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Workmen's Compensation

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WORKMEN'S COMPENSATION

SUBROGATION—INTERVENOR—REASONABLE ATTORNEY'S FEES

Texas. The question whether an intervenor has a right to recover reasonable attorney's fees had not been answered satisfactorily prior to the *Henger Construction* case.[1] The plaintiff had recovered compensation from the insurance carrier and was suing the negligent third party. The carrier intervened and asserted its right to subrogation to the extent of the compensation and net expenses paid to the plaintiff. It also asserted a right to recover an attorney's fee. It was held that the intervenor could recover reasonable attorney's fees out of plaintiff's recovery.

The plaintiff argued that the carrier could recover only when it had initiated the suit. The court's holding, enunciated through Mr. Justice Hart, is justifiable, because of three factors: (1) Article 8307, Section 6a, of the REVISED CIVIL STATUTES[2] places no condition upon the right of an intervenor to recover the reasonable cost of enforcing a third party's liability; (2) Recovery of attorney's fees has been regularly permitted where both the employee and carrier prosecuted suit against a third party;[3] (3) if plaintiff's view prevailed, it could well mean that an employee by hiring an attorney of his own, could prevent an intervening carrier from recovering any attorney's fee, even though the carrier's attorney did substantially all the work. This construction is recognized in Missouri, which holds "that in any case where the insurance carrier is a party to the suit against a third party and

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[1] Smith v. Henger Construction Co., ———Tex.———, 226 S. W. 2d. 425 (1949).

[2] "If compensation be claimed under this law by the injured employee or his legal beneficiaries, then the association shall be subrogated to the rights of the injured employee in so far as may be necessary and may enforce in the name of the injured employee or of his legal beneficiaries or in its own name . . . the liability of said other person, and in case the association recovers a sum greater than paid or assumed by the association to the employee or his legal beneficiaries, together with a reasonable cost of enforcing such liability, which shall be determined by the court trying the case, then out of the sum so recovered the association shall reimburse itself and pay said cost and the excess so recovered shall be paid to the injured employee or his beneficiaries."

[3] Traders & General Ins. Co. v. West Texas Utilities Co., 140 Tex. 57, 165 S. W. 2d. 713 (1942).

employs its own attorney, the insurance carrier should be allowed to recover a reasonable attorney's fee."[4] The amount of the fee is flexible and will be determined by the facts in each case, depending in part on the extent to which the intervenor's attorney contributes to the successful enforcement of the third party's liability.

PARTIALLY DEPENDENT PARENTS CAN RECOVER MAXIMUM PAYMENT FOR DEATH OF EACH SON

Arkansas. The issue of whether partially dependent parents can recover maximum compensation for the death of each son, raised in the *Grilc* case,[5] was one of first impression in Arkansas. The court held that the Workmen's Compensation Commission was justified in holding that the parents, whether partially or wholly dependent on each son, were entitled to recover the maximum weekly award in each case.

The appellant contended that the compensation law did not intend any result which would multiply maximum payments by three, simply because three people were killed, each of whom was contributing equally to the support of the same dependents. The parents were the only surviving dependents.[6]

There is a general rule that unless a workmen's compensation act specifically provides that widow and children shall be presumed, or are conclusively presumed, to be dependent upon the father, the dependent may, in the case of death of two or more of the family contributing to their support, recover compensation with respect to each.[7] However, there is little judicial authority on the specific question. A Utah case[8] has held that dependents are entitled to the maximum amount of compensation provided for by

[4] Wilhelm *et al.* v. Hersh, 50 S. W. 2d. 735, 739 (Mo. App. 1932).

[5] E. H. Noel Co. v. Grilc, ———Ark.———, 221 S. W. 2d. 49 (1949).

[6] Within the terms of the workmen's compensation statutes, ARK. STAT. 1947 ANN. §§ 81-1301—81-1349.

[7] See annotation on this point in 45 A.L.R. 894 (1926).

[8] Utah Fuel Co. v. Industrial Comm., 67 Utah 25, 245 Pac. 381 (1926).

statute, for each death. In *Hodgson v. West Stanley Colliery*[9] it was held that where a father and two sons, all killed in one accident, paid their wages into a common fund for support of their family, the mother and surviving children were entitled to receive compensation in respect to the death of each of the deceased. This was based on the ground that there was no presumption of law making the widow and children totally dependent on the father, and not dependent at all on the other two.

