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WORKMEN'S COMPENSATION

INTENTIONAL INJURY INFLICTED BY EMPLOYER

Arkansas. In *Heskett v. Fisher Laundry & Cleaners Co., Inc.*,¹ the Arkansas Supreme Court held that under certain circumstances an injured employee had an election to sue under the common law or under the workmen's compensation statute. The facts in this case were that the employee had been the subject of an intentional assault and battery during the course of his employment by an officer and general manager of the employer. This decision was distinguished from *Hagger v. Wortz Biscuit Co.*² where it was held that the remedy afforded the employee under the compensation statutes is exclusive where injury or death results from gross negligence of the employer or a fellow employee. The distinguishing fact was that in the instant case the cause of the injury was intentional, whereas the act in the *Hagger* case was accidental. The employee was entitled to treat the act as a severance of the employer-employee relationship if he desired.

DEPENDENCY

Arkansas. A father can be the dependent of his 18-year old son, despite the common law right which he has to the son's earnings. In *Kimpel v. Garland Anthony Lumber Co.*³ it was shown that a considerable portion of the son's earnings was actually used by the father to support himself and family, and the uncontradicted testimony established a case of partial dependency if the son had been twenty-one years old or more. The court said, "We think it clear that the Act does not embrace the common-law rules of dependency, at least as to minors who have reached eighteen."

WEEKLY WAGES OF PART-TIME EMPLOYEE

Louisiana. In *Jarrell v. Travelers Ins. Co.*⁴ the supreme court held that even though an employee was working under a contract

¹Ark....., 230 S. W. 2d 28 (1950).

² 210 Ark. 318, 196 S. W. 2d 1 (1946).

³ 216 Ark. 788, 227 S. W. 2d 932, 933 (1950).

⁴ 218 La. 531, 50 So. 2d 22 (1950).

of hiring for only one day a week, the employee was entitled to compensation for total and permanent disability based upon a weekly wage of six times the daily wage. This carried the interpretation of the statute a step further than it had been carried in any other decision. The nearest approaches are set out in *Rylander v. T. Smith & Son, Inc.*,⁵ where the wages of longshoremen, who were employed intermittently, were determined on the basis of wages for a full week, and in *Calhoun v. Meridian Lumber Co., Inc.*,⁶ where the injured employee had been employed only three days a week for several months due to economic conditions. The court held that the instant case was distinguished from *Durrett v. Unemployment Relief Committee*⁷ and *Young v. Unemployment Relief Administration*⁸ on the facts. In those cases the employment contract was for two days a week, and the employee was prohibited from accepting work from any other employer. *Gay v. Stone & Webster Engineering Corporation*⁹ was stated to be not inconsistent with the instant case in that there the employee was compensated for a full five-day work week, and it was shown that, with one exception, the employee had never worked more than five days a week. *Abbott v. Swift & Co.*,¹⁰ which was also cited by the defendant, involved the question of overtime in computing the normal daily wage; hence that decision was not inconsistent with the instant decision.

HAZARDOUS OCCUPATION

Louisiana. The supreme court affirmed the decision of the court of appeals in *Fields v. General Casualty Co. of America*,¹¹ which involved the interpretation of the workmen's compensation statute with respect to the classification of a certain business as hazardous. One of the duties of the injured employee was to load feed onto motor vehicles owned by the employer's customers. The court held

⁵ 177 La. 716, 149 So. 434 (1933).

⁶ 180 La. 343, 156 So. 412 (1934).

⁷ 152 So. 138 (La. App. 1934).

⁸ 154 So. 642 (La. App. 1934).

⁹ 191 So. 745 (La. App. 1939).

¹⁰ 6 So. 2d 683 (La. App. 1942).

¹¹ 216 La. 940, 45 So. 2d 85 (1950), *aff'g* 36 So. 2d 843 (La. App. 1943).

that such association with motor vehicles was not sufficient to bring the business into the statutory classification of a hazardous business, even though in at least one other case¹² it had been held that actual ownership of the motor vehicle by the employer was not necessary.

