Vanderbilt Law Review

Volume 6
Issue 5 *Issue 5 - August 1953*

Article 5

8-1953

Workmen's Compensation

John M. Cate

WORKMEN'S COMPENSATION

JOHN M. CATE*

A review of the past year in Workmen's Compensation in Tennessee must of necessity take into account any legislative change in the Compensation Act itself[1] as well as trends disclosed through the decisions of the courts. The modern development and growth of this new theory, that of liability without fault, make pertinent the inquiry. Although a development of one generation, the theory of Workmen's Compensation is now almost universal in application. Under it, industry bears its fair share of the cost of injuries to workers, without any reference to fault or blame or negligence, where there is a reasonably apparent relationship of the injury to the job. Its adoption was a revolt from the disastrous results to the injured worker in an overwhelming majority of industrial accident cases of a strict application of the common law rules of contributory negligence, fellow servant's negligence and assumption of risk.

Faced with more than a century of judicial precedent that one person's liability to another was based on fault or negligence, the courts at first tended to a strict construction of such enactments; but the modern trend is to construe the compensation acts liberally to protect the worker and his dependents. Tennessee courts long ago joined with the majority of courts of other jurisdictions in adopting this rule of liberal construction to effectuate the humane objects of such enactments, resolving in favor of the injured employee any reasonable doubt as to whether the injury to such employee arose out of or in the course of his employment. This approach is evident in several of the recent decisions of the Supreme Court hereinafter referred to.

LEGISLATION

Before entering upon a review of Supreme Court cases involving a construction of the Compensation Act, mention should be made of Chapter 111, Public Acts of Tennessee for 1953, whereby the legislature amended the Compensation Act by raising substantially the limits for benefits of injury or death of an employee covered by the Act. Thus, it is provided that the employer's total liability for medical and surgical treatments, hospitalization and the like is raised to $1,500.00 from $800.00;[2] burial expenses to $350.00 from $250.00;[3] maximum weekly

* Lecturer in Law, Vanderbilt University; member, Cate & Cate, Nashville, Tennessee.

1. Tenn. Acts 1919, c. 123, as amended, TENN. CODE ANN. §§ 6851-6901 (Williams 1934, Supp. 1952).
2. Tenn. Pub. Acts 1953, c. 111, § 1.
3. *Ibid.*

compensation to $28.00 from $25.00, with a minimum of $12.00 instead of $10.00 per week,[4] provided that, if the employee's average weekly wages are less than $12.00, he shall receive the full amount of his average weekly wages but in no event less than $10.00, formerly $8.00 per week;[5] and permanent total disability or death benefits to a maximum of $8,500.00 from $7,500.00.[6]

By thus substantially increasing the benefits recoverable by injured employees and dependents of deceased employees, the legislature no doubt took cognizance of current economic conditions resulting in greatly increased costs of living, which, under the theory of the compensation acts, should be passed on to the industry or employment in which the employee is injured or killed.

Judicial Decisions

It would seem that in the 34 years since the effective date of the Tennessee Workmen's Compensation Act[7] every question which might conceivably arise thereunder would have been passed upon by the courts. However, new questions of construction and application arise continually; among those issues decided by the Supreme Court during the past year were two questions of new impression.[8]

Included in the cases before the Court in the period covered by this Survey are a number involving interesting questions, such as the primary responsibility of the compensation insurer for benefits to persons entitled thereto;[9] the right of a wife to recover from her husband's employer at common law for the loss of her husband's consortium as a result of injuries suffered by him in the course of his employment;[10] traumatic or post-traumatic neurosis as being compensable;[11] casual employment;[12] the sufficiency of pleadings in the compensation suit;[13] the notice requirements of the Act;[14] what constitutes injury "arising out of" employment;[15] the liability of a principal contractor for injury to an employee of a subcontractor or independent contractor;[16] the statute of limitations as applied to compensable occupational diseases;[17] speculation and conjecture as to whether or not an injury to or death

