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WORKMEN'S COMPENSATION

INTOXICATION

Arkansas. An interesting contrast in workmen's compensation law within different jurisdictions is presented by the recent supreme court case of *Cox Bros. Lumber Co. v. Jones*.¹ In this case the plaintiff's husband was killed by a freight train while in the course of employment. The evidence clearly indicated that plaintiff's husband had been drinking. This was demonstrated by the testimony of three witnesses, one of whom testified that she saw the plaintiff's husband approximately five or ten minutes before the accident and that it was obvious that he had been drinking. All three witnesses, however, testified that he was not so drunk that he had lost his self-control. The Workmen's Compensation Commission refused to enter an award, and the supreme court reversed the Commission's decision on the ground that the evidence was insufficient to overcome the presumption against intoxication causing the death of an employee. Justice McFaddin wrote a very informative opinion as to the law in Arkansas upon the question of intoxication as a defense. More particularly he cited an Arkansas statute² which says, in effect, that there is a *prima facie* presumption in workmen's compensation cases that the injury did not result from intoxication of the injured employee. He also cited a statute³ that provides that there shall be no liability for compensation where the injury was solely occasioned by intoxication of the injured employee. Justice McFaddin said the effect of these statutes was that the burden of proof was upon the employer. He must not only prove the employee was intoxicated but he must go further and prove that the sole proximate cause of death of the employee was his intoxication. The employer was held to have failed to sustain this burden in the instant case.

¹Ark....., 248 S. W. 2d 91 (1952).

² ARK. STAT. 1947 ANN. (1951 Cum. Supp.) § 81-1324.

³ ARK. STAT. 1947 ANN. (1951 Cum. Supp.) § 81-1305.

The law and the authorities seem to be altogether to the contrary in Texas. Texas' position on this matter is firmly indicated by the case of *Dill v. Texas Indemnity Ins. Co.*⁴ The court set forth the Texas statute⁵ concerning intoxication, which provides that an injury sustained in the course of employment shall not include an injury received while the employee was in a state of intoxication. The court then proceeded to hold that, since the wording of the statute is mandatory, the intoxication of the employee need not be a proximate cause (much less the sole proximate cause) before it will be a complete defense to an action for compensation. The jury need only find that the employee was intoxicated at the time of the injury. In the *Dill* case there was substantial evidence to the effect that the intoxication did not contribute to the employee's injury. In fact, there was a jury finding that, though the employee was intoxicated, the actual cause of the accident was the fact that the employee occasioned two blow-outs on the tires of his truck. However, the court said that the trial court should have disregarded the finding and rendered judgment for the compensation carrier upon the finding by the jury that the employee was intoxicated at the time of the accident. Two later Texas cases, *Traders' & General Ins. Co v. Williams*⁶ and *Texas Employers' Ins. Assn. v. White*,⁷ reiterated the principles in the *Dill* case and explicitly held that the burden of proof was upon the claimant to show that the injured employee or deceased at the time of the injury was acting in the course of employment and was not intoxicated.

Texas had formerly maintained the position that intoxication of an employee was not a defense unless it contributed in some way to the injury, as was illustrated in *Employers' Casualty Co. v. Watson*.⁸ There are a great many jurisdictions that require the

⁴ 63 S. W. 2d 1016 (Tex. Comm. App. 1933).

⁵ TEX. REV. CIV. STAT. (Vernon, 1948) art. 8309, § 1.

⁶ 66 S. W. 2d 780 (Tex. Civ. App. 1933).

⁷ 68 S. W. 2d 511 (Tex. Civ. App. 1934) *er. disp.*

⁸ 32 S. W. 2d 927 (Tex. Civ. App. 1930).

intoxication to contribute in some way, and Arkansas is certainly not by itself in requiring that the intoxication be the sole proximate cause of the injury, before it will be a defense. An outstanding treatise says: "In the States of Arkansas, Kansas, Maryland, New York, Rhode Island, and the Longshoreman's Harbor Worker's Act, the employee's intoxication must be the sole cause of his injuries to bar a recovery of compensation."⁹

EXPERT MEDICAL TESTIMONY

Oklahoma. Three supreme court cases were decided this past year which present another interesting inter-jurisdictional comparison. *Choctaw County v. Bateman*,¹⁰ *E. G. Nicholas Const. Co. v. State Industrial Commission*,¹¹ and *Bareco Oil Co. v. Allison*¹² all illustrate Oklahoma's position on the necessity of expert medical testimony to establish the cause and extent of disability from accidental injury. The three cases were somewhat similar in their fact situations. In the *Choctaw County* case the plaintiff injured his back while shoveling gravel for Choctaw County. At the hearing before the State Industrial Commission a written medical report of the plaintiff's doctor was submitted. The Commission entered an award for three weeks' temporary total disability and twenty-five per cent partial disability. The supreme court held that, though the disability for which plaintiff was seeking compensation was of such character as to require determination of its nature, cause, and extent by skilled and professional persons, the written report was sufficient to support the Commissioners' finding as to the extent and cause of the injury.