DISABILITY TO PERFORM SAME WORK

Louisiana. In *Scott v. Hillyer, Deutsch, Edwards, Inc.*,¹³ the supreme court refused to limit further the type of work which could be performed by the injured man to preclude recovery of compensation. The statute¹⁴ allows compensation for partial or total "disability to do work of any reasonable character." The Louisiana court had interpreted¹⁵ this to mean work of the same or similar description to that which the employee had been accustomed to perform. In the instant case the court of appeals added the word "reasonably" before the word "similar," and the plaintiff objected on the ground that this definition extended the type of work which could preclude recovery. The supreme court held that since the statute used the same word, its use by the court of appeals was proper.

FAILURE TO PAY—JURISDICTIONAL

New Mexico. In *George v. Miller & Smith, Inc.*,¹⁶ the supreme court found that the express provisions of the statute¹⁷ made the refusal or failure of an employer to pay the compensation provided in the act jurisdictional. The plaintiff wanted a judicial determination of the permanency of his disabilities and the duration of the benefits. It was held that, since the employer had paid the benefits up to the date of the suit, the court had no jurisdiction.

¹² *Moritz v. K. C. S. Drug Co., Inc.*, 149 So. 244 (La. App. 1933), involving a delivery boy who owned his own motorcycle.

¹³ 217 La. 596, 46 So. 2d 914 (1950), *aff'g* 38 So. 2d 534 (La. App. 1949).

¹⁴ LA. GEN. STAT. (Dart, 1939) § 4398-1(a), (b) and (c).

¹⁵ *Stieffel v. Valentine Sugars, Inc.*, 188 La. 1091, 179 So. 6 (1938); *Knispel v. Gulf States Utilities Co., Inc.*, 174 La. 401, 141 So. 9 (1932).

¹⁶ 54 N. M. 210, 219 P. 2d 285 (1950).

¹⁷ N. M. STAT. 1941 ANN. § 57-913: "In event such employer shall fail or refuse to pay the compensation herein provided to such workman... it shall be the duty of such workman... to file a claim therefor...."

COURSE OF EMPLOYMENT—HAZARDS OF HIGHWAY—INTOXICATION

New Mexico. Various phases of the meaning of the phrase "arose out of and in the course of employment" with respect to the cause of the injury or death were interpreted by the supreme court during the year 1950. In *Allen v. D. D. Skousen Const. Co.*¹⁸ the employee was injured while preparing breakfast at a camp site furnished by the employer. The court held that, since there were no other accommodations available and the employee was required to occupy such site by his employer, the injury was covered. In *Wilson v. Rowan Drilling Co.*¹⁹ it was held that a head driller, who was required to pick up and transport other drillers to a drilling site, even though he received no compensation for such duty except for his increased wage as head driller, was covered while on his way to work. There was a very strong dissent on the ground that it appeared that the transportation arrangement was solely between the head driller and the other drillers. In *Parr v. New Mexico State Highway Department*²⁰ the question whether the employee had returned to his employment duties was decided in his favor. The court also held that where a defense of intoxication to preclude recovery was raised, the defendant had the burden of proving the employee's intoxication and that it was the cause of the accident.

Calvin J. Henson, Jr.

SCOPE OF EMPLOYMENT

Texas. The case of *American General Insurance Co. v. Williams*²¹ has a new twist on whether a carrier is liable for death benefits where an employee is killed on the employer's premises at a time when the employee's activities are not necessarily in furtherance of the employer's business.

Williams, the deceased employee, and some employees of a

¹⁸ 55 N. M. 1, 225 P. 2d 452 (1950).

¹⁹ 55 N. M. 81, 227 P. 2d 365 (1950).

²⁰ 54 N. M. 126, 215 P. 2d 602 (1950).

²¹Tex....., 227 S. W. 2d 788 (1950).

road construction company had been taken to the place of work in company vehicles. Before going to work they were engaged in a dice game. The company had knowledge that such games of chance regularly occurred on its premises. In fact, supervisory employees of the company were in the habit of "shooting craps" with some of the employees. On the day in question, a dispute over a side-bet arose between Williams and one Thornton. During the dispute Thornton clubbed Williams with a length of timber, causing Williams' death.

