Vanderbilt Law Review

Volume 14
Issue 4 *Issue 4 - October 1961*

Article 25

10-1961

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WORKMEN'S COMPENSATION—1961 TENNESSEE SURVEY

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Two bills amending the Workmen's Compensation Law[1] were enacted during the survey year. The first placed a limit of $12,500 on compensation payable for any permanent partial injury, not limited to those set forth in the schedule.[2] It also added the following self-explanatory sentence to the first paragraph of section 50-1027, Tennessee Code Annotated:

> To receive benefits from the Second Injury Fund, the injured employee must be the employee of an employer who has properly insured his workmen's compensation liability or has qualified to operate under the Tennessee Workmen's Compensation Law as a self-insurer.

The second amendment changed the definition of "employee"[3] and the exclusive remedy provision[4] so as to eliminate the election of a legally or illegally employed minor to accept workmen's compensation or prosecute a tort action for work-connected injuries or death. Henceforth, minors will be limited to workmen's compensation benefits, a reversal of the prior rule giving the minor an election of remedies.[5] Thus, minors will be treated as any other employee, which may or may not be of financial advantage to them. For example, the minor employee in *Davis v. United States Fidelity & Guaranty*

*Office of the General Counsel, National Labor Relations Board, Washington, D.C. The views expressed are those of the author and do not necessarily represent those of any Department or agency of the United States Government.

1. TENN. CODE ANN. § 50-701 (1956).
2. TENN. CODE ANN. § 50-1007(c) (Supp. 1961).
3. TENN. CODE ANN. § 50-902(b) (Supp. 1961).
4. TENN. CODE ANN. § 50-908 (Supp. 1961).
5. Davis v. United States Fid. & Guar. Co., 337 S.W.2d 240 (Tenn. 1960); American Sur. Co. v. City of Clarksville, 204 Tenn. 67, 315 S.W.2d 509 (1958).

Co.[6] had previously collected $15,000 in an action for the loss of 75% of his left hand. The instant case was for workmen's compensation for the same injury, which the Tennessee Supreme Court quite properly denied. However, because of the amendment, a similar case should not arise in the future.

I. Persons Entitled to Workmen's Compensation Protection

In general, only an employee of a covered employer, or the employee's dependents, are entitled to claim workmen's compensation benefits. Two cases turned on the application of this principle during the survey year.

In *Clendening v. London Assurance Co.*,[7] the plaintiff was an employee of a subcontractor engaged in the construction of a house. He brought an action for workmen's compensation against the builder of the house, who with his wife held legal title to the land on which the house was being built, but who had contracted with a married couple to build a house on the lot and convey it to them. The Tennessee Supreme Court reversed the court below and held that the defendant was a principal contractor within the meaning of the compensation statute[8] and therefore liable for the employee's work-connected injury at the construction site. The court refused to regard the builder as the "owner" of the lot; otherwise, he presumably would not have been liable to a subcontractor's employee for injuries suffered while working on the house. To fail to find that the builder was not a "principal contractor" under the statute and liable for injuries to the subcontractor's employees would, in the court's words, "enable principal contractors to evade the Act and defeat its purpose, simply by taking title in themselves pending performance of their contracts. Such evasion will not be permitted."[9]

Although, in denying the petition to rehear in the *Clendening* case, the court admitted that its statement of the facts in its initial opinion had not been completely accurate, it would be difficult to improve on Justice Burnett's first sentence in *Shelley v. Central Woodwork, Inc.*:[10] "The sole question for determination in this case is whether

6. 337 S.W.2d 240 (Tenn. 1960).
7. 336 S.W.2d 535 (Tenn. 1960).
8. "A principal, or intermediate contractor, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of his subcontractors and engaged upon the subject-matter of the contract to the same extent as the immediate employer. . . . This section shall apply only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or which are otherwise nnder his control or management." Tenn. Code Ann. § 50-915 (1956).
9. 336 S.W.2d at 538.
10. 340 S.W.2d 896 (Tenn. 1960).

or not a posthumous illegitimate child is a dependent under the Tennessee Workmen's Compensation Law?"[11] The court recognized that:

> The answer to the question here presented demands that we take one further step than that taken in Winfield v. Cargill, Inc., 196 Tenn. 133, 264 S.W.2d 584. In this case we held for excellent reasons therein set forth that the posthumous child of an employee's void marriage was entitled to share in Workmen's Compensation death benefits.[12]

The court then proceeded to take that next step and reversed the lower court's denial of compensation to the infant. It found that Tennessee's Bastardy Act[13] made an illegitimate child a dependent of its father as a matter of public policy. Therefore, a posthumous illegitimate child would be a dependent and entitled to workmen's compensation benefits for the death of his father, a conclusion with which there can be little quarrel in view of the earlier *Winfield* decision.[14]

II. INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

To be eligible to recover workmen's compensation, a covered employee must suffer an injury by accident "arising out of" and "in the course of" employment. "Arising out of" is an expression of the causal connection which must exist between the employment (including its nature, conditions, obligations, and incidents) and the injury; that is, the injury must be rationally connected with the work by something more than mere coincidence. "In the course of" is a phrase which requires consideration of whether or not an injury is reasonably incident to the employment in terms of the time, place, and conduct of the employee when the accident takes place. The two expressions, however, constitute but a single, rather than a dual, test.[15]

Jakes v. Union Carbide Nuclear Co.[16] was a widow's action for compensation for the death of her husband from a heart attack. He apparently had suffered an attack before he went to the plant and did not engage in any of his regular duties after he arrived. He died shortly after arriving, and the denial of compensation seems fully

11. *Ibid.*
12. 340 S.W.2d at 897.
13. TENN. CODE ANN. § 36-223 (Supp. 1961).
14. Sanders & Bowman, *Labor Law and Workmen's Compensation—1954 Tennessee Survey*, 7 VAND. L. REV. 861, 876 (1954).
15. See Comment, *Arising Out of and in the Course of Employment in Workmen's Compensation*, 28 TENN. L. REV. 367 (1961), for a general review of the application of the test in Tennessee.
16. 334 S.W.2d 720 (Tenn. 1960).

in accord with the facts as presented by the court as well as with the general rule since there was no evidence to connect his death with his employment.[17]

However, in *Aetna Casualty & Surety Co. v. Johnson*,[18] the United States Court of Appeals for the Sixth Circuit affirmed a compensation award under the Tennessee statute in a case involving an employee who also had apparently suffered a heart attack before going to work. Since he had performed his regular employment duties, and there was medical evidence that that could have contributed to his death, the necessary connection between the work and the fatality was thereby provided.

The Tennessee Supreme Court also affirmed a compensation award for the death of an employee in *Fennell v. Maryland Casualty Co.*[19] There the employee had injured his back at work on July 25, 1957; he had recovered from an operation on it but continued to suffer pain, for which he took about 7.5 ounces of whisky per day for relief. He also began to suffer from malnutrition and died on April 23, 1959, from a form of hepatitis. The court reasoned that

> where this injured man suffered this long, continued and excruciating pain, found that neither the operation did him any good nor did the drugs that he and his wife thought were given at least partly for pain relief, gave him such relief and that whisky, a well known home remedy throughout the ages, did give him the best relief, that he did not know that it was dangerous to his life to take either the drugs or the whisky when he was suffering from malnutrition and that the scientific undisputed evidence is that these items are dangerous and fatally so only when the body is in rundown condition which causes the liver cells to atrophy, then it seems that there is reasonable causal connection between the original injury and the final occurrence of death.[20]

But, in *Gridley v. Liberty Mutual Insurance Co.*,[21] the court affirmed a denial of compensation to a widow whose deceased husband had driven from his place of business to a railroad crossing, left his car at the crossing, and run to the railroad tracks and "disappeared" under the wheels of a train, which killed him. In reaching its decision, the court seemed to rely primarily on the view that the decedent did not meet death in the course of his employment. It may also have felt that there was no accidental injury since the employee was found to have deliberately placed his body under the train. On the subject of compensation in suicide cases, Professor Larson has said:

> Suicide under the majority rule is not compensable unless there has

17. 1 LARSON, WORKMEN'S COMPENSATION LAW 38.00 (1952).
18. 278 F.2d 200 (6th Cir. 1960).
19. 344 S.W.2d 352 (Tenn. 1961).
20. 344 S.W.2d at 355.
21. 344 S.W.2d 356 (Tenn. 1961).

> followed as the direct result of a work-connected injury an insanity of such violence as to cause the victim to take his own life through an uncontrollable impulse or in a delirium of frenzy without conscious volition to produce death, i.e., without knowledge of the physical consequences of the act. The minority rule is that if the injury produces insanity, and the insanity produces suicide, the suicide is compensable.[22]

III. EXTENT OF INJURY

In *United States Fidelity & Guaranty Co. v. Townsend*,[23] the court affirmed an award of 75% disability to the body as a whole to a nurse's aide who suffered a leg injury. The injury had spread to other parts of the body and therefore was compensable on the basis of an injury to the body as a whole rather than being restricted to the leg alone.

The court followed its earlier decision in *Diamond Coal Co. v. Jackson*[24] when it affirmed a compensation award in *H. K. Ferguson Co. v. Kirk*[25] for impairment of an employee's hearing. One ear had been injured in an industrial accident which had caused a permanent partial loss of hearing, and the compensation award, according to the court, was properly based on the extent of the loss of hearing as a result of the second injury rather than the damage to the ear, since the schedule[26] in the Workmen's Compensation Law provides compensation for a loss of hearing rather than for injury to one ear or to both.