In a recent case[10] the Arkansas Supreme Court held that it is well settled that partial dependency is sufficient to justify an award for compensation and that one is a dependent within the meaning of the Workmen's Compensation Act if one relies for support in whole or in part upon the aid of another.[11] In the instant case the court justifiably found that the parents were at least partially dependent on each of their sons and that they were entitled to recover the maximum compensation for each death.

Penalty for Failure to Supply Safety Devices

New Mexico. In the *International Minerals* case[12] the point raised for the first time was whether mining companies are required to provide only those safety devices required by the Mine Safety Act of 1933[13] in order to escape a 50 per cent penalty to an injured workman, as originally provided by the Workmen's Compensation Act of 1917, or whether a 1937 amendment required that they also furnish safety devices in general use in the

[9] [1910] A. C. 229.

[10] Crossett Lumber Co. v. Johnson, 208 Ark. 572, 187 S. W. 2d. 161 (1945).

[11] 1 Honnold, Workmen's Compensation (1st ed. 1917) 232: "The phrase 'actual dependents' means dependents in fact whether wholly or partially dependent. Hence it was no defense, in proceedings under an act using this term, that petitioner and his family were not entirely dependent on the deceased. Partial dependency, giving a right to compensation, may exist, though the contributions be at irregular intervals and of irregular amounts, and though the dependent have other means of support, and be not reduced to absolute want."

[12] Jones v. International Minerals & Chemical Corp., 53 N. M. 127, 202 P. 2d. 1080 (1949).

[13] N. M. Laws, c. 153; N. M. Stat. 1949 Ann. §§ 67-301 *et seq.*

industry or suffer such penalty.[14] The court held that the later penalty section did not apply to the mining industry, for which specific safety regulations are provided by the Mine Safety Act.

It is to be noted that the penalty is suffered in two instances by the employer, *viz.*, (a) if injury to, or death of, a workman results from failure of the employer to provide the safety devices required by law; or (b) in any industry in which safety devices are not provided by statute, if injury to, or death of, a workman results from negligence of the employer in failing to supply reasonable safety devices in general use for the protection of the workman.

When the New Mexico Legislature enacted the statute in its present form it had in mind industries of two kinds, namely, (1) those in which named safety devices are required by law, and (2) those in which specific safety devices are not required by any law. As to the former, the penalty was to be incurred only if death or injury to a workman resulted from an employer's failure to provide safety devices required by law. As to the latter, the penalty would be incurred only if death or injury to a workman resulted from an employer's negligence in failing to supply "reasonable safety devices in general use" for the workman's protection. The court found that the mining industry fell into the former category, and, therefore, need comply only with the provisions of the Mine Safety Act.

[14] N. M. Laws 1937, c. 92, § 5 (N. M. STAT. 1941 ANN. § 57-907), amended the safety device provision of the earlier workmen's compensation act and reads: "In case an injury to, or death of a workman results from his failure to observe a statutory regulation appertaining to the safe conduct of his employment, or from his failure to use a safety device provided by his employer, then the compensation otherwise payable under this act shall be reduced to fifty per centum (50%). In case an injury to, or death of, a workman results from the failure of the employer to provide safety devices required by law, or in any industry in which safety devices are not provided by statute, if an injury to, or death of, a workman results from the negligence of the employer in failing to supply reasonable safety devices in general use for the use or protection of a workman, then compensation otherwise payable under this act shall be increased by fifty per centum (50%). Provided further, that any additional liability resulting from any such negligence on the part of the employer shall be recoverable from the employer only and not from the insurer, guarantor, or sureties of said employer under this act except that this shall not be construed to prohibit employers from insuring against such additional liability."

PAYMENTS FOR BOTH TEMPORARY AND PERMANENT DISABILITIES

New Mexico. In *Scofield v. Lordsburg Municipal School District of Hidalgo County*[15] the construction given an amendment to the Workmen's Compensation Law[16] was the principal issue, and it was one of first impression. The injured employee recovered compensation at the statutory rate of eighteen dollars per week[17] for the period from August 26, 1946, seven days after injury, to August 13, 1947, for temporary total disability, in addition to an award in like weekly amounts for 130 weeks for loss of one leg by amputation above the knee. Defendant's counsel based their argument that compensation may not be had for both temporary and permanent disability on an amendment to the controlling statute which omits the language "compensation consecutively for each permanent injury."[18] It was held by the court that the proper construction of the statute and amendment is one which upholds the right to compensation, both for temporary and for permanent disability.

