South Carolina Law Review

Volume 23
Issue 4 *Survey of South Carolina Law*

Article 16

1971

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Recommended Citation
Stringer, Patrick F. (1971) "Workmen's Compensation," *South Carolina Law Review*: Vol. 23 : Iss. 4 , Article 16.
Available at: https://scholarcommons.sc.edu/sclr/vol23/iss4/16

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WORKMEN'S COMPENSATION

I. POST-INJURY EARNINGS

Outlaw v. Johnson Service Co.[1] affirms the proposition of law which was set forth in the 1969 term of the South Carolina Supreme Court in *Owens v. Herndon.*[2] The claimant sustained a compensable back injury for which he was paid 10 weeks' benefits. Thereafter, he returned to work making the same or more money than he made prior to the injury. He was not able to do the more strenuous work, but his employer was nonetheless satisfied with his performance. The South Carolina Industrial Commission found a thirty percent permanent, general, overall bodily disability and awarded him compensation. Upon appeal to the Richland County Court of Commn Pleas, the award was set aside. The South Carolina Supreme Court, two justices dissenting, affirmed the decision of the Court of Common Pleas. The majority cited Section 72-10 of the South Carolina Code which defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."[3] The majority relied heavily on the decisions of *Parrot v. Barfield*[4] and *Owens v. Herndon,*[5] in deciding that disability was to be measured solely by the employee's capacity to earn the wages he was receiving at the time of his injury. According to the majority, medical opinion is not determinative as to whether the claimant has suffered a disability if there is no diminution in earning capacity.[6] The supreme court concluded its opinion by noting that if such claims are to be compensated the ruling should be changed by the legislature, not by the court.[7]

Justices Bussey and Lewis dissented in this case as they did previously in *Owens v. Herndon.*[8] Justice Bussey felt that since there was a possibility that the claimant was receiving, not earning, post-injury wages equal to his pre-injury wages, the case should have been

1. 254 S.C. 486, 176 S.E.2d 152 (1970).
2. 252 S.C. 166, 165 S.E.2d 696 (1969).
3. S.C. CODE ANN. § 72-10 (1962).
4. 206 S.C. 381, 34 S.E.2d 802 (1945).
5. 252 S.C. 166, 165 S.E.2d 696 (1969).
6. In Walker v. City Motor Car Co., 232 S.C. 392, 102 S.E.2d 373 (1958) the South Carolina Supreme Court noted that: "Loss of earning capacity alone is the criterion and medical opinion as to the extent of physical disability can have no probative value against actual earnings."
7. 254 S.C. 486, 490, 176 S.E.2d 152, 155 (1970).
8. The dissenting opinion in *Owens* is discussed in 21 S.C.L. REV. 677, 680-81 (1969).

Published by Scholar Commons, 1971

remanded to the Commission for a full determination of this factual issue. Justice Bussey concluded by noting that if the case be remanded, it would be in order to expressly hold that the simple receipt of, as opposed to earning, post-injury wages equal to pre-injury wages is not a legal bar to a finding of disability.[9]

II. WEIGHT GIVEN TO MEDICAL TESTIMONY

The central issue in *Rollins v. Wunda Weve Carpet Co.*[10] was whether the Commission had the power to make a determination as to the cause of an injury when medical testimony conflicted with the Commission's finding. The claimant in this case sustained a fracture of his right elbow on July 28, 1968, in a non-compensable motorcycle accident. Subsequently,on November 22, 1968, he sustained an injury to his right shoulder and arm while at work.

According to medical testimony, the second accident could not have caused the disability in the claimant's arm. There was also medical testimony to the effect that the claimant had suffered no permanent disability from the first non-compensable accident. In spite of this testimony, the Hearing Commissioner found that the second accident aggravated the pre-existing injury to the right elbow, and awarded the claimant compensation for thirty percent permanent disability. The Full Commission increased this award and found that the claimant had suffered forty percent permanent disability in his arm.

The South Carolina Supreme Court recognized that there are situations where the lay mind may draw reasonable inferences of causation, notwithstanding conflicting medical testimony. The main basis for the award was the personal observation of the injury by the Industrial Commission, and other circumstantial evidence which pointed to the fact that the injury was caused by the compensable accident. The supreme court concluded that the injury "was so naturally and directly connected with the accident that proof of causality does not depend on expert evidence."[11]

III. FINDINGS MUST BE SUPPORTED IN THE OPINION

In *Hill v. Jones*,[12] the South Carolina Supreme Court reversed the

9. 254 S.C. 486, 492, 176 S.E.2d 152, 155 (1970).

