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WORKMEN'S COMPENSATION

THE responsibility of an employer for negligence resulting in injury to his employees has always been recognized as a part of the basic tort law, but with industrial expansion and the attitude on the part of the courts to encourage it, there arose a need for more definite protection than was offered by the common law remedy. This was recognized by the legislatures in most states, and as a result workmen's compensation laws were enacted. The Texas Workmen's Compensation Act, passed first in 1913, took permanent form in 1917, and, although there have been no fundamental changes in its general scheme, almost every legislature since then has amended it.[1]

In 1947 the legislature made three important changes:

1. The act was enlarged by extending coverage to occupational diseases.[2]

2. The amount of compensation was raised from a minimum of $7.00 to $9.00, and the maximum from $20.00 to $25.00 per week.[3]

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[1] 45 TEX. JUR. § 1 (1937).

[2] TEX. STAT. (Vernon, Supp. 1947) art. 8306, adding Sections 20 through 27. Previous to the 1947 Amendment, Section 1 of Art. 8309 provided that the term "injury" as used in the Act shall be construed to mean harm to the physical structures of the body and such diseases and infections as naturally result therefrom. Therefore the courts have limited recovery to accidental injuries. Where the incapacity was the result of a long exposure to the natural surroundings of the employment and developed gradually from such continued exposure to risks common to the industry, it was held to be an occupational disease, and thus not compensable. Texas Employers Insurance Association v. Jackson, 265 S. W. 1027 (Tex. Comm. App. 1924); Aetna Life Insurance Co. v. Graham, 284 S. W. 931 (Tex. Comm. App. 1926).

[3] TEX. STAT. (Vernon, Supp. 1947) art. 8306, amending sections 7, 8, 10, 11, and 12. Section 7 pertains to medical and hospital services, and provides in part: "During the first four weeks of the injury the Association shall furnish reasonable medical aid, *nursing*, hospital services and medicines. During the fourth or any subsequent week, upon the application of the attending physician certifying the necessity therefor to the Board and the Association, the Board may authorize medical attention and *nursing* not to exceed one week, unless at the end of such additional week the attending physician shall certify to the necessity for another week of medical attention or *nursing*, or so much thereof as may be needed, but in no event shall such medical attention or *nursing*

3. Provision was made for the creation of a "second injury" fund from which an employee who has suffered a previous injury may, if subsequently injured, be compensated for the combined incapacities resulting from both injuries.[4]

Since actions under the Workmen's Compensation Act are purely statutory, the cases in this field are necessarily concerned with construction of the statutes. The cases in 1947 reflect no radical changes in the general construction previously given the various sections of the act. However, a few vital issues upon which there has always been much litigation, and about which there has been some conflict have received the attention of our appellate courts, and appear to have been settled, at least for the present.

Good Cause for Failure to File Claim Within Statutory Period

The statute provides that a compensation claimant must file his claim with the Industrial Accident Board within six months after the occurrence of the injury.[5] For *good cause*, however, the Board may waive the strict compliance with this requirement.[6]

Texas Employers Insurance Association v. Frankum[7] involved this question of "good cause." In this case the employee did not file his claim until more than a year after his injury. He alleged, and offered evidence to prove that he relied upon an examination by the insurance company physician and upon subsequent examinations by two other physicians which showed that the injury was trivial. Later, after X-ray examination, he discovered for the first

be authorized for a period longer than 91 days from the date of the injury." (Italics supplied.) The change is the addition of the word "nursing" in each instance used.

[4] *Ibid.*, amending § 12c. The section had previously provided that if an employee who has suffered a previous injury shall suffer a subsequent injury which results in incapacity to which both injuries contributed, the Association shall be liable only for compensation for which the subsequent injury would have entitled the injured employee had there been no previous injury.

[5] The statute continues: "Or in case of death of the employee or in event of his physical or mental incapacity, within six months after death or removal of the incapaciy."

[6] Tex. Stat. (Vernon, Supp. 1947) art. 8307, § 4a.