It seems clear that a construction contrary to that enunciated by the court would be reversing the trend of current legislative history reflecting constant enlargement, rather than curtailment,

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[15] 53 N. M. 249, 205 P. 2d. 834 (1949).

[16] Material portions of the act prior to amendment, N. M. STAT. ANN. 1929 Comp. § 156-118, read as follows: "Compensation for all classes of injuries shall run consecutively and not concurrently as follows: 'Surgical, medical and hospital services and medicines, as provided in this paragraph. After the first seven days, compensation during temporary disability. Following both, either or none of the above, compensation consecutively for each permanent injury. Following any or all or none of the above, if death results from the accident, funeral expenses as hereinbefore provided following which compensation to dependents, if any." As amended the statute now reads, "Compensation for all classes of injuries shall run consecutively and not concurrently as follows: Surgical, medical and hospital services and medicines, as provided in this paragraph. After the first seven days, compensation during temporary disability. Following both, either or none of above, if death results from accident, funeral expenses as hereinbefore provided following which compensation to dependents, if any." N. M. Laws 1937, c. 92, § 10; N. M. STAT. 1941 ANN. § 57-919.

[17] Now raised to twenty-five dollars.

[18] The position of defendant's counsel on this claim may best be summed up in language taken from their reply brief: "[Claimant can] recover for the temporary disability and for the permanent disability, provided that the time given for temporary disability is deducted from the time given for permanent disability, as such would mean, in effect, just one award."

of benefits to injured employees under compensation acts.[19] A Wyoming case, *In Re McConnel*,[20] which had substantially the same facts as the principal case, set forth what is probably the general rule: an award may be made for temporary disability, and, when that disability has terminated, if a permanent partial disability has resulted from the injury, then allowance will be made of an additional award.

COMPROMISE SETTLEMENTS—MAXIMUM AWARD OBTAINABLE GOVERNS JURISDICTION OF COURT

Texas. The court in *Branon v. Pacific Employer's Insurance Co.*[21] set at rest any question concerning the jurisdiction of the courts in cases filed to set aside compromise agreements approved by the Industrial Accident Board. The injured employee had settled his claim for $215 but later sued to set aside the settlement on grounds of fraud, alleging that his injury had resulted in total and permanent disability for which he was entitled to maximum compensation.[22] The insurance carrier contended that the court did not have jurisdiction to entertain the matter inasmuch as it involved only $215. It was held that jurisdiction in such a case was governed by the amount of compensation that could be recovered by an injured employee in the event that the compromise settlement was set aside.

Approval by the Industrial Accident Board of a compromise agreement is not an award of compensation,[23] nor an order denying compensation, and, therefore, the board has no authority to set aside a compromise settlement or its order approving the same. Consequently, the power of the courts to set aside such an agreement for fraud is not derived from the Workmen's Compen-

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[19] See Curtis v. Hayes Wheel Co., 211 Mich. 260, 178 N. W. 675 (1920); 71 C. J., *Workmen's Compensation Acts*, 830; 58 Am. Jur., *Workmen's Compensation*, 786.

[20] 45 Wyo. 289, 18 P. 2d. 629 (1933).

[21] ———Tex.———, 224 S. W. 2d. 466 (1949).

[22] TEX. REV. CIV. STAT. (Vernon, 1948) art. 8306, § 10.

[23] Lumberman's Reciprocal Assn. v. Day, 17 S. W. 2d. 1043 (Tex. Com. App. 1929).

sation Act but is asserted by virtue of the Constitution and statutes defining their jurisdiction. A court is the only forum to which an aggrieved party can resort.[24] In cases of this kind the court has no power to grant or deny compensation but only the power to pass upon the question whether the compromise agreement should be set aside or upheld.[25]

If the injured employee herein prevailed in his contention that the compromise agreement was invalid, then he would have the right to go back to the Industrial Accident Board and pursue his claim for total and permanent disability benefits, which would entitle him to recover $10,025. The sum of $10,025, less the $215 paid on the compromise, was the amount in controversy between the parties since that was the claim the insurance carrier was denying. The sum of $215 which was paid in consideration of the release was in no sense the amount in controversy between the parties since the injured employee was not claiming that he was entitled to this sum. The real controversy was the claimant's contention that he was entitled to an additional $9,810.

