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Workmen's Compensation

William McB. Wood

WORKMEN'S COMPENSATION

I. Effect of Voluntary Retirement on Unemployment Compensation

Ernest C. Richey was employed by the Riegel Textile Corporation for approximately fifty-five years. His job placed him in the category of "salaried personnel," which made him eligible to participate in a retirement annuity plan instituted by his employer in 1945. This plan was entirely voluntary and had as one of its provisions an agreement that employees within the program would retire at age sixty-five. Richey did not join the plan until 1955; he gave as a reason for his belated entrance "that he understood from an official of the company that the mandatory retirement feature had been eliminated."[1] Richey was initially furnished with an information booklet expressly setting forth the retirement feature, and he was later given annual statements showing his total contributions and his "normal retirement date" as June 1, 1965. He was duly retired over his protest and was denied unemployment compensation by the Employment Security Commission because of a finding that he had "voluntarily retired." The trial court affirmed the commission's decision.[2]

The issue on appeal was one of voluntariness. Evidence indicated that the terms of the annuity plan were explained to the employee at the time of payroll deduction authorization—that is, with the privilege to draw a pension goes the contractual obligation to retire at sixty-five when the pension is due. The plaintiff was in a supervisory capacity, and his length of service gave evidence that he was familiar with the fact that program participants retired at age sixty-five.

The Employment Security Law was designed to provide stability when industrial employment becomes unstable, and available reserves are "to be used for the benefit of persons unemployed through no fault of their own."[3] The *Richey* court

1. Richey v. Riegel Textile Corp., 253 S.C. 59, 62, 169 S.E.2d 101, 103 (1969).
2. Factual issues and findings of the Commission are binding on appeal if supported by any evidence. *See* Hyman v. South Carolina Employment Security Comm'n, 234 S.C. 369, 108 S.E.2d 554 (1959); Johnson v. Pratt, 200 S.C. 315, 20 S.E.2d 865 (1942).
3. S.C. Code Ann. § 68-38 (1962).

unanimously held, therefore, that "voluntary retirement"[4] includes a worker who by "his own choice, elects to leave his employment under a retirement annuity plan upon reaching a specified age. In such case, the employee voluntarily terminates his employment."[5] The court further held that the effect on unemployment compensation was without the contemplation of the parties when they agreed to the retirement plan.

II. INJURY BY ACCIDENT

In *Riley v. State Ports Authority*[6] the plaintiff's intestate suffered a brain hemorrhage because of fits of coughing which caused increased blood pressure. The deceased, who had a pre-existing malady of asthma, had been exposed to a dust-laden atmosphere during duty hours with the State Ports Authority. The trial court affirmed an award of benefits by the Industrial Commission, and the Ports Authority and the State Workmen's Compensation Fund appealed.

Citing *Hiers v. Brunson*,[7] the supreme court held unanimously that there was "injury *by accident*" within the meaning of the Workmen's Compensation Act,[8] because the trauma came about by "chance or without design, taking place unexpectedly or unintentionally."[9] Death by *natural* causes does not come within the meaning of the Act; but, if a pre-existing malady is shown to have been accelerated or increased by some act or event of chance, the accidental nature of the injury is established. In Riley's case the court found a causal connection between the employee's work (unloading clay bags and sporadically sweeping up) and "his death, such being an accident which arose out of and in the course of his employment."[10]

III. DISFIGUREMENT

In *Smith v. Daniel Construction Co.*[11] the court was asked to define the term, disfigurement.[12] The appellant, Smith, was

4. One who "voluntarily retires" is ineligible for unemployment compensation benefits. *See* S.C. CODE ANN. § 68-114(6) (1962).
5. 253 S.C. 59, 65, 169 S.E.2d 101, 104 (1969).
6. 253 S.C. 621, 172 S.E.2d 657 (1970).
7. 221 S.C. 212, 70 S.E.2d 211 (1952).
8. S.C. CODE ANN. § 72-14 (1962).
9. 253 S.C. 621, 625, 172 S.E.2d 657, 659 (1970), *quoting from* Hiers v. Brunson, 221 S.C. 212, 70 S.E.2d 211 (1952).
10. 253 S.C. 621, 627, 172 S.E.2d 657, 660 (1970).
11. 253 S.C. 248, 169 S.E.2d 767 (1969).
12. In case of serious facial, head or bodily disfigurement, the Commission shall award proper and equitable compensation not to

injured while in the employment of Daniel. The injury necessitated the removal of his spleen, which left an abdominal scar. The Industrial Commission awarded $300 for the scar and $2,000 for the loss of the spleen as an organ of the body.[13] On appeal the majority affirmed the trial court's decision to strike the award for the loss of his "organ."

