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Workmen's Compensation

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WORKMEN'S COMPENSATION

I. Definition of Terms

A. "Change in Condition"

In *Causby v. Rock Hill Printing & Finishing Co.*[1] the claimant was awarded compensation as the result of a compensable injury. Thereafter she applied, through new counsel, for review of the award on a change in condition under the following provision of the Workmen's Compensation Law:

> Upon its own motion or upon the application of any party in interest on the ground of a change in condition, the Commission may review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Title . . . .[2]

The hearing commissioner, finding as a fact that the claimant had sustained a change in condition for the worse, made a further award. The circuit court reversed, holding that the award was without evidentiary support. The South Carolina Supreme Court in *Cromer v. Newberry Cotton Mills*[3] had held that a "change in condition" meant a change in the physical condition of the claimant as a result of the original injury, occurring after the first award. In the instant case the court, in affirming the lower court, distinguished an appeal under section 72-359 of the Code from an appeal from the original award, and found that under the former the claimant must show that the condition which arose as a result of the original injury had worsened. The court held that a condition which continues, or remains at the same degree of disability, cannot be appealed as a change in condition under the Workmen's Compensation Law.

B. "Accident"

In *Pellum v. W. C. Chaplin Transport*,[4] the hearing examiner and the full Industrial Commission had found that the employee, a truck driver for the defendant, had suffered a fatal heart attack caused by an accident arising out of his employment as

1. 249 S.C. 225, 153 S.E.2d 697 (1967).
2. S.C. Code Ann. § 72-359 (1962).
3. 201 S.C. 349, 23 S.E.2d 19 (1942).
4. 154 S.E.2d 432 (S.C. 1967).

contemplated by the Workmen's Compensation Law.[5] The circuit court reversed and the South Carolina Supreme Court affirmed, holding that work for prolonged hours over a period of time does not constitute an accident under the statute. The court stated that

> if a heart attack results as a consequence of the ordinary exertion that is required in the performance of the duties of the employment in the ordinary and usual manner, and without any outward untoward event, it is not compensable as an accident. The fact that due to a weakened heart condition, the exertion required for the ordinary performance of the work is too great for the particular employee, who undertakes to perform it, does not make it a compensable accident.[6]

In the instant case the claimant's decedent, having a history of heart illness, worked long hours in delivering fuel oil during the winter months. The court felt that it was normal for fuel oil deliverymen to work long hours during winter when fuel was in heavy demand.

II. PROCEDURAL REQUIREMENTS

In *Chapman v. Foremost Dairies, Inc.*[7] the employee suffered a fall that produced a hematoma which became infected, producing an abscess. The circuit court reversed a compensation award, but the supreme court found error in the reversal and affirmed the award.

The basis of the defendant's appeal was an objection that the claimant's action was barred by the one-year limitation in the Workmen's Compensation Law. The statute requires that written notice of the claim be filed with the Commission within one year after the accident.[8] The claimant was injured on June 23, 1961, and made timely notice to his supervisor of the injury; however, it was not until April 27, 1963, that the claimant had to stop work and seek medical attention.

The supreme court found that the defendant notified the claimant by mail that it was denying his claim because in its opinion, he had not sustained an accident arising out of and

5. S.C. CODE ANN. § 72-14 (1962).

6. Pellum v. W. C. Chaplin Transport, 154 S.E.2d 432 (S.C. 1967), *quoting from* Walsh v. U.S. Rubber Co., 238 S.C. 411, 418, 120 S.E.2d 685, 689 (1961).

7. 154 S.E.2d 845 (S.C. 1967).

8. S.C. CODE ANN. § 72-303 (1962).

during the course of his employment. The hearing commissioner refused to allow the defendant, at the hearing, to assert the additional defense of the statute of limitation since it was omitted from the letter of denial of liability, written pursuant to the rules of the Industrial Commission.[9] The court agreed with the Commission and the lower court that the claim, not being filed within the requisite one-year period, was barred by the statute of limitations, but that the defendant must raise the issue in the required letter from the employer to the employee prior to the hearing.[10] The court held that the one-year limitation was waived, and the employer and carrier were estopped from asserting it.

III. STATUTORY CONSTRUCTION

Dunmore v. Brooks Veneer Company[11] raised the issue of the definition of the term "leg" in the Workmen's Compensation Law.[12] The claimant sustained a compensable crushing injury to the ankle. The limb was surgically amputated at a point about six and one-half inches below the knee so that it could better be fitted with a prosthesis. The Industrial Commission found that the claimant had suffered a specific loss of one hundred percent of his leg, and awarded compensation accordingly. On appeal by the employer to the circuit court, the award of the Commission was affirmed.

The employer appealed on the ground that the claimant had suffered the loss of a foot and not one hundred percent use of his leg, and that the removal of a portion of the leg between the knee and ankle was a surgical necessity referred to medically as having been performed at the "site of election."

The South Carolina Supreme Court was faced with an interpretation of Section 72-153 of the South Carolina Code which

9. Industrial Commission Rules and Regulations, R. 18; S.C. CODE ANN. Vol. 17, p. 320 (1962).

10. *See, e.g.,* Hoke v. Cherokee County, 216 S.C. 376, 58 S.E.2d 330 (1950).