[7] 145 Tex. 658, 201 S. W. (2d) 800 (1947).

time that he had a serious back injury. Then it was only after he had been operated on and had left the hospital that he learned the insurance company was not going to pay him. The court, sustaining the Board's award, held that the evidence warranted the finding of good cause for failure to file the claim within the statutory period.

The statute does not define "good cause," and the cases indicate that there can be no accurate explicit definition thereof.[8] It would seem by the *Frankum* case,[9] however, to be now settled that

[8] Previous cases had held that "good cause" depends upon the circumstances of each case, and that it is a matter within the discretion of the Board. *See* Texas Employers Insurance Association v. McGrady, 296 S. W. 920 (Tex. Civ. App. 1927); Employers Indemnity Corporation v. Felter, 264 S. W. 137 (Tex. Civ. App. 1924).

Good cause was held to exist where the injured employee relied upon the promise of the employer or his agent to file the claim. *See* Maryland Casualty Co. v. Merchant, 81 S. W. (2d) 794 (Tex. Civ. App. 1935). Also where he relied upon the insurer's agent to file it. *See* Lloyds Casualty Co. v. Meredith, 63 S. W. (2d) 1051 (Tex. Civ. App. 1933). In Home Life and Accident Co. v. Orchard, 227 S. W. 705 (Tex. Civ. App. 1920) *writ of error refused it* was held ot be good cause where he, not knowing what procedure to follow, was told by the agents of the insurance company that no proceeding was necessary. Cases generally have held "good cause" to exist where the employee in good faith believed his injury was trivial. *See* Texas Employers Insurance Association v. Clark, 23 S. W. (2d) 405 (Tex. Civ. App. 1929). However, the good cause shown must exist not only for the first six months, but until the actual filing of the claim. *See* Halloway *et al.* v. Texas Indemnity Insurance Co., 40 S. W. (2d) 75 (Tex. Comm. App. 1931).

Good cause has been found not to exist where the injured employee alleged that his employer's custom of giving employees medical attention and employment suitable to their physical condition led him to believe he was not entitled to compensation. *See* Texas Indemnity Insurance Co. v. Hayes, 106 S. W. (2d) 760 (Tex. Civ. App. 1925). Also where he alleged he did not have actual knowledge that his employer carried compensation insurance (employer had given proper notice). *See* Zurich General Accident and Fidelity Insurance Co. v. Walker, 35 S. W. (2d) 115 (Tex. Comm. App. 1931). Lack of knowledge of one's rights and failure to try to ascertain such rights is not good cause. *See* Amburn v. Employers Liability Assurance Corporation, 77 F. (2d) 749 C. C. A. 5th 1935).

[9] There were two federal court cases also in 1947 on the issue of "good cause." Pacific Employers Insurance Co. v. Oberlechner, 161 F. (2d) 749 (C. C. A. 5th 1947), holding that the test of whether an employee has shown good cause for delay in filing his claim for compensation with the Industrial Accident Board as required by the Texas Workmen's Compensation Law is whether or not he has prosecuted his claim for compensation with that degree of diligence that a reasonably prudent person would under the same or similar circumstances. The other case, Bennett v. Great American Indemnity Co., 164 F. (2d) 386 (C. C. A. 5th 1947), held that a Texas Workmen's Compensation claimant, who knew or by reasonable diligence should have know that he was seriously disabled, must file his claim within the six months statutory period, and a physician's statement that he would be cured and able to go back to work at the end of two or three months incapacity was not good cause for failure to file the claim within such period.

whether or not good cause exists in a particular case is a matter within the discretion of the Board, subject to judicial review, and that, on the trial of the case, the existence of good cause is a jury question. Moreover, such good cause must be shown to have continued until the claim was filed, and the test in every case is whether the claimant exercised that degree of diligence that a reasonably prudent man would under the same or similar circumstances.

Experience indicates that many compensation claimants do not realize that their injuries are serious enough to entitle them to file claims, and that many are not aware of their rights to compensation and do not attempt to learn of such rights until after they have lost good paying jobs. This is especially true in view of the abundance of good paying jobs during and immediately following the recent war, and thus it is thought that the issue of "good cause" will continue to be a vital issue in workmen's compensation cases.