Where the same question of jurisdiction as in the instant case was raised, the Amarillo Court of Civil Appeals held the district court had jurisdiction.[26] It would seem, then, that the jurisdictional amount is to be determined not by the sum involved in the compromise agreement but by the difference in amount between that which the workman might be entitled under compensation law and that which the workman received under the settlement

Dual Capacity of Executive and Employee

Arkansas. Whether an executive acting in a dual capacity may be counted as an employee in determining the jurisdiction of a

[24] Traders and Gen. Ins. Co. v. Bailey, 127 Tex. 322, 94 S. W. 2d. 134 (1936); Commercial Cas. Ins. Co. v. Hilton, 126 Tex. 497, 87 S. W. 2d. 1081 (1935); Gibson v. Employers' Liability Assurance Corp., 131 S. W. 2d. 327 (Tex. Civ. App. 1939), *writ of error refused;* Wood v. Traders and General Ins. Co., 82 S. W. 2d. 421 (Tex. Civ. App. 1935), *writ of error refused;* Lumbermen's Reciprocal Association v. Henderson, 15 S. W. 2d. 565 (Tex. Comm. App. 1929).

[25] Tex. Employers' Ins. Assn. v. Kennedy, 135 Tex. 486, 143 S. W. 2d. 583 (1940).

[26] 57 S. W. 2d. 616 (Tex. Civ. App. 1933), *writ of error refused; see* 45 Tex. Jur., *Workmen's Compensation,* sec. 244; 21 C. J. S., *Courts,* sec. 54, note 80.

Workman's Compensation Commission had been an undecided question until the case of *Brook's Inc. v. Claywell.*[27] At the time the employee was injured, the Commission held that, excluding the executive, there were not five regular employees, although that finding might have been made upon the authority of *Green v. Benedict.*[28] But the commission held that the compensation act[29] was applicable upon its finding that the executive himself was an employee. The basis for that finding was that the executive often helped the other employees, lifting cases and boxes, sweeping out the store, and doing other manual jobs.

The court held: (a) in determining whether one is an employee or an independent contractor, the compensation act is to be given a liberal construction in favor of the workman, and any doubt is to be resolved in favor of his status as an employee rather than as an independent contractor;[30] (b) the same liberal rule should be applied in determining whether the executive was also an employee; (c) when so applied, the testimony supports the finding that the executive was also an employee. The following language in a leading text[31] vividly highlights the issue and has been cited with approval in a number of jurisdictions:[32]

> "While in all ordinary transactions the existence of a relation of contractor as between two given persons excludes that of principal and agent, or master and servant, there is not necessarily such a repugnance

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[27] ———Ark.———, 224 S. W. 2d. 37 (1949).

[28] 102 Conn. 1, 128 Atl. 20 (1925).

[29] ARK. STAT. 1947 ANN. § 81-1302(c) provides that employment means "every employment carried on in the State in which five or more employees are regularly employed in the same business or establishment...." Texas has enacted that officers cannot be employees, TEX. REV. CIV. STAT. (Vernon, 1948) art. 8309, sec. 1a: "The president, vice-president or vice presidents, secretary or other officers thereof provided in its charter or by-laws and the directors of any corporation which is a subscriber to this law shall not be deemed or held to be an employee within the meaning of that term as defined in the preceding section hereof, and this notwithstanding they may hold other offices in the corporation and may perform other duties and render other services for which they receive a salary."

[30] Irwan v. Bounds, 205 Ark. 752, 170 S. W. 2d. 674 (1943); Parker Stave Co. v. Hines, 209 Ark. 438, 190 S. W. 2d. 620 (1945); *see* 71 C. J. 449.

[31] 4 SCHNEIDER'S WORKMEN'S COMPENSATION (Perm. Ed. 1941) § 1076.

[32] Soltz Machinery & Supply Co. v. McGehee, 208 Ark. 747, 187 S. W. 2d. 896 (1945).

between them that they cannot exist together, and an employee may be an independent contractor as to certain work, and yet be a mere servant as to other work for the same employer."[33]

Perhaps the proper conclusion to be drawn is that under the rule of liberal construction and in the absence of a statutory provision to the contrary, executives who perform the work of employees will be brought within the coverage of workmen's compensation.