11. 248 S.C. 326, 149 S.E.2d 766 (1966).

12. S.C. CODE ANN. § 72-153 (1962), the pertinent parts of which read: *When disability deemed to continue for certain periods; disfigurement; compensation.* In cases included in the following schedule, the disability in each case shall be deemed to continue for the period specified and the compensation so paid for such injury shall be as specified therein, to wit: . . . (14) For the loss of a foot, sixty per cent of the average weekly wages during one hundred and twenty-five weeks; (15) For the loss of a leg, sixty per cent of the average weekly wages during one hundred and seventy-five weeks; . . . (18) Total loss of use of a member or loss of vision of an eye shall be considered as equivalent to the loss of such member or eye . . . .

is patently unambiguous, but under which the Industrial Commission had, for many years, awarded compensation for one hundred percent loss of the leg where the amputation was above the ankle joint. Although recognizing that the court in *Etiwan Fertilizer Company v. South Carolina Tax Commission*[13] held that a uniform construction of a statute by an administrative body over a long period of years, acquiesced in by the General Assembly, is entitled to weight and should not be overruled without cogent reason; the court held:

> This sound principle may not be invoked to perpetuate a palpably erroneous application of an unambiguous statute which, in this respect, requires no construction, and which the commission and the courts are obligated to enforce.[14]

The supreme court reversed, delineating its construction in a footnote:

> We unhesitatingly conclude that the word leg in our Workmen's Compensation Act refers to lower limb of the body including the thigh, even though in the nomenclature of anatomy it bears the restricted meaning of lower leg as distinguished from thigh. Otherwise, a mid-thigh amputation would not be compensable as a specific loss.[15]

IV. Coverage Under The Code

A. Status as Employee or Partner

Marlow v. E. L. Jones & Son, Inc.[16] was concerned with the problem of the coverage of the claimant under the Workmen's Compensation Law. The claimant, with two others, was a textile worker who "moonlighted" as a roofer for a contractor, being paid a certain sum for each square of shingles applied to the contractor's buildings. The three roofers guaranteed their work and, on receiving any complaint, made inspections and repairs without charge. The claimant was injured while making an inspection of a previously installed roof.

On prosecution of his claim against the contractor, the hearing examiner found that the claimant was not an employee, but

13. 217 S.C. 354, 60 S.E.2d 682 (1950).
14. Dunmore v. Brooks Veneer Co., 248 S.C. 326, 333, 149 S.E.2d 766, 769 (1966).
15. *Id.* at 767, n.1.
16. 248 S.C. 568, 151 S.E.2d 747 (1966).

rather, was an independent contractor. On appeal the full commission reversed, holding that the claimant was an employee of a sub-contractor of the contracting firm. The circuit court affirmed.

The South Carolina Supreme Court placed this case squarely within the rule of *McDowell v. Stilley Plywood Co.*[17] which held that the Workmen's Compensation Law[18] does not include a subcontractor or independent contractor, but only their employees; and that this claimant, with two others, were equal partners. On a finding that the claimant was not an employee of either or both of his associates, but enjoyed the status of a partner, the court was able to dismiss the claim without considering whether the claimant's injury was sustained in the performance of work undertaken by the contractor.

B. Coverage Based on Situs

Arant v. First Southern Company[19] was concerned with coverage for foreign injuries under the Workmen's Compensation Law.[20] The employee was injured in an accident in Tennessee after being hired in North Carolina to perform duties largely in South Carolina. The key question on appeal was whether the Industrial Commission had jurisdiction under the Law, which provides:

> When an accident happens while an employee is employed elsewhere than in this State which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if (a) the contract of employment was made in this State, (b) the employer's place of business is in this State and (c) the residence of the employee is in this State; provided the contract of employment was not expressly for service exclusively outside the State . . . .[21]

17. 210 S.C. 173, 41 S.E.2d 872 (1947).

18. S.C. CODE ANN. § 72-112 (1962). *"Liability of contractor to workmen of subcontractor.*—When any person . . . referred to as 'contractor,' contracts to perform or execute any work for another person which is not a part of the trade, business or occupation of such other person and contracts with any other person . . . for the execution or performance by or under the subcontractor of the whole or any of the work undertaken by such contractor, the contractor shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if that workman had been immediately employed by him."

19. 249 S.C. 305, 153 S.E.2d 919 (1967).

20. S.C. CODE ANN. § 72-169 (1962).

21. *Id.*

The South Carolina Supreme Court has construed this section as having four prerequisites to the Industrial Commission's having jurisdiction of a claim arising out of an out-of-state accident.[22] The supreme court determined that the first requisite, requiring that the contract of employment was made in this state, was not met and disposed of this case without going into any of the other requisites. The court held that the Industrial Commission was without jurisdiction.

