Louisiana Law Review

Volume 8 | Number 3
March 1948

Prematurity and Prescription Under the Workmen's Compensation Act Where the Employee is Retained on the Payroll After Injury

Iddo Pittman Jr.

LOUISIANA LAW REVIEW

LOUISIANA STATE UNIVERSITY LAW SCHOOL
UNIVERSITY STATION, BATON ROUGE, LOUISIANA

Subscription per year $4.00 (Foreign $4.50) Single copy $1.00

VOLUME VIII MARCH, 1948 NUMBER 3

Comments

PREMATURITY AND PRESCRIPTION UNDER THE WORKMEN'S COMPENSATION ACT WHERE THE EMPLOYEE IS RETAINED ON THE PAYROLL AFTER INJURY

Louisiana's Employer's Liability Act provides compensation for employees who are disabled due to injuries arising out of and dur-

ing the course of the employer's hazardous business.[1] The courts have held that an employee is totally and permanently disabled if he is no longer capable of performing the duties of the occupation in which he was engaged at the time of the injury. It is clear that he is entitled to compensation for his injury even though he should find work of a different nature with another employer[2] and at a higher wage.[3] This has led to several difficulties in cases where the employee remains with the same employer performing different duties and receiving wages equal to or greater than the maximum allowable compensation. Thus the extent of the rights of the injured employee may depend not only on the injury itself, but also upon the identity of the subsequent employer. Among the problems raised by this type of situation are those of prematurity and prescription.

Under the act as originally drafted, the injured employee was entitled not only to have the amount of his compensation determined but also to have a judgment fixing the period of disability, notwithstanding that when the suit was brought the employer was paying the maximum compensation.[4] This position may be justified by Section 17 of the act, which enumerates the disputes that may be compromised and includes the "extent or duration of the injury or disability involved."

Later legislation, however, has reflected the attitude that employers who are paying full compensation should not be harassed with law suits by their injured employees. The legislature in 1926 enacted Section 18.1 (B) which provides, "Unless . . . it is alleged . . . that the employee or the dependent is not being or has not been paid, and that the employer has refused to pay, the maximum per centum of wages to which petitioner is entitled under the provisions of this act, the presentation or filing of such complaints shall be premature and shall be dismissed . . . ."[5]

Relying upon the 1926 amendment, the court of appeal for the first circuit held that, despite the fact that a dispute exists as to the total amount of the claim, any action brought while the employee

1. La. Act 20 of 1914, as last amended by La. Acts 120 and 143 of 1944 [Dart's Stats. (1939) §§ 4391-4432].

2. McQueen v. Union Indemnity Co., 18 La. App. 612, 136 So. 761 (1931); Brown v. Continental Oil Co., 22 So. (2d) 758 (La. App. 1945); McKenzie v. Standard Motor Co., 15 So. (2d) 115 (La. App. 1943).

3. Sumrall v. E. I. DuPont de Nemours & Co., 1 So. (2d) 430 (La. App 1941).

4. Ford v. Fortuna Oil Co., 151 La. 489, 91 So. 849 (1922); Daniels v. Shreveport Producing & Refining Corp., 151 La. 800, 92 So. 341 (1922); Hulo v. City of New Iberia, 153 La. 284, 95 So. 719 (1923).

5. La. Act 85 of 1926 [Dart's Stats. (1939) § 4408(1)(B)].

is actually receiving the maximum allowable compensation is premature.[6] In *Ulmer v. E. I. DuPont de Nemours & Company*[7] the same court was faced with a situation where the employee was placed on light duty and continued on the payroll at the same wages after the injury. The plaintiff asked for compensation for the period during which wages were received. Holding the suit premature, the court relied upon the well known case, *Rylander v. T. Smith & Son, Incorporated*,[8] where the supreme court had stated that:

> "The workmen's compensation statute is not a statute allowing the workman *damages* for injuries sustained in the course of his employment even through the negligence or fault of his employer. It is essentially insurance against the loss or diminution of earning capacity, . . ."