10. 177 S.E.2d 5 (S.C. 1970).

11. *Id.* at 8, *quoting* Ballenger v. Southern Worsted Corp., 209 S.C. 463, 40 S.E.2d 681 (1946).

12. 178 S.E.2d 142 (S.C. 1970).

decision of the Common Pleas Court and remanded the case to the Industrial Commission because the opinion of the Commission did not give a statement of the findings of fact, rulings of law, and other matters pertinent to the question at issue, as required by Section 72-354 of the 1962 Code of Laws.[13]

The claimant testified that injuries which he sustained to his left shoulder were the result of a fall from a scaffold. The employer and its carrier denied liability, contending that the claimant had a physical seizure of some sort which caused him to fall while he was walking across the construction site. The hearing commissioner denied the claim, but the Full Commission reversed this decision and remanded the case to the hearing commissioner to determine the benefits due the claimant. Upon appeal to the circuit court, the award was affirmed.

The South Carolina Supreme Court found that, although there was conflicting evidence as to the cause of the injury, there was sufficient evidence to sustain a finding in favor of the claimant. The supreme court then noted that the Industrial Commission is required by statute to file its award with a statement of the findings of fact, rulings of law, and other matters pertinent to the question at issue.[14] The main question at issue below was whether the claimant was injured because of a fall from a scaffold, or from a seizure which caused him to fall. The opinion of the Majority Commission contained only brief references to the testimony, and the reason given for the award was simply that the "basic purpose of the Workmen's Compensation Act is to include injured workmen within its protection rather than exclude them."[15] The supreme court, in remanding the case, noted that the vice of this opinion was that it gave no indication of the basis for the finding of compensability, thereby creating a substantial question as to whether the claimant proved his right to benefits by the preponderance of the evidence.

13. S.C. CODE ANN. § 72-354 (1962).

14. S.C. CODE ANN. § 72-354 (1962).

15. S.C. CODE ANN. § 72-1 (1962), the pertinent parts of which read:

Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents . . . and the Act should be given a liberal construction in furtherance of the purposes for which it was designed . . . but should not be converted into a form of insurance . . . or be so construed as to do violence to a specific requirement of the Act.

IV. ARISING OUT OF EMPLOYMENT

In *Floyd v. W. O. Greene Plumbing & Heating Co.*,[16] the employee was found dead during working hours at a location where his duties required him to be. There was no eye witness to the death, nor a definite medical opinion as to the cause of death. Upon a claim for death benefits the Industrial Commission held that the death of the employee was due to an accident which arose out of and in the course of employment and accordingly made an award to the claimants. The South Carolina Supreme Court affirmed the award, relying on the principle that where an employee is found injured or dead at a time and place where his employment reasonably required him to be, there is a presumption of fact that the injury or death arose out of and in the course of employment.[17]

The sole issue involved in *Compton v. Town of Iva*[18] was whether the death of the employee arose out of and in the course of his employment. The employee, Compton, was one of three policemen employed by the town of Iva. In August 1967 Compton submitted his resignation, to become effective on August 15, 1967. On August 12, while off duty, but still "on call", Compton went with another Iva policeman to investigate a disturbance at a local cafe. Upon completion of his investigation, Compton got in the patrol car of State Highway Patrolman L. E. Browder, intending to go back to the cafe to check it periodically. Browder then received a call to travel to an accident involving a motorcycle. While proceeding towards the site of the accident, the patrol car was involved in a head-on collision in which Compton was killed.

The case was originally heard before a single commissioner who made an award to the widow and children of the employee. This award was subsequently affirmed by both the Full Commission and the Court of Common Pleas. The South Carolina Supreme Court, in affirming the decision of the Court of Common Pleas, reasoned that since the Industrial Commission was the fact finding body, and the evidence was susceptible of more than one reasonable inference, the finding of the

16. 179 S.E.2d 28 (S.C. 1971).

17. S.C. CODE ANN. § 72-401 (1962) provides in part:

"Injury shall mean only injury by accident arising out of and in the course of the employment . . ."

See also, Steed v. Mount Pleasant Seafood Co., 236 S.C. 253, 113 S.E.2d 827 (1960); Jake v. Jones, 240 S.C. 574, 126 S.E.2d 721 (1962).

18. 180 S.E.2d 645 (S.C. 1971).

commission that Compton's death arose out of and in the course of his employment should not be overruled.