IV. EXTENT OF REVIEW

In perhaps the court's most dramatic reiteration of its rule that it will not disturb a trial court's findings of fact in compensation cases if they are supported by any material evidence, the court affirmed an award because such evidence was in the record.[27] The court said: "We think the medical testimony brought out at the trial showed that the plaintiff sustained an injury to his left eye, and that the degree of disability ranged from fifty to sixty per cent. The trial court fixed the disability to the eye of plaintiff at twenty per cent."[28]

V. LIABILITY OF SUCCESSIVE EMPLOYERS AND INSURORS

The court held, in *Tennessee Tufting Co. v. Potter*,[29] that the in-

22. 1 LARSON, *op. cit. supra* note 17, at 36.00.
23. 335 S.W.2d 830 (Tenn. 1960).
24. 156 Tenn. 179, 299 S.W. 802 (1927).
25. 343 S.W.2d 900 (Tenn. 1960).
26. TENN. CODE ANN. § 50-1007(c) (1956).
27. Maryland Cas. Co. v. Harvey, 338 S.W.2d 569 (Tenn. 1960).
28. *Ibid.*
29. 336 S.W.2d 539 (Tenn. 1960).

surance company carrying an employer's workmen's compensation policy at the time an employee is last injuriously exposed to the hazards of an occupational disease before becoming disabled is solely liable for compensation without any right to contribution from the carrier who had the policy when the disease was contracted. However, in *J. E. Greene Co. v. Bennett*,[30] the court held that successive employers were jointly and severally liable for an employee's damaged vision in one eye since the trial court had found that his permanent partial disability in that eye was the result of two injuries, or a combination of the two, which he sustained while employed by each of the two employers and it would be impossible to allocate any particular part of the damage to either employer.

VI. Computing the Award

In *Paristyle Beauty Salon, Inc. v. Chandler*,[31] the court held that where an employer denies compensation liability he may be required to pay for medical expenses incurred by the employee more than one year from the notice of injury.[32] However, the court also held that the award could not include a sum for an operation which had not yet been performed, though it allowed the employee one year from the date of the judgment to undergo the operation and claim compensation for its cost.

The employee in *American Casualty Insurance Co. v. White*[33] had previously received a compensation award for a 25% disability to the body as a whole. Then she received a second injury which further reduced her ability to do her work by another 25%. The court held that in such circumstances the lower court had properly refused to take the prior award into consideration in computing the compensation due in the instant case, though the trial court had erred in including in the compensable medical expenses one doctor's bill for $100 for testifying as an expert witness at the trial of the case. And in *Manley v. Municipality of Jefferson City*,[34] the court held that an insurance carrier satisfied its duty to furnish medical care by offering an injured employee treatment by a physician, which he accepted. Because of this, the carrier was not held liable for the cost of the

30. 341 S.W.2d 751 (Tenn. 1960).
31. 341 S.W.2d 731 (Tenn. 1960).
32. The employee was found to have suffered a hernia. The statute requires that a hernia appear suddenly and be accompanied by pain. The employee testified that he felt a hot sting at the time, and the court said: "This court thinks that a stinging sensation comes within the definition of pain. Any one who has been stung by a wasp or hornet will probably be in full agreement." 341 S.W.2d at 732.
33. 339 S.W.2d 15 (Tenn. 1960).
34. 343 S.W.2d 358 (Tenn. 1960).

treatments the employee received from a chiropractor to whom he had gone for treatment on his own volition.

VII. EMPLOYEE'S DUTY TO ACCEPT MEDICAL TREATMENT

Tatum v. Palmer[35] involved an employee who had sustained a compensable injury to her back but who refused to submit to a myelogram examination to determine more definitely whether she had ruptured a disc in her back. Some discomfort is involved in such an examination and the court concluded that her refusal to submit to it was not so unreasonable as to justify suspending compensation payments, particularly since she would, as she justifiably could, refuse to submit to an operation for a ruptured disc even if the myelogram definitely disclosed one. The case seems an entirely consistent extension of the rationale in *Edwards v. Travelers Insurance Co.*,[36] on which the court relied.

VIII. EFFECT OF PRIOR JUDICIALLY APPROVED SETTLEMENT AGREEMENT ON INJURY NOT SPECIFICALLY INCLUDED IN THE SETTLEMENT

An employee injured in September, 1957, received a judicially approved settlement for the accident late in 1958. In the instant case, he alleged total disability from silicosis, which was admittedly probably present at the time of the 1957 injury and the 1958 settlement but was not diagnosed until early in 1959 and was not specifically mentioned in the settlement agreement or in the judgment approving it. The court held that the settlement was not a bar to the instant suit and remanded the case for trial.[37]

35. 340 S.W.2d 914 (Tenn. 1960).
36. 202 Tenn. 364, 304 S.W.2d 489 (1957).
37. Layne v. Tennessee Consol. Coal Co., 337 S.W.2d 237 (Tenn. 1960).