemployment compensation on this date, and, in so doing, made himself available for the labor market."[16]

The circuit court affirmed the award of the full Commission on two grounds: (1) the claimant was estopped to claim Workmen's Compensation by his receipt of unemployment benefits and his assertion then that he was able and available for work, (2) the Commission's finding as fact that the claimant did not suffer compensable disability after June 1963 was supported by competent evidence and was conclusive.

At the outset, the supreme court pointed out that this finding of fact upon which the circuit court and the Commission based

16. *Id.* at 446, 147 S.E.2d at 699. (Emphasis added.)

their denial of the claim was based on the assumption that the application for unemployment benefits was prima facie *proof* of maximum recovery. This finding was not based on any consideration of evidence bearing on the claimant's actual physical condition as of June 1963. Thus, if the assumption was founded on an error of law, then the entire opinion would be in error. What the employer and its carrier raised was the question of equitable estoppel. Equitable estoppel is a protection afforded one who has relied on a false representation or a statement based on concealment of material facts known to the party who makes the representation. The respondents based their assertion of equitable estoppel on the claimant's alleged misrepresentation of his state of health in applications to Butte and to the South Carolina Employment Security Commission. However, as the court points out, it is well settled in South Carolina that equitable estoppel is used to prevent an injustice to one who invokes it; it is not used to penalize or punish the adversary party. The court concluded that whatever effect the claimant's alleged misrepresentation had on Butte Mills and the South Carolina Employment Security Commission, Art Metal, Inc. and its insurance carrier were not harmed by it. Thus, the court held that although a claimant's application for and acceptance of unemployment compensation may be used as evidence of whether the disability continued and may even be conclusive against a disability award, it cannot be viewed as raising an estoppel to any relief.

Though the court seems to decide very directly that estoppel cannot be raised in a conflict between workmen's compensation and unemployment compensation, the larger question of how a claimant can be able to work for purposes of unemployment compensation and disabled under workmen's compensation at the same time remains unanswered. The court viewed the problem of duplicating payments as one of statutory construction not raised in the lower court and therefore not properly before it. The majority of states seems to favor some sort of set off arrangement[17] as a way of minimizing the inconsistency, a view which the single commissioner in this case seemed to favor. Yet the cases which deal directly with this problem usually involve

17. For a discussion of application for, or receipt of, unemployment compensation benefits as affecting a claim for workmen's compensation, see Annot., 96 A.L.R.2d 941 (1964).

Hoefer: Workmen's Compensation

unemployment compensation and workmen's compensation claims arising out of the same employment.

V. When Industrial Commission's Findings of Fact Are Conclusive

Herndon v. Morgan Mills, Inc.[18] involved a challenge of the Industrial Commission's finding that there was a causal connection between claimant's deceased's death from myeloma and an injury sustained while in the employ of Morgan Mills. This case is as much a discussion of rules of evidence as it is of workmen's compensation law. However, the supreme court does restate some familiar but very important principles of law in this area. The burden of proof in workmen's compensation cases rests on the claimant who must show by the preponderance of the evidence that his claim is a valid one. In this case, the claimant offered no medical testimony to support the claim that there was a causal connection between the deceased's myeloma and his work accident. However, the Commission made an award on the basis of its finding that there was such a causal connection. The court pointed out that although the Commission's findings of fact are conclusive where there is a conflict in the evidence, these findings can be examined on appeal to determine whether there was any competent evidence to support them. The supreme court saw this finding as one based on speculation and surmise. The only expert medical testimony offered was to the effect that no one knew the cause of myeloma. Though expert testimony is not binding on the Commission, the supreme court affirmed the lower court's reversal of its decision as one not supported by competent evidence.

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18. 246 S.C. 201, 243 S.E.2d 376 (1965).

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