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harm to trespassing children whose presence on the premises can be reasonably foreseen. It is applicable only to children of tender years who are unable to appreciate the risks involved. It is further limited by considerations of social policy which require that the utility of the business and the expense of making it safe be balanced against the probable risks to children. The Florida court is firmly committed to the doctrine, although it has not discussed the latter limitation.

JOHN S. VAN DE MOTTER

LEGISLATIVE NOTES

WORKMEN'S COMPENSATION: COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE

Florida Laws 1947, c. 23822, §1, Fla. Stat. Ann. §440.39

The Florida Workmen's Compensation Law¹ became effective July 1, 1935. It was intended to provide for workmen injured in the course of their employment, or for their dependents in case of death, so that the economic loss would not fall on the individual nor directly on society but on the industry served.² The section of this chapter applicable to cases where the injury was caused by the wrong or negligence of a person other than the employer³ has been amended by the 1947 Legislature.⁴ The prin-

the risk involved in intermeddling in it or coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

¹FLA. STAT. 1941, c. 440.

²Wheeler Co. v. Pullins, 152 Fla. 96, 11 So.2d 303 (1942); Duff Hotel Co. v. Ficara, 150 Fla. 442, 7 So.2d 790 (1942).

³FLA. STAT. 1941, §440.39. *Constitutionality upheld over various objections: State ex rel. Jacksonville Gas Co. v. Lewis*, 125 Fla. 816, 170 So. 306 (1936). *Cf. Longshoreman's and Harbor Workers' Compensation Act*, 44 STAT. 1440, as amended, 52 STAT. 1168, 60 STAT. 1095, 33 U. S. C. 933.

⁴FLA. STAT. 1941, §440.39, as amended by Florida Laws 1947, c. 23822, §1.

cial changes concern the employee's election to take compensation from the employer or proceed against the tort-feasor, the subrogation of the employer, and the disposition of the proceeds of the employer's suit against the tort-feasor. A time limit within which the employer must bring an action against the third person or lose his right of subrogation was added.

I. ELECTION

The original statute⁵ provided that, in case of disability or death for which compensation was payable, if the person entitled to the compensation determined that some person other than the employer⁶ was liable in damages, he should elect, by giving notice within 30 days to the employer and the Florida Industrial Commission⁷ to accept compensation or to seek damages against such third person. The term "elect" was held not to be an election between two inconsistent remedies, and an employee who had accepted a settlement from a third party was held not to be precluded from receiving compensation.⁸ The court added, *obiter*, that the employer could still recover damages from the tort-feasor.⁹ This was evidently regarded as important; compensation was denied in a later case¹⁰ similar in circumstances except that the Georgia statute of limitations had barred the employer's action against the tort-feasor. In neither of the above cases was notice given, but where notice to pursue the remedy against the third person was given, although purporting expressly to reserve claimant's right to compensation, claimant was not allowed compensation.¹¹

The act, as amended by the 1947 Legislature, provides that, if the employee is injured or killed by the wrong or negligence of a person other than the employer, the employee or his dependents shall elect to accept compensation or pursue his or their remedy against such third person.¹² No notice is required and no time limit is set, though compen-

⁵FLA. STAT. 1941, §440.39(1).

⁶A subcontractor is not "some person other than the employer." *Younger v. Gillen Contracting Co.*, 143 Fla. 335, 196 So. 690 (1940).

⁷The Industrial Commission, FLA. STAT. 1941, §440.44, as amended by Florida Laws 1947, c. 23920, §1.

⁸*Sweat v. Allen*, 145 Fla. 733, 200 So. 348 (1941).

⁹*Id.* at 741, 200 So. at 352 (1941).

¹⁰*Lovejoy v. Ackis*, 153 Fla. 876, 16 So.2d 297 (1944).

¹¹*Cullinane v. Crown Can Co.*, 156 Fla. 655, 24 So.2d 5 (1945).

¹²FLA. STAT. 1941, §440.39(1), as amended by Florida Laws 1947, c. 23822, §1(1).

sation must in all cases be applied for within two years.¹³ The Statute of Limitations¹⁴ would apply, of course, to an action against the tort-feasor.

The new enactment further provides that settlement of a claim or commencement or settlement of an action against the third person shall constitute an election and preclude the receipt of compensation.¹⁵ This should resolve the doubt which existed formerly.¹⁶ Most jurisdictions require an election of this type.¹⁷ Though the details of other statutes vary, with consequent variations in the holdings, the majority of the more recent cases hold that an election to proceed against a third person bars the claim to compensation.¹⁸ If the person entitled to the compensation is a minor, the Commission shall make the election or shall authorize the parent or guardian of such minor to do so.¹⁹ This provision was the same in the statute before amendment.²⁰

II. SUBROGATION

The statute before amendment provided that the notice to accept compensation operated as an assignment to the employer of all rights of the person entitled to compensation against the third person.²¹ This notice of election was necessary to assign the right of action to the employer, for without such notice the employer could not bring action against the tort-feasor,²² although the employee was allowed to sue the third

¹³FLA. STAT. 1941, §440.19(1) (Supp. 1945).

¹⁴FLA. STAT. 1941, §95.11 (Supp. 1945).

¹⁵FLA. STAT. 1941, §440.39(2), as amended by Florida Laws 1947, c. 23822, §1(2).

¹⁶Cases cited *supra* notes 7, 8.

¹⁷3 SCHNEIDER, WORKMEN'S COMPENSATION TEXT §834.