SIGNIFICANT LEGISLATIVE CHANGES: 1949

Arkansas.[34] A. Maximum payments were raised from $20 to $25, provided compensation is not to exceed 65 per cent of the average weekly wage or 450 weeks of disability or $8,000.[35]

B. Payment of compensation for disablement or death as a result of silicosis or asbestosis, even though there is a waiver of such compensation, was raised from $2,000 to $2,500.[36]

C. The time within which to file for compensation before the claim is barred was increased from one year to two, either (a) from the date of the accident or (b) from the date of the last injurious exposure to disease or infection.[37]

D. The time within which to file an application for review of an award of the Workmen's Compensation Commission was raised from fourteen days to thirty.[38]

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[33] In the case of In re Raynes, 66 Ind. App. 321, 118 N. E. 387, 391 (1917), it was said: "If the corporation is great and powerful, with extensive financial resources; if an officer is a large stockholder and his time is occupied in discharge of such duties —it would seem apparent that he could not be regarded as an employee under such an act. But in another corporation of humbler proportions such official duties would constitute but a small portion of services rendered by him to the corporation. Such an officer might be hired in fact to perform manual labor in connection with other employees, and his time in main be occupied in performing such service and regular wages paid him accordingly. Such an official in his capacity as workman might measure up in all respects to the conception of an employee within the meaning of the act as we hereinbefore developed it, and in such capacity we believe that he should be regarded as an employee within the meaning of the Compensation Act."

[34] ARK. STAT. 1947 ANN. §§ 81-1301—81-1349.

[35] *Id.* (1949 Cum. Supp.) § 81-1310.

[36] *Id.* § 81-1314-5.

[37] *Id.* § 81-1318a.

[38] *Id.* §81-1323b.

New Mexico.[39] A. Extra-territorial coverage was provided.[40]

B. Maximum benefits were increased from $18 to $25, and the minimum payments from $10 to $12.

C. Funeral expenses were increased from $150 to $250.

D. The allowances for special fees and for hospital expenses were increased from $100 to $150 and from $50 to $150, respectively.[41]

The extra-territorial provision stipulates that if an employee is hired or regularly employed in New Mexico and receives an accidental injury in the course of employment outside the state, and the injury occurs within six months after leaving New Mexico (longer if notice has been given the State Labor Industrial Commission that he elects to extend his coverage), then he is entitled to recover compensation. However, an employee who has been hired outside New Mexico and his employer are exempt from the provision while the employee is temporarily working within the state.

Texas. The only change in the Workmen's Compensation Act[42] authorized counties to provide for compensation for county employees and their representatives and beneficiaries for personal injuries sustained in the course of employment and for deaths resulting therefrom. The amendment provided: (a) a county could be either self-insuring or could purchase Workmen's Compensation Insurance from any company authorized to do business in Texas; (b) compensation coverage is permissive and not mandatory; (c) the commissioners court of the county may by proper order put into effect the provisions of this act.[43]

Oklahoma.[44] Maximum and minimum payments were increased from $18 and $8 to $25 and $15, respectively.[45]

B. The organization of the State Industrial Commission was

[39] N. M. STAT. 1941 ANN. §§ 57-901—57-931.
[40] N. M. Laws 1949, c. 14, § 1.
[41] *Id.* c. 51, §§ 1-7.
[42] TEX. REV. CIV. STAT. (Vernon, 1948) arts. 8306—8309a.
[43] Texas Acts 1949, c. 428; TEX. REV. CIV. STAT. (Vernon, 1950) art. 8309c.
[44] OKLA. STAT. ANN. (Perm. Ed.) Title 85.
[45] 85 OKLA. STAT. ANN. (Perm. Ed.) § 22, 71.

changed as follows: (1) the number of commissioners was increased from three to five; (2) their terms of office were reduced from six years to four; (3) residence qualifications of the commissioners were increased from two years next preceding appointment to five years; (4) age qualifications were lowered from thirty years to twenty-five for all members of the commission, except the chairman, who still must be at least thirty years of age; (5) the added requirement was made that the chairman and at least two other members of the commission shall be regularly licensed attorneys in Oklahoma for at least five years next preceding their initial appointments; (6) salaries of members of the commission were raised from $3,900 per annum to $7,200, and the salary of the chairman was raised from $4,200 to $7,500.

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