Then in the *Bareco* case, which involved a heart attack on the part of the plaintiff, and the *Nicholas* case, which was concerned with a claim based on a heat stroke suffered by the plaintiff's

⁹ 6 SCHNEIDER'S WORKMEN'S COMPENSATION (Perm. ed. 1948) § 1586.

¹⁰ ____Okla.____, 252 P. 2d 465 (1952).

¹¹ ____Okla.____, 250 P. 2d 221 (1952).

¹² ____Okla.____, 251 P. 2d 1040 (1952).

deceased, the rule as to expert medical testimony was set forth in language to the effect that in a proceeding before the Industrial Commission, if the alleged disability is of such character as to require skilled and professional men to determine the cause and extent thereof, the question is one of science and must be proved by the testimony of skilled professional persons. In the *Nicholas* case the evidence indicated that the plaintiff's deceased suffered a fatal heat stroke while shoveling "chat" or gravel, and the testimony of his fellow employees clearly proved the fact that such heat stroke occurred in the course of employment. However, the testimony of two doctors only established the fact that the deceased's death was caused by a heat stroke, and the court vacated the award so that the Commission could proceed further in the matter. The reason was that such medical testimony was insufficient in that some connection between the deceased's employment and injury must be proved. The connection could only be established by the expert testimony of a doctor. Thus, these cases reveal the strict requirement of the Oklahoma court in regard to expert medical testimony.

It seems that Texas has adhered to a much more lenient rule. There are three cases that adequately supply Texas authority on the subject. In *Texas Employers Ins. Assn. v. Hevolow*¹³ the plaintiff sustained a broken leg in a fall down a stairway while carrying a heavy drum. The plaintiff testified that this injury extended to the back, and the jury found that the plaintiff was permanently and totally disabled. On appeal the defendant complained of such finding because there was no expert medical testimony submitted by the plaintiff to substantiate his testimony about his back. The court of civil appeals said: "The jury may find as to these matters unaided by expert medical testimony."¹⁴ In the later case of *Texas Employers Reinsurance Corporation v. Jones*¹⁵ the plaintiff had also suffered a broken leg. While loading some logs

¹³ 136 S. W. 2d 931 (Tex. Civ. App. 1940) *er. dism. judgm. cor.*

¹⁴ *Id.* at 933.

¹⁵ 195 S. W. 2d 810 (Tex. Civ. App. 1946) *er. ref. n.r.e.*

on a truck, a log fell on his leg and broke his ankle. The defendant objected to the submission of special issues inquiring whether the plaintiff had suffered any actual incapacity following his period of total incapacity on the ground that there was not sufficient evidence to warrant such submission. The plaintiff and his father both testified in detail about the injury he had received, but no expert medical testimony was submitted. The jury found that the plaintiff had suffered partial incapacity for life after his period of total incapacity. In answer to the defendant's complaint of such finding on appeal, the court said: "It is true that no medical expert gave testimony as to his estimate of the nature and extent of the appellee's injury, but such testimony is not necessary in order that the injured workman may be entitled to a judgment for compensation when sufficient lay testimony has been received in the case."¹⁶ *Western Casualty & Surety Co. v. Mueller*¹⁷ more or less reiterates the *Hevolow* and the *Jones* holdings. The defendant was complaining of a jury verdict awarding the plaintiff fifty per cent partial disability without the presence of testimony from a medical doctor, testifying as an expert. The court again laid down the proposition that no such testimony was necessary: "It is not, however, necessary to the validity of a finding of partial disability that there be contained in the record of the evidence an estimate of an expert medical witness as to the percentage of disability."¹⁸

ATTORNEY'S FEES

One of the most important cases that has come out in this past year concerning workmen's compensation is *Texas Employers Ins. Ass'n v. Hatton*.¹⁹ It appears that the question presented was one of first impression before the supreme court. Most authorities would consider this decision surprising, especially in the face of

¹⁶ *Id.* at 812.

¹⁷ 169 S. W. 2d 223 (Tex. Civ. App. 1943) *er. ref. w. m.*

¹⁸ *Id.* at 224.