Prior to the 1941 amendment to the Workmen's Compensation Act which was construed in *Smith*, the court in *Manning v. Gossett Mills*[14] held that the loss of a testicle was *not* serious bodily disfigurement. Additionally, in the case of *Bowen v. Chiquola Mfg. Co.*[15] (decided after the enactment of the questioned amendment), the court stated that in pre-1941 cases, except for disfigurement to the face or the head, proof of reduced earning capacity was required before compensation was allowed. These pre-1941 interpretations largely prompted the enactment of the questioned amendment to section 72-153 of the South Carolina Code of Laws. The amendment added the following:

> *Disfigurement shall* also *include the loss* or serious or permanent injury *of any* member or *organ* of the body for which no compensation is payable under the schedule of specific injuries set out in this section. And in cases of bodily disfigurement it shall not be necessary for the employee to prove that the disfigurement handicaps him in retaining or procuring employment or that it interferes with his earning capacity.[16]

The *Smith* court held that the effect of the 1941 amendment was to raise a presumption of reduction in earning capacity for all serious bodily disfigurements, but that it did *not* "either expressly or by reasonable inference extend the scope of 'serious bodily disfigurement' to nondisfiguring loss or injury to [previously non-scheduled] members."[17] Thus, the court reiterated

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> exceed two thousand five hundred dollars. *Disfigurement shall also include the loss or serious or permanent injury of any member or organ of the body for which no compensation is payable under the schedule of specific injuries set out in this section.* And in cases of bodily disfigurement it shall not be necessary for the employee to prove that disfigurement handicaps him in retaining or procuring employment or that it interferes with his earning capacity.

253 S.C. 248, 256, 169 S.E.2d 767, 771 (1969), *citing* S.C. CODE ANN. § 72-153 (1962) (emphasis added by Bussey, A. J.).

13. S.C. CODE ANN. § 72-153 (1962) also limits recovery for disfigurement to $2,500 total.
14. 192 S.C. 262, 6 S.E.2d 256 (1939).
15. 238 S.C. 322, 120 S.E.2d 99 (1961).
16. S.C. CODE ANN. § 72-153 (1962) (emphasis added).
17. 253 S.C. 248, 252, 169 S.E.2d 767, 769 (1969).

the pre-1941 position that a disfigurement must disfigure—a scar is a disfigurement, but the loss of the spleen behind the scar is not a disfigurement.

Justice Bussey dissented and questioned such an interpretation of the amendment, since the amendment purported to cover situations such as in the *Manning* case, by pronouncing that a "disfigurement shall also include the loss . . . of an organ [not previously within the schedule of specific injuries] . . . ."[18] The *Bowen* court indicated that there must be a disfigurement in the general sense of the word. The dissent urged that to continue *Bowen's* interpretation of the 1941 amendment would be palpable error and cited several cases containing precedent for the striking of erroneous opinions.[19] The dissent further argued that *Bowen* gave a different interpretation to the 1941 amendment than other opinions of the court. These opinions, according to Justice Bussey, clearly show the true and correct interpretation of legislative intent: loss of an organ is a "disfigurement."[20] For example, a unanimous court in *Cagle v. Clinton Cotton Mills*[21] interpreted the loss of six teeth as squarely within the provisions of the 1941 amendment even though there was no "apparent disfigurement."

> We can reach no other conclusion than that it was the intendment of the legislature to enlarge the coverage provided by the Act declaring the loss or serious or permanent injury of any member or organ of the body for which no provision is made under the schedule of specific injuries, *a disfigurement as a matter of law.... It is not necessary that the loss or serious or permanent injury to the organ impair the appearance of the claimant.*[22]

18. 253 S.C. 248, 257, 169 S.E.2d 767, 772 (1969). See note 12 *supra* for text of S.C. CODE ANN. § 72-153 (1962).