4. *Id.* § 2.
5. *Ibid.*
6. *Ibid.*
7. July 1, 1919.
8. Wood v. Dean, 254 S.W.2d 751 (Tenn. 1953); Napier v. Martin, 250 S.W.2d 35 (Tenn. 1952).
9. Douglas v. Sharp, 249 S.W.2d 999 (Tenn. 1952).
10. Napier v. Martin, 250 S.W.2d 35 (Tenn. 1952).
11. Buck & Simmons Auto & Elec. Supply Co. v. Kesterson, 250 S.W.2d 39 (Tenn. 1952).
12. Harper v. Grady Counce & Son, 250 S.W.2d 371 (Tenn. 1952).
13. Ledford v. Miller Bros. Co., 253 S.W.2d 552 (Tenn. 1952).
14. Edwards v. Harvey, 253 S.W.2d 766 (Tenn. 1952).
15. Jim Reed Chevrolet Co. v. Watson, 254 S.W.2d 733 (Tenn. 1953).
16. Wood v. Dean, 254 S.W.2d 751 (Tenn. 1953).
17. Holeproof Hosiery Co. v. Wilkins, 254 S.W.2d 973 (Tenn. 1953).

of an employee is one "arising out of" and "in the course" of his employment, and burden of proof in compensation cases;[18] aggravation of pre-existing injury or disease as being compensable;[19] and the reopening of a court-approved settlement agreement on petition of an employee for assessment of additional benefits.[20]

Primary Responsibility of Insurer. The case of *Douglas v. Sharp*[21] was one wherein the lower court awarded compensation to the dependents of a deceased worker and the employer and insurer appealed and assigned error. The Supreme Court held that a sublease by a partnership of its mining property to another was a mere management contract and that the deceased worker continued to be an employee of the partnership; the latter's insurer, which made no change in the policy after notice of the sublease and continued to take into consideration the deceased employee's wages in computing the premiums paid to it on the policy, was liable for compensation benefits as provided by the Act.

It is clear in this State, said the Court, that an employee's action under the Workmen's Compensation Act may be against the employer and the insurer jointly, citing *American Mut. Liability Ins. Co. v. Patrick.*[22] The contract which the insurance company makes in such cases is not one of guaranty but is one which creates a primary responsibility and possesses characteristics and incidents which cause its construction to be with special reference to the subject of the contract.[23] The Court referred to Code section 6899,[24] which among other things directs that the insurance company promptly pay benefits to the persons entitled thereto and provides that "this obligation shall not be affected by any default of the insured for the injury or by any default in the giving of any notice required by such policy or otherwise." Therefore, the Court held the insurer is directly responsible to the person entitled to compensation.

Exclusiveness of Remedy. The question of the exclusiveness of the compensation remedy was before the Court in the case of *Napier v. Martin.*[25] Mrs. Napier sued Martin and others to recover damages at common law for loss of the service and consortium of her husband due to injuries suffered by him while in the employ of the defendants, who were paying him benefits under the Workmen's Compensation Act.

18. Cunningham v. Hembree, 257 S.W.2d 12 (Tenn. 1953).
19. Howell v. Charles H. Bacon Co., 98 F. Supp. 567 (E.D. Tenn. 1951), *aff'd*, 197 F.2d 333 (6th Cir. 1952).
20. Wright v. Gerst Brewing Co., opinion by Prewitt, J., filed April 25, 1953.
21. 249 S.W.2d 999 (Tenn. 1952).
22. 157 Tenn. 618, 11 S.W.2d 872 (1928).
23. United States Fidelity and Guaranty Co. v. Booth, 164 Tenn. 41, 45 S.W.2d 1075 (1932).
24. TENN. CODE ANN. § 6899 (Williams 1934).
25. 250 S.W.2d 35 (Tenn. 1952). See the discussion of this case in the section on Actions for Loss of Consortium in the Domestic Relations Article.

To review a judgment of the circuit court sustaining a demurrer to the complaint and dismissing the suit, plaintiff brought error. The Supreme Court held that the exclusive right to recover compensation for such injuries was under the Compensation Act. Hence, plaintiff could not maintain the common law action.

Conceding that the question presented was one of first impression in the State, the Court held that no such right of action exists in Tennessee under the common law or by statute, citing *Hull v. Hull Bros. Lumber Co.*[26] The plaintiff insisted that, since the passage of Chapter 126, Acts of 1919, commonly known as the Married Woman's Emancipation Act, she was entitled to maintain her suit in the same manner as a husband is entitled to maintain a suit for loss of services where his wife is the injured party. In rejecting this argument, the Court pointed out that the Workmen's Compensation Act contains express provisions for the wife, children and other dependents of an employee who dies as a result of injury received in a compensable accident, thereby clearly evidencing a legislative intent to bring the entire family group of which the employee is the head within the purposes and coverage of the Workmen's Compensation Act. Therefore, the wife could not maintain the action for common law negligence, and the lower court was correct in dismissing her suit.[27]

Traumatic or Post-traumatic Neurosis as Compensable. In the case of *Buck & Simmons Auto & Elec. Supply Co. v. Kesterson,*[28] on appeal from a judgment in favor of the plaintiff, the Supreme Court held that traumatic or post-traumatic neurosis caused by an accident is an injury within the Compensation Act and, therefore, compensable.

