1966

Survey of North Carolina Case Law: Workmen's Compensation

Philip C. Thorpe
Indiana University School of Law

his witnesses from the courtroom to a luncheon establishment. On this motion having been made, the trial judge conducted an immediate inquiry, and from this it appeared that the plaintiff, his witness and the juror had not discussed the case but talked about fishing and corned herring. Several other jurors and the sheriff had eaten at the same luncheon place. The sheriff testified the juror in question was a truthful person and had a good reputation. The juror himself said that if he had not seen the plaintiff at the lunch hour, his verdict would have been the same. On this evidence the trial judge found the encounter had been a casual one and that it had not affected the verdict. Motion of defendant was accordingly denied.

In affirming the action of the trial judge, Justice Sharp, for the Court, declared that the granting or denial of defendant's motion for a mistrial was in the discretion of the trial judge and under the facts of this case there was no evidence indicating any abuse of discretion.

WORKMEN'S COMPENSATION

*Philip C. Thorpe**

INDUSTRIAL COMMISSION'S FINDINGS OF JURISDICTIONAL FACTS

The Court decided two cases that make clear the proper procedures respecting findings of jurisdictional facts by superior court judges.[1] In *Askew v. Leonard Tire Co.*[2] the superior court judge overruled the exceptions filed to the Industrial Commission's findings of jurisdictional facts,[3] but without making independent findings of such facts. On appeal the defendant argued that prior decisions in *Beach v. McLean*[4] and *Aylor v. Barnes*[5] necessitated

* Assistant Professor of Law, University of North Carolina at Chapel Hill.

[1] Burns v. Riddle, 265 N.C. 705, 144 S.E.2d 847 (1965); Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

[2] See note 1 *supra*. *Burns* was based upon the decision in *Askew*. See Hanft, *Administrative Law, North Carolina Case Law*, 44 N.C.L. REV. 889 (1966), for further discussion of this case.

[3] The jurisdictional question was whether an employment relationship existed.

[4] 219 N.C. 521, 14 S.E.2d 515 (1941).

[5] 242 N.C. 223, 87 S.E.2d 269 (1955).

independent findings.[6] The Court refused to so hold and established guidelines for findings of jurisdictional facts.

At present, the following rules apply. The Court still holds that the Industrial Commission's findings of jurisdictional facts are not conclusive even though they are supported by competent evidence;[7] thus the superior court judge may examine the record independently. The judge may refer to and affirm the Commission's findings without making separate findings, at least as long as it is clear that he examined the record independently and decided that the jurisdictional facts were as found by the Commission. The Court intimated in *Askew* that if counsel had requested independent findings, the superior court would have been under an obligation to file them.

Statutory Employer in "Loaned Servant" Cases

In *Leggette v. J. D. McCotter, Inc.*[8] the Court held that an employee was employed by each of two employers. It affirmed a finding of the Industrial Commission, which had been reversed by the superior court, requiring the employers to split the payment of compensation benefits between them. *Leggette* represents a departure from prior decisions in "loaned servant" cases. It rests upon the proposition that, in close cases, fairness requires both the general and the special employer to be liable for compensation. It is clear from the opinion that the Court does not mean to overrule earlier cases in which the employee was clearly performing work solely for the special employer.[9] Only where the employee's duties benefit both employers, or arguably do so, will the *Leggette* rule apply.

"Injury by Accident"

In *Lawrence v. Hatch Mill,*[10] the Court reaffirmed its recent (since 1957) definition of the statutory term "injury by accident."[11]

[6] In Pearson v. Peerless Flooring Co., 247 N.C. 434, 101 S.E.2d 301 (1958), the superior court specifically adopted the Industrial Commission's findings as its own. This practice was approved, but was not followed in *Askew.*

[7] Thus the Court has not moved away from the largely discredited jurisdictional facts theory. See 2 Larson, Workmen's Compensation Law § 80.41, at 324 (1952) [hereinafter cited as Larson]. For criticism of the rule on the ground that almost all findings of fact are "jurisdictional" in the sense that an absence of such facts places the matter outside the range of those cases to which the compensation act applies.

[8] 265 N.C. 617, 144 S.E.2d 849 (1965).

[9] See, *e.g.,* Shapiro v. City of Winston-Salem, 212 N.C. 751, 194 S.E. 479 (1938).

[10] 265 N.C. 329, 144 S.E.2d 3 (1965).

[11] N.C. Gen. Stat. § 97-2(6) (1965).