The court held that Williams' widow was not entitled to death benefits under the law.²² Games of chance are not in furtherance of the employer's business. There must be a causal connection between the conditions under which the work is required to be performed and the injury, and the risk of injury must be incidental to, or arise out of, the employment.²³ The court stated that not to hold for the insurance carrier in this case would be to extend the coverage of the workmen's compensation act, a legislative and not a judicial function.

Oklahoma. An employee who takes a truck home over the Christmas holidays and is injured in an accident while collecting a bill for his employer and picking up a tire for the truck is not covered by workmen's compensation according to *Mansfield v. Industrial Service Co.*²⁴

This case seems to draw a close distinction as to whether or not an employee is furthering his employer's business. The court reasoned that "in the course of employment" means performing duties which the employee was actually employed to perform, and that there must be a causal connection apparent to reasonable minds between the employee's job and what he was doing at the time of injury. It would seem that this was a mixed transaction and that a slightly more liberal interpretation of the law would have allowed recovery to the employee.

Oklahoma. A case in which the employee was more clearly not

²² TEX. REV. CIV. STAT. (Vernon, 1948) art. 8309, § 4.

²³ *Safety Casualty Co. v. Wright*, 138 Tex. 492, 160 S. W. 2d 238 (1942).

²⁴Okla....., 223 P. 2d 373 (1950).

entitled to recovery is *Shirley v. National Tank Co.*²⁵ An employee was injured while making a whatnot shelf for his own use. He was doing the work in his spare time on a power saw owned by the company. In this case the risk was not reasonably incident to the employment, and recovery was properly denied.

TWO BUSINESSES—COVERAGE OF ONE

Texas. When an employer is conducting two separate business enterprises and his workmen's compensation policy covers the employees of only one of the enterprises, is an employee of the non-covered business entitled to recover for an injury under his employer's policy, or does he have a common law action against his employer? This question was raised in *Hartford Accident & Indemnity Co. v. Christensen*,²⁶ where an employee lost the sight of an eye while welding. The employee sued both at common law and on the insurance policy.

The court held that an employer is not compelled to carry compensation insurance on his employees and that where the employer has two different types of business involving different risks, payrolls, and premiums, he may insure those employees engaged in one and leave his employees in the other uninsured. The rights of an employee who sues for compensation are determined by the specific terms of the employer's policy.²⁷ The carrier was, therefore, absolved from liability for plaintiff employee's injury, but the employee could still bring a common law action against his employer.²⁸

Oklahoma. The Oklahoma compensation act provides that an employee must be working in certain enumerated hazardous activities in order to recover for injuries under the act.²⁹ Two recent cases have held that where the employee is engaged in a hazardous activity in connection with a business not included in the list of hazardous activities, he is entitled to recover.

²⁵Okla....., 223 P. 2d 540 (1950).

²⁶Tex....., 228 S. W. 2d 135 (1950).

²⁷ *Mulkey v. Traders and General Ins. Co.*, 93 S. W. 2d 582 (Tex. Civ. App. 1936) *er. ref.*

²⁸ TEX. REV. CIV. STAT. (Vernon, 1948) art. 8306, § 3a *et seq.*

²⁹ 85 OKLA. STAT. ANN. (Perm. Ed.) § 2.

Both cases involved employees of retail stores which carried on activities beyond strictly retail operations. In *Dalton Barnard Hardware Co. v. Gates*³⁰ the injured employee was the manager of a drapery and slipcover department of the company's furniture store. The department was equipped with a power sewing machine. When she was loudly reprimanded by her employer, she fell and injured her back. In *Gates v. Weldon*³¹ a butcher shop and frozen food locker business were carried on in connection with a grocery business. Plaintiff employee was injured by a power saw used to cut meat. In both cases the machinery on the premises rendered activities hazardous under the law, and recovery was allowed.³²

EXAMINATION BY PHYSICIANS

Texas. The workmen's compensation act requires that an injured employee submit to reasonable examinations by physicians.³³ *Wallace v. Hartford Accident and Indemnity Co.*³⁴ held that the judge of a district court, in which an appeal from the decision of the Industrial Accident Board is filed, has discretion to limit this examination in a reasonable manner.