C. Employer's Election of Coverage

In *Marsh v. Leo's, Inc.*[23] the court was concerned with a case in which the full Commission had reversed an award of the hearing commissioner and had dismissed a claim on finding that the employer had fewer than fifteen employees as specified in the Workmen's Compensation Law[24] and had not elected to be covered by the Act.[25] An insurance agent applied for a policy as a means of obtaining a rate quotation for the employer, and the issuing company filed the policy with the Industrial Commission. The policy was not accepted by the employer.

A person exempted from the mandatory provision of the Workmen's Compensation Law may come in under its terms by filing a written notice of his desire to do so with the Industrial Commission.[26] The court, in *White v. J. T. Strahan Co.*[27] had held that substantial compliance with this section was sufficient to bring an employer under the Act.

The supreme court, in affirming, found that the employer here did nothing which had any tendency to indicate that he intended to come in under the terms of the Act.

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22. *See, e.g.*, Price v. Horton Motor Lines, 201 S.C. 484, 23 S.E.2d 744 (1942) and Younginer v. J. A. Jones Constr. Co., 215 S.C. 135, 54 S.E.2d 545 (1949), which together list the four prerequisites as follows:
    (1) The contract of employment must have been made in South Carolina.
    (2) The employer's place of business must have been in South Carolina.
    (3) The residence of the employee must have been in this State.
    (4) The contract of employment must have been for services to be performed not exclusively outside of this State.

23. 249 S.C. 45, 152 S.E.2d 352 (1967).

24. S.C. CODE ANN. § 72-107 (1962), the pertinent parts of which read:
    Casual employees and other excepted employments. . . . This Title shall apply to: . . .
    (2) Any person that has regularly employed in service less than fifteen employees in the same business within this State; . . . .

25. S.C. CODE ANN. § 72-109 (1962).

26. *Id.*

27. 244 S.C. 120, 135 S.E.2d 720 (1964).

V. FACT FINDING

A. The Fact Finding Authority of the Commission

Two cases were concerned with the inherent right of the Industrial Commission to determine the facts without infringement on appeal. In *Couch v. Greenville County*[28] the claimant was a deputy sheriff with a prior history of heart disease who suffered an aggravation of his heart condition as a result of being told of complaints made against him by citizens of the county. The employer defended on the ground that (1) notice of the injury was not given to the employer within the required thirty days,[29] (2) the claim was barred by a release signed by the claimant, and (3) the claimant had not sustained an injury by accident in the course of his employment.[30]

The hearing commissioner made an award to the claimant on the holding that notice of the injury was properly given and that the claimant suffered a heart attack while investigating a rape case. No ruling was made in regard to the claim being barred by a release signed by the claimant.

On appeal to the full Commission the award was affirmed, the Commission holding that the injury was caused by a severe emotional disturbance as the result of a reprimand by his employer. The Commission also failed to pass on the effect of the release. On appeal to the circuit court, the case was remanded to the commission for the purpose of passing on all questions raised.

The supreme court held that the Commission, in finding differently from the hearing commissioner as to the cause of the accident, had involved itself in the merits of the case; thus, the supreme court limited itself to a determination that the full Commission had properly determined that the claimant had sustained a compensable accident, and that the issue of the claimant's release was not properly before the circuit court, as this concerned the merits of the claim. The supreme court was therefore able to reverse the order of remand and affirm the award of the Industrial Commission.

28. 249 S.C. 186, 153 S.E.2d 394 (1967).

29. S.C. CODE ANN. § 72-301 (1962).

30. S.C. CODE ANN. § 72-14 (1962), the pertinent parts of which read:
Injury and personal injury.—"Injury" and "personal injury" shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form, except when it results naturally and unavoidably from the accident and except such diseases as are compensable under the provisions of chapter 5 of this Title . . . .

Bundrick v. Powell's Garage & Wrecker Service[31] concerned a claimant who suffered a compensable injury to the arm which rendered him unable to continue in his employment. The only testimony offered before the commission was by the claimant and his doctor, and by a doctor presented by the defendant. Following the medical testimony of both doctors and the testimony of the claimant, the commissioner inspected the claimant's arm and noting scars, made an award. The circuit court reversed the Commission by stating that "although the claimant's testimony had probative value relating to the question of whether the claimant's right arm was disabled at all, such testimony had no probative value in the determination of the extent to which it was disabled." The court therefore rejected the claimant's testimony and held, in effect, that the issue was to be determined on medical testimony alone.

The supreme court, however, was of the opinion that the issue of the extent of loss of use of the claimant's arm was not so technically complicated as to require medical testimony alone. The court held that the lower court, in undertaking to choose between the conflicting testimony of the two medical witnesses, impinged upon the fact-finding function of the hearing commissioner.

B. Refusal to Consider Facts

Moore v. Reeves Bros.[32] was concerned with a finding by the Industrial Commission that the claimant had suffered a compensable injury which required him to seek lighter work at diminished pay, and awarded him sixty percent of the difference between his former salary and his diminished salary. The circuit court affirmed.

The supreme court held that the case could only be determined by a finding of fact by the Commission, and that such a finding is conclusive.

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31. 248 S.C. 496, 151 S.E.2d 437 (1966).
32. 249 S.C. 201, 153 S.E.2d 498 (1967).