Rights of Minor Employees

Some of the most difficult problems arising under the Workmen's Compensation Act are those dealing with minor employees. It is a settled principle of general tort law that an injury sustained by a minor may result in two causes of action, one by the child and the other by the parent.[10] The rule prevailing in most jurisdictions is that workmen's compensation laws, which provide that the compensation paid shall be the exclusive remedy of the injured person, do not bar recovery by the parent even though the minor has accepted compensation.[11] Such, however, is not the law in Texas. The case of *Haskins v. Cherry*[12] seems definitely to have settled the question in this state.

In this case a minor, by her father as next friend, sued defendant for damages for personal injuries which she sustained while

[10] Restatement, Torts § 703 (1934).

[11] Madden and Compton, Cases on Domestic Relations (1940) 625, n. 2.

[12] 202 S. W. (2d) 691 (Tex. Civ. App. 1947), *writ of error refused.*

employed in defendant's plant. Defendant's plea in abatement was grounded upon the fact that since he was a subscriber under the Workmen's Compensation Law, plaintiff's claim was controlled exclusively by the provisions thereof, and therefore, the cause of action against him was unauthorized. The court held that the minor was an "employee" within the meaning of the statute, and was not only entitled to the rights and benefits thereof but also subject to its limitations and restrictions, one of which is that employees and their beneficiaries (or parents) shall look for compensation solely to the Association (insurance carrier) and shall have no right of action against such subscribing employer.

In 1931 the legislature, apparently for the purpose of resolving a conflict which existed among the decisions prior to that time,[13] amended the statute by expressly providing that minors employed in violation of law as to age were nevertheless entitled to compensation under the Act.[14] However, in face of the plain language of the amendment, the issue continued to be controverted.[15] In fact, it was argued in the *Haskins* case that the only proper construction that could be placed upon the statute was that it gives the illegally employed minor the right either to enforce his claim under the Workmen's Compensation Act or in a common law tort action

[13] Several cases on the provisions of the Act applicable to minors reached our appellate courts, and the general construction placed upon them (prior to 1931) was that minors employed in violation of law were not "employees" within the meaning of the statute, therefore they were neither compelled nor permittd to invoke its provisions. In Waterman Lumber Co. v. Beatty, 110 Tex. 225, 218 S. W. 363 (1920) recovery was permitted against the employer who was a subscriber, on the ground that the Workmen's Compensation Law is applicable only to valid employment contracts, and persons employed in violation of law as to age do not come within its terms. Galloway *et al.* v. Lumbermen's Indemnity Exchange, 238 S. W. 646 (Tex. Comm. App. 1922), which was an action by the mother of a minor employee to recover compensation for his death resulting from injuries received in the scope of his employment, refused recovery.

[14] TEX. STAT. (Vernon, 1931) art. 8306 § 12i.

[15] Southern Underwriters v. Huffman *et ux.*, 114 S. W. (2d) 926 (Tex. Civ. App. 1938) held that the parents of the minor, who signed a release with the employer so that the boy could obtain employment as a truck driver, with knowledge that the boy was required to misrepresent his age to the Railroad Commission in order to obtain a truck driver's license, could not recover under the compensation act for his accidental death. The case was reversed by Huffman v. Southern Underwriters, 133 Tex. 354, 128 S. W. (2d) 4 (1939).

against the employer. The decision seems finally and definitely to have settled the matter that minors are "employees" within the meaning of the statute, and have no right of action against the subscribing employer, but they, their parents and beneficiaries may look only to the insurance carrier.

Extent of Liability to Provide Medical Attention, Nursing and Hospital Services

The question of the extent of the insurance carrier's liability to provide medical attention, nursing and hospital services to the compensation claimant was raised in the federal court case of *Travelers Insurance Co. v. Dickson.*[16] In this case, the Board had issued its order directing the insurance company to provide medical, hospital and nursing services to the injured employee in the amount of $175 per week "for an indefinite period not exceeding 401 consecutive weeks from the time of the injury, unless changed by subsequent order of the Board." The insurance company brought suit to set aside the award on the grounds that it ordered medical services beyond the 91 days after the date of the injury, which is the limit allowed by the statute, and further that the award did not conform with the statutory provision which authorizes orders for hospital services only week by week and for one week at a time, and finally, that the award directed the furnishing of private nurses, services not ordinarily provided by hospitals, and hence not authorized by the statute.[17]

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[16] 160 F. (2d) 167 (C. C. A. 5th, 1947).