19. "That doctrine [of stare decisis] has no application, where there is conflict in the decisions of the court." Daughty v. Northwestern Ry., 92 S.C. 361, 75 S.E. 553 (1912). This proposition was reiterated in *Coleman v. Page's Estate*, 202 S.C. 486, 25 S.E.2d 559 (1943).

20. "By the first amendment there was simply added unscheduled members and organs of the body to the scheduled members of Section 31 as subjects for an award for bodily disfigurement apparently having as its genesis the opinion of this court in Manning v. Gosset Mills . . . ." Montgomery v. York Mills Inc., 204 S.C. 469, 30 S.E.2d 68 (1944). *See also* Ingle v. Dunean Mills, 204 S.C. 505, 30 S.E.2d 301 (1944) and the dissent in Parrot v. Barfield Used Parts, 206 S.C. 381, 34 S.E.2d 802 (1945).

21. 216 S.C. 93, 56 S.E.2d 747 (1949).

22. *Id.* (emphasis added).

Webster's[23] specifically defines the spleen as an organ. In addition, the medical reference work utilized at the Medical College of South Carolina provides the following definition: a spleen is "[a] large gland-like but ductless *organ* situated in the upper part of the abdominal cavity on the left side and lateral to the cardiac end of the stomach."[24]

In spite of the foregoing definitions, one could speculate that in South Carolina, the spleen, as a result of the *Smith* case, is not an organ within the meaning of section 72-153. The *Bowen* case, on which the court relied heavily, aptly held that two invertebral discs did not qualify as an organ. There, also, the award was split, even though there was just one injury. But the *Bowen* case can be distinguished, since the disqualified portion was not an organ of the body. In *Smith*, where the questioned portion for which an award is sought does qualify as an organ, Justice Bussey found no reason not to allow the splitting of compensation between loss of the organ and the scar, where both arose out of one injury, and the total of the two is within the $2,500 statutory limitation of award.

The dissent makes a strong case for allowing recovery. The question remains unsettled — Is the loss of an "organ" a disfigurement?

IV. Experience Account — Effect of After-Strike Benefits

Twenty typesetters struck the State-Record Publishing Co. Instead of laying off the 300 non-strikers, State-Record chose to hire replacement typesetters. When the strike ended, the typesetters sought and were refused their old jobs. They applied for unemployment compensation, and the South Carolina Employment Security Commission sought to charge State-Record's experience rating account for the benefits subsequently paid to the applicants. State-Record appealed to the circuit court. In *State-Record Publishing Co. v. South Carolina Employment Security Commission*,[25] the supreme court affirmed the lower court's decision in favor of State-Record.

An employer's contribution to the unemployment reserve is based upon his experience with the unemployment of former employees.[26] The court stated:

23. Webster's New International Dictionary 2200 (3d ed. 1961).
24. Dorland's Illustrated Medical Dictionary 1284 (23d ed. 1958) (emphasis added).
25. 254 S.C. 1, 173 S.E.2d 144 (1970).
26. *See* S.C. Code Ann. § 68-174 (1962).

> [T]he rate of contribution (somewhat equivalent to an insurance premium) is raised or lowered periodically, based on the individual employer's experience . . . . Obviously, if benefits are paid the twenty employees involved in this case, the contribution rate will be adversely affected, though it is impossible to estimate to what extent.[27]

There was no question as to benefits accruing to the employees during their strike: section 68-114(4) specifically denies benefits while on strike.[28] However, the question did evolve: should the employer's experience factor be charged for the *after-strike* benefits, or should the benefits be charged to the general fund for *all* industries to bear?