¹⁸*Bebout v. F. L. Mendez Co.*, 110 Ind. App. 28, 37 N. E.2d 690 (1941); *Nichols v. Ford Motor Co.*, 305 Mich. 268, 10 N.W.2d 852 (1943); *White v. Highway Comm'n*, 42 N. M. 626, 83 P.2d 457 (1938); *De Sharzer v. National Biscuit Co.*, 196 Okla. 458, 165 P.2d 816 (1946); *Taylor v. Mt. Vernon-Woodbury Mills*, 45 S. E.2d 809 (S. C. 1947); *Hart v. Traders General Ins. Co.*, 144 Tex. 146, 189 S. W.2d 493 (1945); *Stone v. Geo. W. Helme Co.*, 184 Va. 1051, 37 S. E.2d 70 (1946). *Contra*: *Clifford v. Eacrett*, 163 Kan. 471, 183 P.2d 861 (1947).

¹⁹FLA. STAT. 1941, §440.39(5), as amended by Florida Laws 1947, c. 23822, §1(5).

²⁰FLA. STAT. 1941, §440.39(5).

²¹FLA. STAT. 1941, §440.39(2).

²²*Weathers v. Cauthen*, 152 Fla. 420, 12 So.2d 294 (1943).

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person whether or not the notice was given.²³

The former statute also provided that the employer after such an assignment might institute proceedings or compromise with the third person, but the compromise had to be approved by the circuit judge of the circuit in which the damages had accrued, and five days' notice to the employee or his dependents was required.²⁴

Under the amended statute, if the employee or his dependents accept or begin proceedings for compensation, the employer shall be subrogated to the employee's or his dependents' rights against the third person, and the employer may bring suit in his own name or in the name of the employee or his dependents, or, in the absence of such consent, by order of the court having jurisdiction of the trial, upon five days' notice to the employee or his dependents.²⁵

The original act also provided that when the employer was insured the insurer should be subrogated to the rights and remedies of the employer.²⁶ This provision is unchanged in the new statute.²⁷

III. PROCEEDS

If the employer, or the insurer after subrogation, brought suit against the third party and was successful, the proceeds of the suit were distributed under the original statute in the following manner: The employer or insurer retained an amount equal to the expenses incurred by reason of the proceedings or compromise, including a reasonable attorney's fee as determined by the Commission,²⁸ the cost of all benefits actually furnished to the employee,²⁹ and all compensation paid or payable. The remainder went to the employee or his dependents.³⁰

The amendment contains two changes relative to proceeds: the employer may no longer retain his expenses but may retain actual court

²³Hartquist v. Tamiami Trail Tours, 139 Fla. 328, 190 So. 533 (1939).

²⁴FLA. STAT. 1941, §440.39(3).

²⁵FLA. STAT. 1941, §440.39(5), as amended by Florida Laws 1947, c. 23822, §1(5).

²⁶FLA. STAT. 1941, §440.39(3), as amended by Florida Laws 1947, c. 23822, §1(3).

²⁷FLA. STAT. 1941, §440.39(5).

²⁸An attorney's fee of one-third of the proceeds is not unreasonable, but the Commission should not award an attorney's fee greater than that agreed upon. Bituminous Casualty Corp. v. Williams, 154 Fla. 191, 117 So.2d 98 (1944).

²⁹The cost of benefits here includes funeral expenses paid by the employer. Bituminous Casualty Corp. v. Williams, 154 Fla. 191, 17 So.2d 98 (1944).

³⁰FLA. STAT. 1941, §440.39(4).

costs and attorney's fees; he may also retain the costs of benefits to be paid, as well as those already paid.³¹

IV. TIME LIMIT

Under an entirely new provision, if the employer or insurer does not bring action against the third person within one year after the action accrues, or if he sooner waives the right to sue, the employee may then bring an action against the tort-feasor and retain all he recovers, regardless of the recovery of compensation, provided that the employer or insurer has had at least six months in which to sue after he became subrogated.³² Though there is at least one other jurisdiction with a similar statute,³³ there have been no cases construing such a provision. There are other statutes allowing the employee to sue if the employer does not, but the employer is still entitled to reimbursement for the compensation.³⁴ The Florida statute is more equitable, as it gives the employer or insurer the opportunity for reimbursement, and if he does not take it he has no complaint.

V. CONCLUSION

The amendments to this statute make it highly advantageous for the injured employee or, in case of death, for his dependents to apply for compensation. If compensation is accepted, the employee or his dependents will receive at least the amount of the award.³⁵ In addition to the award, he receives any excess over the amount of compensation, plus actual expenses, which the employer, or the insurer after subrogation, may recover in a suit against the tort-feasor;³⁶ or, if the employer or insurer fails to bring an action against the negligent third party within the statutory period of one year, the employee, or his dependents, may sue for

³¹FLA. STAT. 1941, §440.39(4), as amended by Florida Laws 1947, c. 23822, §1(4).

³²FLA. STAT. 1941, §440.39(6), as amended by Florida Laws 1947, c. 23822, §1(6).

³³S. C. CODE §7035-12 (1942).

³⁴Baguel v. Springfield Sand & Tile Co., 64 F. Supp. 768 (D. C. Mass. 1946); Stark v. Gripp, 150 Md. 655, 133 Atl. 338 (1926); Theby v. Wisconsin Power & Light Co., 197 Wisc. 601, 222 N. W. 826 (1929), *modified*, 223 N. W. 791 (1929).

³⁵FLA. STAT. 1941, §440.39, as amended by Florida Laws 1947, c. 23822, §1.

³⁶Haverty Furniture Co. v. McKesson & Robbins, 154 Fla. 772, 19 So.2d 59 (1944).