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Workmen's Compensation

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WORKMEN'S COMPENSATION

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Payment of Compensation Award During Appeal

Under the Workmen's Compensation Act the employer is required to make payment of a Commission award until all questions are fully determined. Other sections of the Code, and numerous decisions interpreting this section, have been in conflict. The Court, in *Case v. Hermitage Cotton Mills*,[1] carefully reviews and considers all previous decisions and sets forth the conclusion of the Court with regard to the employer-employee status, following appeal from an award. The opinion on the facts in the case is limited to deciding that the general provision of the Code allowing a supersedeas bond to stay the execution of judgment does not apply to awards under the Workmen's Compensation Act. The dictum of the opinion is far more significant than the determination of the case before the Court. The Court construed the supersedeas section[2] as follows:

1. The only payment required to be made by the employer is the weekly compensation accruing after the date of the Commission's award.

2. Should the Commission deny compensation and the Court reverse the Commission, the weekly payments to be made by the employer should commence from the date of the Circuit Court's decision, and not from the date of the Commission's decision.

3. Payment of the weekly benefits shall continue from the date of the Commission's award until final decision by the Supreme Court, and the provision by the general law[3] relating to a supersedeas bond is not applicable.

Injuries Arising Out of and In the Course of Employment—Personal Mission v. Employment

In *Fowler v. Abbott Motor Co.*,[4] the claimant was a mechanic for the defendant motor company and was on call

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1. 236 S. C. 515, 115 S. E. 2d 64 (1960).
2. CODE OF LAWS OF SOUTH CAROLINA § 72-356 (1952).
3. CODE OF LAWS OF SOUTH CAROLINA §§ 7-412 and 7-418 (1952).
4. 236 S. C. 226, 113 S. E. 2d 737 (1960).

twenty-four hours a day, employer furnishing him an automobile to use in answering service calls during all hours and paying toll charges for a telephone located at the residence of the employee. The employee received a telephone call and was overheard to say, "I'll see about it." In leaving he advised his family, "I'll be back in a minute." He stopped at a store and mentioned something about a car motor somewhere. A short time later the employee was involved in a collision which rendered him totally — mentally and physically — incompetent. The Court denied compensation on the ground that the evidence failed to show that the injury occurred at a place where his duty required him to be.

Similar to the *Fowler* case, in *Corley v. South Carolina Tax Comm'n.*,[5] the deceased had gone to Columbia on the previous day to attend a football game and was returning to his home in Greenwood, South Carolina when he received fatal injuries. Deceased had stated to his wife that it would be necessary for him to make a trip to Columbia to pick up some returns to enable him to finish an audit; however, no effort was made by the deceased to go to the office of the Tax Commission. Deceased made one telephone call in Columbia and met one business acquaintance, but he transacted no business. Compensation was denied, the Court holding that "The mere possibility that an employee was engaged in performing a service on behalf of his employer at the time of his accidental injury was insufficient."

Stronger evidence on behalf of the claimant resulted in the Court affirming an award in *Halpern v. DeJay Stores, Inc.*[6] In this case the deceased left the store during working hours expressing an intention to attempt collection of several delinquent accounts and also to make a personal visit to Chester. His death resulted on the route to Chester after he had passed the last turn-off point to his customer. The Court held that it could reasonably be inferred that he was in the course of his employment although he was unwittingly lost.

Again an award was affirmed in an unwitnessed death case where an employee was drowned during a lull period in the employment. *Steed v. Mount Pleasant Seafood Co.*[7] The employer did not expressly permit nor forbid the practice of

5. 237 S. C. 439, 117 S. E. 2d 577 (1960).
6. 236 S. C. 587, 115 S. E. 2d 297 (1960).
7. 236 S. C. 253, 113 S. E. 2d 827 (1960).

swimming during lull periods and there was evidence to support the finding of accidental drowning.

A five minute deviation by an employee from the course of employment to make a wedge for the use of a fellow employee, although entirely personal, was so trivial a deviation that it could be fairly characterized as insubstantial and the award was affirmed in *Cauley v. Ross Builders Supplies, Inc.*[8]

Employees Within Act

The plaintiff in *Chavis v. E. I. DuPont De Nemours & Co.*[9] was an injured employee of a sub-contractor seeking to maintain a common law action against the general contractor for damages on account of an injury. Plaintiff received compensation from the general contractor's workmen's compensation insurance carrier, but disclaimed realization of the identity of the payer of compensation. His theory was that the owner and the sub-contractor were his employers within the meaning of the Act, and, since the general contractor had no duty to compensate him under the Act, the general contractor was not entitled to the Act's protection against common law liability. The District Court of Appeals, Fourth Circuit, sustained an order for summary judgment against the plaintiff, stating:

> The plaintiff, reading § 71-112 narrowly, contends a general contractor is responsible for compensation of employees of subcontractors only if engaged in work which is not the business of the owner. Indeed, it is true that § 72-111 applies only if the work done is the business of the owner, and § 72-112 only if it is not. It is evident, however, that once the highest responsible person is determined by reference to §§ 72-111 and 112, every intermediate contractor or subcontractor under him shoulders the same, indeed the primary, obligation, for the 'principal contractor' is entitled to indemnity from him and to call him in to defend the compensation claim.