The court refused to go into the merits of the strike and limited its opinion to an interpretation of section 68-115,[29] which provides for not charging the employer's experience factor where an employee voluntarily leaves "without good cause." The court looked to the intent of the legislature to determine if State-Record should be charged. The court found that the legislature sought to encourage employers to provide more stable employment and intended for the "reserves to be used for the benefit of persons unemployed through no fault of their own."[30] The court inferred that the public good and general welfare intended to be promoted by the statute, would not have been served had State-Record laid off 300 non-strikers as a result of the strike by 20. Abruptly, the court decided that under the circumstances, the employer should not be penalized for its actions, since it was faced with a dilemma from which it extricated itself and, at the same time, kept within the intendment of the Employment Security Act.[31]

The court's opinion effectively says that one who strikes is one who voluntarily leaves "without good cause" within the meaning of section 68-115. Such an interpretation is strengthened

27. 254 S.C. at 5, 173 S.E.2d at 145.
28. "Any insured worker shall be ineligible for benefits . . . (4) for any week with respect to which the Commission finds that his total or partial unemployment is directly due to a labor dispute in active progress in the factory, establishment or other premises at which he was last employed . . . ." S.C. CODE ANN. § 68-114(4) (1962).
29. "Benefits paid to any claimant shall not be charged against the account of any employer when the Commission finds that such individual (a) voluntarily left his most recent employment with the employer without good cause . . . ." S.C. CODE ANN. § 68-115 (1962).
30. 254 S.C. at 8, 173 S.E.2d at 147.
31. S.C. CODE ANN. § 68-1 et seq. (1962).

by the court stating that "[s]ection 68-114 and section 68-115 are mutually exclusive;"[32] that is, "'[w]ithout good cause' referred to in Section 68-115 does not contemplate fault in the sense of blame."[33] However, the brief dissent asserted that a lawful strike called by a member's union *was* good cause.[34] Employers may now look to this case as precedent to avoid an adverse effect on their experience factor by payment of *after-strike* benefits if they fall within the *State-Record* circumstances.

V. EMPLOYEE OR INDEPENDENT CONTRACTOR

The unanimous decision in *Tharpe v. G.E. Moore Co.*[35] emphasized that the test for ascertaining whether a person is an independent contractor or not is determined by who had the "(1) right to exercise control [over work], (2) [control] of payment, (3) [responsibility for] furnishing of equipment and (4) right to fire."[36]

The claimant's intestate, a contractor on other jobs for the defendant, subcontracted to install the plumbing at Clinton Cotton Mills on a cost plus 10% basis.[37] Total cost was not to exceed $1,500. Additionally, Tharpe was to receive $165 weekly over and above the cost plus fixed fee, this amount to be paid at the completion of work. But this also had to come within the $1,500 limitation. Therefore, Tharpe could have received nothing for his own labor if the cost plus fixed fee equaled to or exceeded $1,500.

The court pointed out that at no time did Moore seek to control the day-to-day operation of the work or seek to exercise the power to hire and fire Tharpe employees. Tharpe was entitled to charge customary rental for his equipment as part of his cost. Payment for the installation of the plumbing would occur upon completion of the work. The court found that the claimant did not carry her burden of proof on the four critical points. When Moore testified that he would not have paid an excess rate to one of Tharpe's employees or that he would have terminated the contract had Tharpe been drunk or not per-

32. 254 S.C. at 9, 173 S.E.2d at 147.
33. *Id.* at 7, 173 S.E.2d at 146.
34. *Id.* at 9, 173 S.E.2d at 147 (dissenting opinion).
35. 174 S.E.2d 397 (S.C. 1970).
36. *Id. See also* South Carolina Indus. Comm'n v. Progressive Life Ins. Co., 242 S.C. 547, 550, 131 S.E.2d 694, 695 (1963); 1A LARSON, WORKMEN'S COMPENSATION § 44.30 at 653 (1967).
37. Moore contended 8%. 174 S.E.2d 397, 399 (S.C. 1970).

forming in a workmanlike manner, these factors only indicated Tharpe's status as an independent contractor with the duty to perform under an implied covenant of good faith,[38] and perform in a workmanlike manner.[39] It is clear that in South Carolina a person's status as *employee v. independent contractor* will be determined by direct evidence on the four managerial points of control.

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38. Commercial Credit Corp. v. Nelson Motors, 247 S.C. 360, 147 S.E.2d 481 (1966).
39. 17 AM. JUR. 2D *Contracts* § 371 (1964).