The Court pointed out that Code section 6852(d), as it appeared before the Amendments of 1947, provided that " ' "[i]njury" and "personal injury" shall mean *only* injury . . . and shall not include a disease in any form except as it shall naturally result from the injury.' " The Amendment of 1947 provided: " ' "Injury" and "personal injury" shall mean *any* injury . . . and shall include certain occupational diseases. . . .' " (emphasis by Court)[29] The claimant contended that by this change in the Act a neurosis of the kind found to result from the injury in this case is excluded because not specified in the amendment enumerating occupational diseases covered. Rejecting this argument, the Court said that the amendment, by inserting the word "any" in the place of the world "only," broadened the coverage of the Act so as to include the specified occupational diseases in addition to diseases resulting from injuries arising out of and in the course of employment rather than limiting compensable diseases to those specified. This hold-

26. 186 Tenn. 53, 208 S.W.2d 338 (1948).
27. For an interesting discussion of this case, see 22 TENN. L. REV. 976 (1953).
28. 250 S.W.2d 39 (Tenn. 1952).
29. *Id.* at 40.

ing is in line with a long line of cases wherein the Court has followed the principle that a disease connected with the injury is compensable.[30]

The Court expressly adopted the rule laid down in certain Indiana cases[31] that "[t]he fact that appellee was suffering from a mental or nervous condition resulting from a physical injury, rather than from the physical injury itself, cannot have the effect of relieving appellant from liability. This Court is committed to the doctrine that a 'personal injury,' as that term is used in the Workmen's Compensation Act, has reference not merely to some break in some part of the body, or some wound thereon or the like, but also to the consequence of disability that results therefrom."[32] Applying the rule to the instant case, the Court said that the disease met the requirements of the Tennessee Act, which must be construed liberally.

Casual Employment. What constitutes casual employment was the question before the Court in the case of *Harper v. Grady Counce & Son.*[33] This was a proceeding by Richard Harper against the partnership of Grady Counce & Son, operator of an automobile garage, for injuries sustained while plaintiff was employed as a plumber at a stipulated price per hour to install a water pipe in the garage. From a dismissal of his suit, plaintiff appealed. The Supreme Court affirmed the action of the lower court, holding that plaintiff was a casual employee and that, therefore, defendant was not liable.

The Court found that the plumbing business was not part of the business of the defendant or even incidental thereto. Therefore, the hiring of plaintiff as a plumber to install the water pipe at the place of business of the defendant made him a casual employee only.[34] It was insisted that, because the insurance carrier paid compensation insurance to the plaintiff for many weeks, the defendent was estopped to deny liability. Disposing of this contention, the Court said that no estoppel arose or could arise under the facts of the case, for the plaintiff was not injured or prejudiced by the payments made to him by the insurance company.

Pleading. Declaring that strict rules of pleading have no place in compensation cases, the Court held in *Ledford v. Miller Bros. Co.*[35] that the lower court imposed too technical and strict a requirement as to

30. Sears-Roebuck Co. v. Finney, 169 Tenn. 547, 89 S.W.2d 749 (1936); King v. Buckeye Cotton Oil Co., 155 Tenn. 491, 296 S.W. 3, 53 A.L.R. 1086 (1927); Vester Gas Range & Mfg. Co. v. Leonard, 148 Tenn. 665, 257 S.W. 395 (1923).

31. Burton-Shields Co. v. Steele, 119 Ind. App. 216, 83 N.E.2d 623, 85 N.E.2d 263 (1949); Kingan & Co. v. Ossam, 75 Ind. App. 548, 121 N.E. 289 (1918).

32. 250 S.W.2d at 41.

33. 250 S.W.2d 371 (Tenn. 1952).

34. TENN. CODE ANN. § 6856(b) (Williams Supp. 1952); Dancy v. Abraham Bros. Pkg. Co., 171 Tenn. 311, 102 S.W.2d 526 (1937); Gibbons v. Roller Estates, Inc., 163 Tenn. 373, 43 S.W.2d 198 (1931); Murphy v. Gaylord, 160 Tenn. 660, 28 S.W.2d 348 (1930).

