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Workmen's Compensation

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EVIDENCE

Attorneys who are engaged in establishing medical causation in compensation cases have constantly been confronted with the understandable reluctance of medical witnesses to use the phrase "most likely" or "most probably" when there are other medical possibilities. Medicine is not an exact science and frequently cases that should be compensable do involve other medical possibilities. In *Grice v. Dickerson, Inc.*[1] the court declared that where the testimony of medical experts is not solely relied upon to establish causal connection, the medical expert testimony is sufficient if it establishes that a conclusion of causal connection does not involve entry into the field of conjecture.

In this case the claimant suffered an admitted compensable injury resulting in a hernia. Following the hernia operation, for which compensation was paid, the claimant developed rheumatoid arthritis. The medical testimony established that rheumatoid arthritis could be caused by a number of factors and that, of the possibilities, two of them were the stress of a surgical operation and a traumatic injury, both of which were present in the case. Further medical testimony was offered to show that the possibility of a connection between the operation and arthritis was strengthened by an early onset of the disease. The doctors gave as their opinion that medical science has not discovered the exact cause of rheumatoid arthritis, and none of the medical testimony established probable cause or causal connection between the operation and the condition of the claimant.

The court held that even though there was no medical testimony that the arthritis was "most probably" caused by the claimant's injury and subsequent operation, the medical testimony definitely recognized the possibility of the causal connection between them in the light of the facts of the case. Under such circumstances it became the duty of the Commission to weigh the facts in the light of medical possibilities.

> Here, reliance was not upon medical testimony alone to show causal connection between the injury and the subsequent disability of the claimant, but rather in addition upon the cir-

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1. 241 S.C. 225, 127 S.E.2d 722 (1962). This case is also noted in the Administrative Law section at notes 71 and 80.

> cumstances surrounding the injury and the events which followed. The medical testimony was not relied upon to show causal connection, but to show that, from the other facts and circumstances, a conclusion of causal connection did not involve entry into the field of conjecture, surmise and speculation. The Commission was faced with the duty to choose among two or more causative factors. The uncertainty of the medical testimony was sufficiently substantiated by the sequence of events which followed the injury.[2]

Consistent with this decision, the court in *Gosnell v. Bryant*[3] found the combination of lay testimony and the absence of sufficient expert medical testimony insufficient to establish that the alleged disability of the claimant "most probably" resulted from the injury. As a result the court correctly sustained the defendant's position that compensation should be denied.

In *Randolph v. Fiske-Carter*,[4] the court reaffirmed the rule that the general practitioner is qualified to testify as an expert. In that case the court quoted with approval the rule as stated in *Hill v. Carolina Power & Light Co.*[5]:

> a physician or surgeon is not incompetent to testify as an expert merely because he is not a specialist in the particular branch of his profession involved in the case. The fact, however, that the witness is not a specialist in the particular branch of the profession involved may be considered as affecting the weight of his testimony, but this is no ground for completely rejecting it.[6]

JURISDICTION OF THE COMMISSION

The principle of inclusion rather than exclusion is the general rule used in determining the jurisdiction of the Workmen's Compensation Commission. This, however, is to be distinguished from the error of "finding a fact upon a doubt" as set out in *Allen v. Phinney Oil Co.*[7] The claimant here was employed by Phinney who operated a business in his individual capacity. Later Phin-

2. *Id.* at 230, 127 S.E.2d at 725.
3. 240 S.C. 215, 125 S.E.2d 405 (1962). This case is also noted in the Administrative Law section at notes 65 and 79.
4. 240 S.C. 182, 125 S.E.2d 267 (1962). This case is also noted in the Administrative Law section at note 75.
5. 204 S.C. 83, 28 S.E.2d 545 (1943).
6. *Id.* at 109, 28 S.E.2d at 555.
7. 241 S.C. 173, 127 S.E.2d 448 (1962). This case is also noted in the Administrative Law section at note 82.

ney and a Mr. Bruce formed a corporation of which Phinney owned thirty per cent of the stock. This corporation operated under the Compensation Act. The circuit court reversed the Industrial Commission, finding that at no time was the claimant an employee of the corporation and denied any benefits for his death. The Supreme Court reversed the circuit court and reinstated the award of the Industrial Commission. The court cited the general rule that: "the basic purpose of the Workmen's Compensation Act is inclusion of employers and employees within its coverage and not their exclusion, and doubts of jurisdiction will be resolved in favor of inclusion rather than exclusion."[8] However, the court pointed out there was no conflict between this principle and the refusal to extend the principle of liberal construction to the finding of a fact upon doubt rather than evidence, stating,

> There is no sound reason for the translation of the rule of liberal construction of the law to the finding of the facts to the end that doubt with respect to the latter shall be resolved in the favor of the claimant. Doubt as a foundation of a factual finding, can hardly be distinguished from surmise, speculation and conjecture which countless cases have condemned as a substitute for facts and legitimate inferences. Conviction, not doubt, is a proper basis of a conclusion of fact.[9]

In *MacMullen v. South Carolina Elec. & Gas Co.*[10] the importance of decisions determining jurisdiction of the Commission was further illustrated in the reversal by the Fourth Circuit Court of Appeals of a seventy-five thousand dollar district court award. The court held that the appellant electric company was engaged in a part of its "trade, business or occupation" while constructing a steam generating plant; and, therefore, the plaintiff, or injured employee of the sub-contractor, was required to seek his remedy under the Compensation Act.