V. JURISDICTION

The issue presented in *Chavis v. Watkins*[19] was whether the claimant Chavis was an employee or a subcontractor. The Industrial Commission, reversing its hearing commissioner, concluded that the claimant was an employee. The circuit court affirmed this decision.

Since the issue was jurisdictional, the South Carolina Supreme Court held that the Commission's conclusion was subject to review even though it was supported by competent evidence. Before reviewing the evidence, the supreme court noted that an independent contractor is basically one who is not subject to the control of his employer except as to the result of his own work.[20] The supreme court found that the decisions of the circuit court and of the Industrial Commission were supported by the preponderance of the evidence. The employer furnished the paint and paid the claimant an hourly wage for his labor. Most importantly, Chavis was obligated to comply with any instructions given him by his employer Watkins, whenever a job needed to be changed because of customer dissatisfaction. This element of control precluded the appellants from proving that Chavis was an independent contractor and therefore not entitled to compensation.

VII. CIVIL SUIT

In *Boykin v. Prioleau*,[21] the administratrix of Boykin's estate commenced this action against the administrator of the estate of a fellow employee, Richard Dickerson. Boykin, who was sixteen years old, was killed in an automobile accident while being driven home by Dickerson, an adult co-employee of Gene's Pig 'n Chick in the City of Columbia. It was Dickerson's duty to take Boykin and other employees to their respective homes after work. On the night of the accident Dickerson did not take them home, but instead he took them on an extensive joy ride during which time some intoxicants were consumed. Shortly after leaving a restaurant on Farrow Road, Dickerson lost

19. 180 S.E.2d 648 (S.C. 1971).
20. Bates v. Legette, 239 S.C. 25, 34-35, 121 S.E.2d 289, 293 (1961).
21. 179 S.E.2d 599 (S.C. 1971).

control of the car and the accident occurred in which all but one of the occupants were killed.

The hearing commissioner found Boykin's death to be compensable. Pending appeal to the full commission, the claim was compromised and settled without admission of liability. This action for wrongful death was then commenced against the administrator of the estate of Richard Dickerson.

The court below granted defendants motion for a directed verdict, ruling that Boykin was guilty of contributory negligence as a matter of law, and that any tort action based upon the negligence of a co-employee was barred by the Workmen's Compensation Act.[22]

The majority of the South Carolina Supreme Court reversed the decision of the lower court, noting first that contributory negligence is no defense against liability based on reckless misconduct. In regard to Sec. 72-401, the majority said that "a fellow employee is not exempt from common law liability unless at the time of the delict, the employee . . . was performing work incident to the employer's business under circumstances which, in the absence of an applicable common law defense, would have rendered the employer liable at common law, for the acts of the employee under the doctrine of *respondeat superior.*"[23] The majority felt that the only reasonable inference was that Dickerson had embarked upon the pursuit of his own ends. Therefore, he was not conducting his employer's business within the meaning of the statute, and was not exempt from common law liability.

The sole dissenter to the majority opinion, Justice Littlejohn, agreed with the rule that an employee is not exempt from common law liability unless the employer is liable under the doctrine of *respondeat superior,* but disagreed with the application of the rule to the facts of this case. Justice Littlejohn felt that since the employer was under a contractual duty to take Boykin home, he could not delegate this duty to another and be free from liability. Ordinarily, when an employee

22. S.C. CODE ANN. § 72-401 (1962) provides in part:
An employee, subject with his employer to the provisions of the Workmen's Compensation Act of this State, whose injury arises out of, and in the course of, his employment cannot maintain an action at common law against his co-employee, whose negligence caused the injury.

23. 179 S.E.2d 599, 600 (S.C. 1971), *quoting* Williams v. Bebbington, 247 S.C. 260, 266, 146 S.E.2d 853, 855-56 (1966).

deviates substantially from his assignment, the master is not liable, but "where the master, by contract or operation of law, is bound to do certain acts, he cannot excuse himself from liability upon the ground that he has committed that duty to another, and that he never authorized such person to do the particular act."[24] The dissent concluded that since the employer could be held for the delicts of the driver under the doctrine of *respondeat superior*, the employer and the employee were both exempt because of the Workmen's Compensation Act and could not be prosecuted in this civil action.

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24. *Id.* at 603, *quoting* Pullman Palace-Car Co. v. Gavin, 93 Tenn. 53, 23 S.W. 70 (1893).