35. 253 S.W.2d 552 (Tenn. 1952).

the pleadings in excluding the testimony of petitioner's expert medical witness. The circuit court had rendered judgment awarding compensation for a limited period, and petitioner appealed. The Supreme Court held that the exclusion of expert medical testimony tending to show that the fall sustained by petitioner would aggravate a pre-existing diseased condition of her leg was error prejudicial to petitioner.

This case is of particular interest because of its full discussion of the question of pleadings in workmen's compensation cases. Observing that the provisions of the Act[36] are rather meager as to the pleadings required, the Court said that its consistent policy has been to get away from technical proceedings in such cases and to view the matter liberally from the standpoint of the employee. Nevertheless, said the Court, "it is a fact that the pleadings must be sufficient to advise the employer of the nature of the claim so that he can be prepared to meet it."[37]

Notice to Employer. The notice provisions of the Compensation Act were before the Court in the case of *Edwards v. Harvey.*[38] This case was dismissed by the trial court on the ground that the plaintiff did not give the notice of his injuries required by Code section 6872.[39] Confirming its oft-repeated finding that the Workmen's Compensation Act is not to be construed strictly as in derogation of the common law, but liberally in favor of the compensation claimant and in furtherance of the sound public policy that dictated the legislation, the Supreme Court held that, where the employee reported the accident to his foreman immediately after it occurred but did not give written notice to his employer until several months later when the employee learned that his back injury was the result of his fall, the employee sufficiently complied with the requirement of notice. The case was remanded for the assessment of benefits due him.

Injury "Arising out of" Employment. In the case of *Jim Reed Chevrolet Co. v. Watson,*[40] the sole question was whether the employee's injury "arose out of" his employment. The Supreme Court held that it could be assumed that employees who remained in the plant of their employer all night would have some type of weapon with which to protect themselves and that, therefore, an injury received by the claimant, Watson, in an altercation which resulted when another employee, Hendricks, accused him of stealing Hendrick's pistol arose out of the injured employee's employment, even though the employer had

36. TENN. CODE ANN. §§ 6851 *et seq.* (Williams 1934, Supp. 1952).

37. 253 S.W.2d at 553; Phillips v. Diamond Coal Mining Co., 175 Tenn. 191, 133 S.W.2d 476 (1939).

38. 253 S.W.2d 766 (Tenn. 1952).

39. TENN. CODE ANN. § 6872 (Williams 1934).

40. 254 S.W.2d 733 (Tenn. 1953).

not instructed Hendricks to possess a pistol in connection with his employment and did not know of the pistol.

In affirming the award, the Court applied the principle "that an injury may be said to arise out of an employment when there is a 'causal connection between the conditions under which the work is required to be performed and the resulting injury' and also 'when it is something the risk of which may have been contemplated by a reasonable person when entering the employment as incidental thereto.' "[41]

Liability to Employee of Independent Contractor or Subcontractor. The liability of a principal contractor for benefits to the employee of a subcontractor or independent contractor was considered by the Court in the case of *Wood v. Dean.*[42] This was a proceeding against a partnership and its insurer. The circuit court entered judgment awarding compensation, and there was an appeal to the Supreme Court. The defendant partnership was engaged in buying, developing and selling real estate. It acquired a vacant lot, taking title in the name of one of the partners, who intended to retain the lot as his individual property. A contractor who was not subject to the Compensation Act was engaged by the partnership to grade the lot, and an employee of the contractor was injured in the unloading of the contractor's bulldozer near the lot. The Court held that the partnership was the "principal contractor" and, therefore, liable under the Compensation Act.

The question thus decided was recognized by the Court as being one of first impression in the State. Thus, said the Court:

> "We are confronted with a question that has not heretofore been before us in any compensation case, that is the liability of a partnership, dealing with a member, for injuries to one who is a servant of a subcontractor of such partnership, and possibly an independent contractor. . . .
>
> "A liberal construction of the Compensation Statute would bring the transaction within its provisions."[43]

Statute of Limitations: Occupational Disease. The case of *Holeproof Hosiery Co. v. Wilkins*[44] was a proceeding to obtain workmen's compensation benefits for an injury to the claimant's wrist arising as a consequence of an occupational disease. No question was raised as to the disease being one compensable under the 1947 amendment of the Workmen's Compensation Act,[45] the sole defense in the case being the statute of limitations provided in said amendment and carried into the Code as section 6852(d),[46] which reads in part as follows: "The right