In *Lawrence* plaintiff was removing a heavy object from a tool box when he felt pain in his back. There was no evidence of unusual twisting, lifting, or any other unusual or fortuitous occurrence. Relying on several recent cases,[12] the Court applied a rule requiring proof of an external fortuitous incident before an injury may be characterized as accidental.[13]

The "injury by accident" question has proved troublesome, particularly in cases involving hernias, heart attacks, and back injuries.[14] North Carolina decisions reflect the problems in deciding what is a compensable accidental injury. Prior to 1940, the statute was construed to require an external, fortuitous occurrence.[15] In 1940, the Court apparently reversed itself in *Smith v. Cabarrus Creamery Co.*,[16] holding that an injury was accidental (1) if caused by an external, fortuitous event, or (2) if the result itself was unexpected.[17] This rule was altered in 1957,[18] and since then the Court has required a fortuitous external occurrence in order for the injury to be compensable.[19] Although *Hensley v. Farmers Fed'n Co-op.*[20] distinguished rather than overruled *Smith,* a review of the cases decided after *Smith* and prior to *Hensley* shows that the Court did not require that the injury be induced by an unusual external event. In several cases, the testimony indicated that the claimant was doing his usual work in his usual way.[21]

Hensley represented a return to a rule now in the minority in

[12] *E.g.,* Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963); Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962); Turner v. Burke Hosiery Mill, 251 N.C. 325, 111 S.E.2d 185 (1959).

[13] The test requires more than that the usual work was being done in the usual way. Lawrence v. Hatch Mill, 265 N.C. 329, 330, 144 S.E.2d 3, 4 (1965).

[14] See 1 LARSON § 37.30.

[15] *E.g.,* Slade v. Willis Hosiery Mills, 209 N.C. 823, 184 S.E. 844 (1936); Scott v. Aetna Life Ins. Co., 208 N.C. 160, 179 S.E. 434 (1935).

[16] 217 N.C. 468, 8 S.E.2d 231 (1940).

[17] *E.g.,* Beaver v. Crawford Paint Co., 240 N.C. 328, 82 S.E.2d 113 (1954); Glace v. Pilot Throwing Co., 239 N.C. 668, 80 S.E.2d 759 (1954); Rice v. Thomasville Chair Co., 238 N.C. 121, 76 S.E.2d 311 (1953); Edwards v. Piedmont Publishing Co., 227 N.C. 184, 41 S.E.2d 592 (1947).

[18] Hensley v. Farmers Fed'n Co-op., 246 N.C. 274, 98 S.E.2d 289 (1957). See 37 N.C.L. REV. 378 (1958); 41 N.C.L. REV. 410 (1963).

[19] *Compare* Hensley v. Farmers Fed'n Co-op., *supra* note 18, *with* Searcy v. Branson, 253 N.C. 64, 116 S.E.2d 175 (1960), *and* Keller v. Electric Wiring Co., 259 N.C. 222, 130 S.E.2d 342 (1963).

[20] 246 N.C. 274, 98 S.E.2d 289 (1957).

[21] *E.g.,* Beaver v. Crawford Paint Co., 240 N.C. 328, 82 S.E.2d 113 (1954); Glace v. Pilot Throwing Co., 239 N.C. 668, 80 S.E.2d 759 (1954).

the United States.[22] However, since the statute does not require an external occurrence, the Court has alternative interpretations available. The problem is one of distinguishing between sudden failures of the body (accidental injuries) and those requiring time to develop (disease). By requiring proof of an external occurrence, the Court has needlessly limited compensation coverage, overlooking its own authorities to the contrary in the process.

MISCELLANEOUS

In *Gibbs v. Carolina Power & Light Co.*,[23] plaintiff-employee brought a third-party action against the defendant, pursuant to G.S. § 97-10.2. Defendant asserted a claim for indemnity or contribution against plaintiff's employer The Court held that such a claim could not be joined in the employee's action.[24] In *Jones v. Myrtle Desk Co.*[25] the employee was injured while doing personal work on company time. Although company rules permitted employees to do personal work, the employee had not obtained permission from his foreman as required. The Court affirmed the Industrial Commission's findings that plaintiff was not injured in the course of his employment. This holding is clearly a proper result. It would seem that the only situation in which compensation would be payable when the employee's injury occurred while doing personal work is where the personal work benefits the employer. At times a benefit can be found in the educational value of personal work when the employer benefits from the employee's attempts at self-improvement.[26] No such showing was made in *Jones*.

---

[22] See 1 LARSON § 38.00.
[23] 265 N.C. 459, 144 S.E.2d 393 (1965).
[24] See discussion of *Gibbs* in Thorpe, *Torts—Part II, North Carolina Case Law*, 44 N.C.L. REV. 1047 (1966).
[25] 264 N.C. 401, 141 S.E.2d 632 (1965).
[26] See 1 LARSON § 27.31(b).