After a detailed review of the facts in which the court observed that the defendant's employees had been engaged continuously in construction of new power generating facilities since 1949, the court stated that the purpose of the act "would be defeated to hold the act applicable only to maintenance and

8. *Id.* at 180, 127 S.E.2d at 452.
9. *Ibid.*
10. 312 F.2d 662 (4th Cir., 1963).

repair and to exempt the employer in the more important field of new construction."[11]

ACCIDENTAL INJURY

The claimant in *Lee v. Wentworth Mfg. Co.*[12] became disabled as a result of an infection following a tuberculin test that was administered to her during working hours and in accordance with an agreement between the employer and the claimant's union. The court held that the test was administered for the mutual benefit of the employer and the employee and was therefore properly held to be incidental to her employment.

In *Jake v. Jones*[13] the evidence established that the deceased lost his life by drowning during normal working hours on the property controlled by the employer and at a place where his duties required him to be. The court found that a presumption arose that the death of the employee resulted as a consequence of his employment and the award for compensation was affirmed.

OCCUPATIONAL DISEASES

In *Brittle v. Raybestos-Manhattan, Inc.*[14] the deceased employee was totally disabled as a result of the occupational disease of asbestosis prior to his death. In the claim arising from his death, the medical board, appointed on motion of the employer, determined that the employee had died as a result of two diseases, the asbestosis of long standing and pulmonary cancer. The asbestosis was held eighty-five per cent responsible for his death and the cancer fifteen per cent responsible. Thereafter, the Commission awarded the full amount of the statutory death benefits. The employer contended that where the death of the employee was caused by an occupational disease and a noncompensable infirmity, the award from the death benefits should be reduced by the percentage which the non-compensable infirmity was determined to have contributed to the employee's death. The South Carolina Workmen's Compensation Act provides that compensation payable for disability or death "shall be computed

11. *Id.* at 666.
12. 240 S.C. 165, 125 S.E.2d 7 (1962). This case is also noted in the Administrative Law section at note 68.
13. 240 S.C. 574, 126 S.E.2d 721 (1962). This case is also noted in the Administrative Law section at notes 69 and 81.
14. 241 S.C. 255, 127 S.E.2d 884 (1962). This case is also noted in the Administrative Law section at note 70.

by the proportion which the disability from the occupational disease bears to the entire disability."[15] The Supreme Court held against the defendant's construction of the section and decided that "the factor determining the amount of death benefit, where death is caused by an occupational disease and a non-compensable infirmity, is the relation in proportion which the disability from the occupational disease bears to the entire disability and not the proportion which such occupational disability bears to the cause of the death."[16]

In this case it was undisputed that the employee was totally disabled from the disease of asbestosis. This being true, although there were other factors, any one of which may have rendered the employee totally disabled, there should be no reduction in the death benefits.

It is interesting also in this case that voluntary payments were made by the employer in the amount of $100.00 per month. The total sum amounted to $6,820.00. The employer claimed credit for this payment, which was denied. The court cited with approval the rule as stated in *Larson's Workmen's Compensation Law* that: "The credit rule has been applied only when the wages paid were at least equal to the compensation that was due for the week. This can easily be defended under the intention rule, since the employer can not be ascribed an intention to make certain payments in lieu of compensation when the payments are too small to be compensation benefits."[17]

In *Drake v. Raybestos-Manhattan, Inc.*[18] the court, although approving the remand of the case to the Industrial Commission for further findings of fact, defined the rule determining the limitation period for giving notice under the occupational disease section of the act. In this case the employee was discharged in March, 1954, and about four years later filed her claim for compensation benefits. The defendant contended that timely notice of her claim was not given as required by the compensation law. In discussing the law governing notice under occupational diseases statutes, the court stated:

> The date of the accrual of compensability does not necessarily establish the date when the statute of limitations for the giving of notice or the filing of a claim begins to run

15. S.C. CODE § 72-258 (1962).
16. 241 S.C. 255 at 261, 127 S.E.2d at 887.
17. 2 LARSON, LARSON'S WORKMEN'S COMPENSATION LAW 24 (1961).
18. 241 S.C. 116, 127 S.E.2d 288 (1962). This case is also noted in the Administrative Law section at notes 84 and 90.

in such cases. While our statutes, Sections 72-301 and 72-303, date the running of the limitation period from the accident, such term as used in reference to occupational diseases means, as we have pointed out above, disregard disablement from such diseases and, in case of a pulmonary disease, as here involved, total disability. In determining the occurrence of disability in occupational disease cases we are dealing usually with a period of time over which the disease progresses to the point of disablement. An employee may contract a disease from exposure in his employment and for a long time afterward not know that he has it. Usually diagnosis can only be made by a physician and diagnosis, even by a physician, in many instances, is most difficult and delayed. It is because of this latent character of the disease and the inability of the employee to diagnose and appreciate the nature and character of his illness that many courts have adopted the rule that limitation periods prescribed in Workmen's Compensation Acts, in occupational disease cases, for notice to the employer and for the filing of a claim for compensation, begin to run when the disease has culminated in disability and when the claimant by reasonable diligence could have discovered that his condition was a compensable one.[19]

Therefore, the South Carolina rule as to determining the beginning of the running of the period of limitations in cases involving occupational diseases is one in keeping with the majority of jurisdictions. It is the time when the disease has culminated in disability and when the claimant by use of reasonable diligence could have discovered that he had a compensable claim.

19. *Id.* at 122, 127 S.E.2d at 291.