It is noteworthy that the *Rylander* case involved an entirely different problem. The question there was as to the manner of determining the amount of compensation to be allowed where the employee had worked only part time. The court concluded that workmen's compensation was essentially insurance against loss of earning capacity and that payments should be determined by the agreed rate of wages instead of the average amount actually received.

The supreme court in *Carlino v. United States Fidelity Company*[9] approved the holding of the *Ulmer* case, but stated:

> ". . . that a suit brought by an injured employee for compensation for a period during which he is paid wages equal to or exceeding in amount the compensation claimed would be unavailing, not on the ground of its being premature, but because there would be no cause or right of action for compensation for that period."

The *Carlino* case also involved the question whether or not an employee could maintain a suit for compensation while being paid wages equal to or greater than the maximum allowable compensation under the act. The court, relying primarily on *Hulo v. City of*

6. Moss v. Levin, 10 La. App. 149, 119 So. 558 (1929); Reiner v. Maryland Casualty Co., 185 So. 93 (La. App. 1938); Pitts v. M. W. Kellogg Co., 186 So. 389 (La. App. 1939).

7. 190 So. 175 (La. App. 1939).

8. 177 La. 716, 720, 149 So. 434, 435 (1933).

9. 196 La. 400, 415, 199 So. 228, 233 (1940).

New Iberia[10] and without mentioning Section 18.1(B) of the act, states:

> ". . . that the plaintiff is entitled to a judgment fixing the rate of compensation to which he is entitled, even though the insurer should not be obliged to pay the compensation as long as the employer continues to pay to the injured employee—even as a gratuity—wages equal to or exceeding in amount the compensation which he is entitled to."[11]

The following year the court of appeal for the first circuit, in *Carpenter v. E. I. DuPont de Nemours & Company,*[12] held that where the injured employee was assigned to lighter duties at his old salary, prescription was interrupted under Section 31 of the Workmen's Compensation Act. In *Arnold v. Solvay Process Company,*[13] a suit was based on a specific injury under Section 8(1)(d). This same court held that payments of wages after injury did not interrupt prescription under Section 31. In differentiating the *Carpenter* case the court explained that the reason for its holding there was that the employee had been led into a false sense of security. A sounder basis for distinction and one easier to administer is that the *Carpenter* case was based primarily on loss of earning capacity and brought under Section 8(1)(b), while the *Arnold* case was an action under Section 8(1)(d) for a specific injury, and loss of earning capacity is not a factor in such a suit.

This problem reached its climax in *Thornton v. E. I. DuPont de Nemours & Company.*[14] Here the plaintiff, not being able to perform his regular duties after an injury, was given light work and retained at the same salary. Eleven months and thirty days after his injury he instituted an action for permanent total disability. The supreme court held that plaintiff had acted advisedly in bringing his action before the year expired, since payments of wages do not in-

10. 153 La. 284, 95 So. 719 (1923). This case was decided before Section 18.1(B) was added to the act.

11. 196 La. 400, 411, 199 So. 228, 232 (1940).

12. 194 So. 99, 101 (La. App. 1940), the court stated, "The statute itself as is well known calls for a liberal interpretation of its provisions in favor of the injured employee, and it is our confirmed opinion that when, with knowledge of the employee's disabling injury, the employer continues to pay him usual wages which is 35 per cent. more than the amount of compensation he would have to pay for performing lighter services than he was doing before, there results a situation in which the provisions of the statute regarding the bar of peremption have been fully satisfied and as long as those payments continue prescription does not run."

13. 15 So. (2d) 238 (La. App. 1943).

14. 207 La. 239, 21 So. (2d) 46 (1944).

terrupt the running of prescription. It explained that Section 18.1(B), which provides that a suit will be premature unless it is alleged the employer has refused to pay the maximum per cent of wages to which the employee is entitled under the provisions of the act, has reference only to payments of compensation. It has no application where the payment is made in the form of wages. Justice Rogers dissented on the ground that Section 18.1(B) does make an action premature where wages equal to or greater than the allowable compensation are being paid. The dissent reasoned that this position would work no hardship upon the injured employee because, under a liberal interpretation of Section 31, such payments would interrupt prescription.