[17] Tex. Stat. (Vernon, Supp. 1939) art. 8306, § 7 provides in part: "During the first four weeks of the injury, . . . the Association shall furnish reasonable medical aid, hospital services and medicines. During the fourth or any subsequent week, upon application of the attending physician certifying the necessity therefor to the Board and to the Association, the Board may authorize additional medical attention not to exceed one (1) week, unless at the end of such additional week the attending physician shall certify to the necessity for another week of medical attention or so much thereof as may be needed, but in no event shall such medical attention be authorized for a period longer than ninety-one (91) days from the date of the injury." (The same provision is made for additional hospital services, except that the maximum is 180 days.) ". . . Such additional hospital services as are herein provided shall not be held to include any obligation on the part of the Association to pay for medical, nursing or surgical services not ordinarily provided by hospitals as a part of their services."

In sustaining the Board's award, the court held that the compliance with the statute which is required is not technical but substantial compliance, and that the Act would be given its fullest possible effect, and that no insubstantial failures to comply would be allowed to defeat its full remedial application. The record in this case contained sufficient weekly certifications of necessity of additonal hospital services up to the judgment date, and the insurance company had agreed to the stipulation that conditions which would authorize a continuance of the certifications would exist for the full 401 weeks. The court held that the Board had authority to dispense with the formal weekly certifications, and to give effect to the stipulation.

The most difficult question in the case concerned the board's order to furnish private nursing services for the maximum 401 weeks. The insurance company contended that since these were services not ordinarily furnished by hospitals, they were not authorized by the statute.[18] The correct determination of the point would seem necessarily to depend upon the fact issue of whether or not private nursing is a part of the ordinary hospital services. Yet, in spite of the abundant evidence in this case that it was not, the court felt obliged to follow a Texas Civil Appeals decision,[19] holding that a claim for private nursing services as distinguished from "floor nurses" was allowable, under what it termed a common sense construction of the statute, namely that the statute required the furnishing of such additional hospital services as is needed for each individual case.[20]

In view of the fact that this decision is not binding upon the Texas courts,[21] it can not accurately be said to state the Texas law

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[18] *Id.*, the last sentence of that section.

[19] Lumbermen's Reciprocal Association v. Wilmoth *et al.*, 1 S. W. (2d) 415 (Tex. Civ. App. 1927). This case went up on a writ of error and was affirmed on other points in Lumbermen's Reciprocal Association v. Wilmoth, 12 S. W. (2d) 972 (Tex. Comm. App. 1927).

[20] The opinion laments the fact that the question of whether the hospital services recoverable under the statute ought not to include services of private nurses had not been foreclosed by an authoritative decision of the Texas Supreme Court.

[21] The state appellate courts are the highest authority on questions of state law, thus

on this question of liability for medical aid, nursing and hospital services. But it raises some doubt about an issue of considerable importance to the insurance companies, because it seems obvious that it has not been contemplated by the insurance companies or by the Texas Insurance Commission[22] in fixing the rates that recovery to such a great extent would be consistently permitted.[23]

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on the construction of state statutes, the Texas Supreme Court is not bound to follow a federal court decision. Erie R. R. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817 (1938).

[22] The insurance carriers have no part in making the rates, but it is important that they know in advance the approximate extent of their liability. The duty of fixing rates is imposed upon the Texas Insurance Commission. Texas Employers Insurance Association v. Russell *et al.*, 91 S. W. (2d) 317, 319 (Tex. Comm. App. 1936).

[23] Maximum recovery for compensation under the Act is $10,025.00, exclusive of medical aid and hospital services, which in the average case would seldom exceed the amount of compensation, but in this case, at the rate of $175.00 per week for 401 weeks, the insurance company will have to pay out $70,175.00 for medical and hospital services alone.