Wallace was examined and treated by two different physicians, both of whom had examined other patients for the insurance carrier. At the trial the carrier sought to have a third physician examine the plaintiff. The court denied the request stating that, by paying the physicians for examining and treating the injured employee, the employer and the carrier had made these doctors their own. Since the doctors were in no way proved incompetent, the trial court did not abuse its discretion by refusing the carrier's request to allow further medical examination of the claimant. The case will doubtless cause insurance companies to be more careful in the future in the selection of physicians.

Oklahoma. The case of *Liberty Glass Co. v. Lemons*³⁵ is very

³⁰Okla....., 220 P. 2d 249 (1950).

³¹Okla....., 223 P. 2d 372 (1950).

³² *Harbour-Longmire-Pace Co. v. State Industrial Commission*, 147 Okla. 207, 296 Pac. 456 (1931).

³³ TEX. REV. CIV. STAT. (Vernon, 1948) art. 8307, § 4.

³⁴Tex....., 226 S. W. 2d 612 (1950).

³⁵Okla....., 217 P. 2d 516 (1950).

similar to the *Wallace* case. The claimant had been examined by eight different physicians, and the carrier sought to have a ninth appointed to examine the claimant. The trial court's refusal to allow further examination was held not to be an abuse of discretion.

SECOND INJURY FUND

*Texas. Miers v. Industrial Accident Board*³⁶ is a case of first impression regarding the Second Injury Fund, which was created by an amendment to the workmen's compensation act in 1947.³⁷ This fund was created for the express purpose of encouraging employers to hire handicapped workers. The statute has always provided that in the event of a subsequent injury to an already handicapped employee, the carrier should only be liable to the extent of the second injury. The amendment provides that the employee shall be entitled to be paid any other benefits to which he is entitled out of a specially created fund.

The claimant, Miers, lost the sight of one eye through a non-compensable accident in 1929. In 1946 he lost the sight of his other eye in a compensable accident. The carrier paid the claimant \$25.00 per week for 100 weeks, which was the full extent of its liability. The question was whether Miers was entitled to 201 weeks or 301 weeks' compensation out of the Second Injury Fund. In other words, should the fund be given credit for 100 weeks which would have been paid at the time of the loss of the first eye if that injury had been compensable?

The court construed the compensation act and the wording of the amendment to allow a full 301 weeks recovery. The court, however, expressly refused to rule as to whether the deduction of 100 weeks would be allowed, if compensation benefits had been paid at the time of the first injury.

Workmen's compensation statutes are usually liberally construed in Texas, and the instant case is consistent with this attitude.

Oklahoma. The Special Indemnity Fund of Oklahoma corre-

³⁶Tex....., 232 S. W. 2d 671 (1950).

³⁷ TEX. REV. CIV. STAT. (Vernon 1948) art. 8306, § 12c.

sponds to the Second Injury Fund of Texas. The case of *Special Indemnity Fund of Oklahoma v. Hewes*³⁸ is to be compared with the *Miears* case. The *Hewes* case held that when an employee, who has previously been partially disabled, suffers a subsequent injury, his compensation shall be determined as follows: take the amount payable as a result of the total disability caused by both injuries, subtract the amount that was paid by the carrier as a result of the second injury, subtract also the amount that was provided for the first injury, and then pay the remaining amount, if any, to the employee out of the Special Indemnity Fund. Mathematical formulae to determine the cumulative effects of two injuries are not to be used unless such formulae reasonably reflect the degree of disability.³⁹

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³⁸Okla....., 214 P. 2d 240 (1950).

³⁹ *Special Indemnity Fund v. Patterson*,Okla....., 217 P. 2d 536, 539 (1950).

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