It appears that the application of Section 18.1(B) will be strictly limited to payments of compensation. Where the plaintiff alleges that he is receiving maximum compensation, but the employer has refused to admit the extent of his liability, a suit to fix the period is premature.[15] However, if the plaintiff is receiving earned wages, a suit for compensation may be brought.[16] The supreme court has recently indicated that should the wages be unearned, such payments will be treated as compensation[17] and the suit be held premature.

Both the majority and dissenting opinions of the *Thornton* case seem to agree that prematurity and prescription are interrelated. If the plaintiff cannot proceed because his action is premature, prescription obviously should not run; whereas prescription does run when the action would not be premature. This result appears to be in agreement with the general idea of prescription, that the plaintiff should not be prejudiced if he is doing all he can to preserve his rights.

15. Lanoue v. Century Indemnity Co., 30 So. (2d) 207 (La. App. 1947).

16. Thornton v. E. I. DuPont de Nemours & Co., 207 La. 239, 21 So. (2d) 46 (1944); Rigsby v. John W. Clark Lumber Co., 28 So. (2d) 346 (La. App. 1946).

17. See Dominic A. D'Antoni v. Employers' Liability Assurance Corp. Ltd., La. Sup. Ct. Docket No. 38,443 (1948). Plaintiff was injured while employed as a motorcycle policeman. After partial recovery he was assigned, at his usual wage, to a clerical position and later to another light job, that of making patrols in automobiles driven by other men. While employed in the latter capacity he brought this suit, claiming the maximum compensation allowed for permanent and total disability. The supreme court overruled the plea of prematurity and stated:

> "If the employee is actually earning the wages paid him, his suit cannot be dismissed on a plea of prematurity for as much as he is not receiving compensation. . . . Conversely, if it is shown on the trial of the plea that the wages being paid the employee are in reality a gratuity and not for the performance of work, then the action will be dismissed as premature—for, in such instance, the payment of the wage is the equivalent to the payment of compensation."

According to the majority opinion, where wages are being paid to the disabled employee, he is entitled to have his rights fixed by a judgment and should not be made to rely on the uncertainty that the employer will continue such payments. However, the uncertainty here is no greater than in the case where the employer is making compensation payments and will not admit his total liability. Yet it is agreed that an action for compensation, while maximum payments are being made, is premature under Section 18.1(B).

The minority opinion in the *Thornton* case reaches the seemingly anomalous result that if the plaintiff is employed elsewhere at a different occupation he may maintain his action for compensation, even though the wage he is receiving is greater than payments of compensation; while if he remains with the same employer performing different duties, such action is premature. This is the unavoidable result of a basic incongruity of doctrine. The courts have persistently defined "disability" to mean incapacity to perform the duties engaged in at the time of the injury. However, they have also insisted that the primary purpose of the Workmen's Compensation Act is insurance against loss of earning capacity. These two notions must necessarily rub elbows at some point.

As a practical matter, the advantages realized seem to overshadow the theoretical inconsistencies. The dissenting opinion seems more in accord with the policy upon which the act is based. If an employer is willing to rehabilitate his injured employees by retaining them on the payroll at lighter duties, this practice should be encouraged, for it produces a result similar to the object at which the Workmen's Compensation Act is aimed. It creates good relations between management and labor, and probably furnishes a more substantive source of income than the act can provide. The employee is thus encouraged to render valuable services, and avoid the complete loss of manpower which so often follows the resort to compensation.

In order to protect fully the rights of the injured employee under such a plan, the courts would have to adopt a liberal interpretation of Section 31 of the act and hold that such payments would stop the running of prescription, thereby recognizing the interrelationship of prematurity and prescription.

IDDO PITTMAN, JR.