¹⁹ _____Tex., 255 S. W. 2d 848 (1953).

two civil appeal cases, *Employers' Liability Assurance Corporation v. Sims*²⁰ and *Houston Fire & Casualty Insurance Co. v. Ford*,²¹ which seem to be *contra*. However, the supreme court proceeded to distinguish the two cases from the principal case and adopted the common law rule.

In the *Hatton* case the plaintiff was seeking compensation for an injury to his foot. The defendant's attorney asked the trial court to instruct plaintiff's counsel not to read to the jury that portion of his petition setting out certain fact allegations concerning a contract which had been made with the plaintiff for a third of the recovery to be paid as attorney's fees. The court sustained the defendant's motion. But upon a subsequent request by the defendant's attorney that the court further instruct the plaintiff's counsel not to read to the jury a succeeding part of the petition which repeated facts concerning the contract for attorney's fees, the court overruled the defendant's motion. The court of civil appeals affirmed the judgment of the trial court, and the defendant brought error. The supreme court reversed and remanded, declaring that the trial court had committed error. The reading of the portion of the petition objected to was reasonably calculated to create increased sympathy for respondent and to influence the jury to make a larger award than it would otherwise make.²² The opinion, written by Justice Culver, distinguished the case at bar from the *Sims* and *Ford* cases. Both of those cases involved an issue of lump-sum award, and such issue was before the jury for determination. But in the *Hatton* case the defendant's attorney had conceded at the beginning of the trial that the evidence would sustain the award of a "lump-sum" recovery; thus, such issue was not before the jury. In the *Sims* and *Ford* cases the element of attorney's fees was properly to be considered by the jury on the "lump-sum" issue, whereas in the *Hatton* case knowledge of the contract for the attorney's fees could serve no such

²⁰ 67 S. W. 2d 445 (Tex. Civ. App. 1933) *er. ref.*

²¹ 241 S. W. 2d 158 (Tex. Civ. App. 1951) *er. ref. n.r.e.*

²² 255 S. W. 2d at 849.

purpose but would only hinder the jury in reaching a fair verdict.

The court justified its decision by adopting the common law rule as set forth in *White Cabs v. Moore*²³ and other cases. In the *Moore* case the plaintiff was suing the defendant for personal injuries received in a collision. The material question was whether or not the trial court erred in not granting the defendant's motion for new trial based upon jury misconduct. The jury, in reaching an answer on the special issue as to the amount of damages, began speculating as to the amount of the sum recovered by plaintiff that would have to be paid out in attorney's fees. After "a minute or two" of such discussion the foreman warned that such considerations were improper. The supreme court reversed and remanded the cause, saying that "a jury's discussion, when considering the amount of the damages to be awarded the plaintiff, of the attorney's fees that the plaintiff may be required to pay out of what he recovers is material misconduct and is calculated to prejudice the rights of the defendant."²⁴ Justice Culver, in applying this rule in the *Hatton* case, said that the common law rule was just as applicable to workmen's compensation cases because the same calculated influence is brought to bear upon the minds of the jurors.

The *Hatton* opinion referred to the rule set forth in *Texas Employers' Insurance Assn. v. Lane*²⁵ and other decisions that the amount of attorney's fees to be allowed in a compensation case is exclusively for the court and not for the jury. A treatise in the field of workmen's compensation²⁶ concludes that the statutes in almost all jurisdictions vest in the commission or the court the power to determine the attorney's fees. Illustrating this statement,²⁷ New Mexico seems to have adopted precisely the rule in the *Lane* case. *Robinson v. Mittry Bros.*²⁸ held that "the matter

²³ 146 Tex. 101, 203 S.W. 2d 200 (1947).

²⁴ *Id.* at 105, 203 S. W. 2d at 201.

²⁵ 124 S. W. 2d 893 (Tex. Civ. App. 1939) *er. disp. judgm. cor.*

²⁶ 10 SCHNEIDER'S WORKMEN'S COMPENSATION (Perm. ed. 1948) § 2107.

²⁷ *Id.*, § 2146.

²⁸ 43 N. M. 357, 94 P. 2d 99 (1939).

of attorney's fees is a question for the court to determine and not the jury," but, as is frequently true in other jurisdictions, the court went on to hold that the jury's knowledge of the amount of attorney's fees to be paid out of compensation awarded is harmless and not reversible error. Though the rule remains uncertain in most jurisdictions, it appears that the question is settled in Texas as a result of the *Hatton* decision.

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