The filing of a Workmen's Compensation policy with the Commission purporting to insure the defendant employer without the knowledge of the employer and without other evidence indicating the intention of the employer to come

8. 238 S. C. 38, 118 S. E. 2d 879 (1961).
9. 283 F. 2d 929 (4th Cir. 1960).

within the terms of the Act was held insufficient to establish the intention of the employer to operate under the Compensation Act in *Dependents of Sweeney v. Cape Fear Wood Corp.*[10]

Unusual Exertion or Strain

Over a period of two or three weeks claimant worked unusually long hours, was subject to a work environment that was unusually difficult because of several incidents, and greatly over-exerted himself in his performance of his duty. The Court in *Kearse v. South Carolina Wildlife Resources Dep't.*[11] held that a thrombosis suffered by an employee was compensable if induced by unexpected strain or over-exertion in the performance of his employment under unusual or extraordinary conditions. Although a pre-existing pathology may have been a contributing factor, and although the work is the same general type in which the employee is regularly involved, these would be no bar to compensation as the phrase "unusual or excessive strain" is not so limited in meaning as to include only the work of an entirely different character than that customarily done.

Again, where the claimant established that preceding a thrombosis his working hours had increased from eight and one-half to sixteen hours per day in order to perform extra duty, the Court held the case compensable, but remanded because of the finding of the total disability rather than partial disability. *Wynn v. People's Natural Gas Co.*[12] Medical testimony established that claimant was able to work if he would avoid undue physical or mental strain. The Court declared:

> total disability does not require complete helplessness. Inability to perform common labor is total disability for one who is not qualified by training or experience for any other employment. . . .
>
> [One] who is capable of performing other work that is continuously available to him will not be deemed totally disabled because he is unable to resume the duties of the particular occupation in which he was engaged at the time of his injury. . . . The generally accepted test of total disability is inability to perform services other than those that are 'so limited in quality, dependability, or

10. 237 S. C. 471, 118 S. E. 2d 70 (1961).
11. 236 S. C. 540, 115 S. E. 2d 183 (1960).
12. 238 S. C. 1, 118 S. E. 2d 812 (1961).

> quantity that a reasonable stable market for them does not exist.'

Likewise, the Court denied the claim for compensation for a heart attack where there was no evidence of any increased working hours and where there was an absence of evidence such as that presented in the *Kearse* case. The claimant was a jailer and suffered a heart attack following a busy night at the City Jail. *West v. City of Spartanburg.*[13]

Aggravation of Pre-Existing Injury

Where there is an aggravation of a pre-existing condition by injury or accident, any resulting disability or death is compensable. This applies to an aggravation of a dormant cancerous condition, provided expert medical testimony concludes that the result "most probably" came from the alleged cause. *Glover v. Columbia Hosp.*[14] It is equally applicable to osteoarthritis. *Daley v. Public Savings Life Ins. Co.*[15]

Change of Condition

In *Krell v. South Carolina Highway Dep't.*[16] claimant sought to recover compensation for a hernia on an application for a change of condition following an original back injury. No claim was filed for hernia at the time of the hearing. Compensation was denied. The Court said at page 589:

> If [the] claimant sustained injuries at the time of the original action which he knew about at the time of his claim but for some reason failed to include in the claim, he cannot for the first time assert disability from these injuries in a petition based on 'Change of condition.'

Statute of Limitations

Claimant was injured and was directed to the company physician. She was informed that her condition had nothing to do with the accident and was referred to her family physician. Claim for compensation was not filed within the year as required by the Statute, the claimant contending that the employer was estopped to invoke the Statute by his conduct.

13. 236 S. C. 553, 115 S. E. 2d 295 (1960).
14. 236 S. C. 410, 114 S. E. 2d 565 (1960).
15. 236 S. C. 236, 113 S. E. 2d 758 (1960).
16. 237 S. C. 584, 118 S. E. 2d 322 (1961).

The claim was denied on the ground that there was no evidence of any conduct on the part of the employer that would warrant an estoppel. *Case v. Hermitage Cotton Mills.*[17]

Specific Loss v. Total Disability

Claimant suffered a severe injury to his leg as the result of a fall. One doctor rated the claimant with a 60% loss of use of his right leg, and other medical testimony established that the claimant had a 50% to 75% loss of the whole body, one physician stating that the injury gave the claimant almost a total disability. The Commission found that the only injury causing disability was to his right leg, but awarded the claimant total disability. The Supreme Court after first affirming the award, granted a petition for a re-hearing and reversed, stating where the injury is confined to the scheduled member and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation even though other considerations, such as age, lack of training, or other conditions peculiar to the individual, effect a total or partial industrial capacity. *Singleton v. Young Lumber Co.*[18] To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected.

Rule of Liberal Construction

Claimant alleged an accident aggravating an osteoarthritic condition. Claimant's medical witness stated, "It's possible" that the condition was aggravated by injury. Compensation denied. *Cross v. Concrete Material.*[19] Rejecting the contention that lay testimony was sufficient to sustain the finding of causal connection, the case was distinguished from prior cases where the disability was visible, external, and subject to observation. The Court further declared that the rule of liberal construction of the law did not apply to the finding of facts. Conceding that some courts do apply the rule that where there is a doubt about the facts, the doubt will be resolved in favor of the claimant, the Court stated that the rule in South Carolina is different, and that the Court will affirm a factual finding of the Commission if there is "any competent evidence of the record to sustain it and reverse it only if there is not."

17. 236 S. C. 284, 113 S. E. 2d 794 (1960).
18. 236 S. C. 454, 114 S. E. 2d 837 (1960).
19. 236 S. C. 440, 114 S. E. 2d 828 (1960).

Contributory Negligence of Workmen's Compensation Employer No Bar to An Action Against the Third Party

Deceased was killed while he was a passenger in the truck of his employer. Compensation death benefits were paid by the employer and thereafter an action filed by the employer's insurance carrier against the third party. The jury found contributory negligence on the part of the employer, and the circuit court denied recovery on the part of the insurance carrier. The Supreme Court held "the contributory negligence of the employer constitutes no defense to an action brought by him or his carrier against a third party to recover compensation paid." *Indemnity Ins. Co. of North America v. Odom.*[20]

20. 237 S. C. 167, 116 S. E. 2d 22 (1960).