41. *Id.* at 734. Peters v. Salant & Salant, Inc., 168 Tenn. 272, 77 S.W.2d 452 (1935); Shockley v. Morristown Produce & Ice Co., 158 Tenn. 148, 11 S.W.2d 900 (1928); Hendrix v. Franklin State Bank, 154 Tenn. 287, 290 S.W. 30 (1926).
42. 254 S.W.2d 751 (Tenn. 1953).
43. *Id.* at 753.
44. 254 S.W.2d 973 (Tenn. 1953).
45. Tenn. Pub. Acts 1947, c. 139.
46. TENN. CODE ANN. § 6852(d) (Williams Supp. 1952).

to compensation for occupational disease shall be forever barred unless suit therefor is commenced within one year after the beginning of incapacity for work resulting from an occupational disease. . . ."

The Court held that the statute is not tolled as of the date of the commencing of the disease, for that would be impossible to determine with any degree of accuracy, but is tolled at the beginning of "incapacity to work," as clearly provided in the amendment of 1947. Since it appeared that the claimant ceased work because of the disease on January 28, 1950, and was paid benefits under the Compensation Act until September 9, 1950, her suit instituted on May 2, 1951, being within one year of the date of the last payment made to her, was clearly authorized by the 1947 amendment[47] to section 6874 of the Code and was not barred by the aforesaid section 6852 (d).

Burden of Proof. Discussing the question of the burden of proof in compensation cases, the Supreme Court in the case of *Cunningham v. Hembree*[48] held that the evidence sustained a finding that the death of the deceased was due to a cerebro-vascular accident and that a sun and heat stroke was a contributing cause.

Commenting on the facts that this was another of the many border line cases which the Court is required to pass upon and that the Court is not privileged to indulge in speculation and conjecture as to whether the injury to or death of the employee is one "arising out of" and "in the course" of his employment,[49] the Court held that, where a prima facie case is made out, the burden shifts to the employer to overthrow such a prima facie case in order to defeat the claim.[50] Said the Court:

> "In a review of most of our decisions, as well as some from other jurisdictions, we find what appears to be a general belief among some members of the legal profession that in this class of cases what is meant by the petitioner having the burden of proof is that the proof on his behalf must be sufficiently strong that the determinative issues are *not a matter of speculation.* This implies that the petitioner must establish such issues to a degree of certainty. This is certainly an erroneous view since having made out a *prima facie* case 'the burden shifts to the employer to produce evidence to overthrow [such a *prima facie* case]'. Milstead v. Kaylor . . . [186 Tenn. 642, 212 S.W.2d 614]."[51]

Aggravation of Pre-Existing Injury or Disease. The case of *Howell v. Charles H. Bacon Co.*[52] was an action by Mrs. Elsie Howell against the Charles H. Bacon Company to recover death benefits under the

47. *Id.* § 6874.
48. 257 S.W.2d 12 (Tenn. 1953).
49. Milstead v. Kaylor, 186 Tenn. 642, 212 S.W.2d 610 (1948); R. W. Hartwell Motor Co. v. Hickerson, 160 Tenn. 513, 26 S.W.2d 153 (1930); Home Ice Co. v. Franzini, 161 Tenn. 395, 32 S.W.2d 1032 (1930).
50. Shockley v. Morristown Produce & Ice Co., 158 Tenn. 148, 11 S.W.2d 900 (1928).
51. 257 S.W.2d at 15.
52. 98 F. Supp. 567 (E.D. Tenn. 1951), *aff'd,* 197 F.2d 333 (6th Cir. 1952).

Workmen's Compensation Act. The United States district court, invoking the "reasonable inference rule" of Tennessee,[53] held that the medical testimony warranted the inference that constant pain, worry and nervous tension resulting from the fracture of a heel bone in a fall from a broken scaffold aggravated a pre-existing coronary sclerosis and hastened the death of the employee from coronary thrombosis some three months after the accident. Pointing out that in Tennessee it is well settled that disability resulting from an untoward event, commonly referred to as an accident, which hastens the onset of or aggravates a pre-existing disease, is compensable,[54] the court concluded that, where the stronger inference is that the deceased employee's injury and its inseparable consequences of ceaseless pain, worry and nervous tension aggravate a pre-existing coronary sclerosis and hasten his death, the case is compensable.

Reopening Court-Approved Settlement. In the case of *Wright v. Gerst Brewing Co.*,[55] the Supreme Court had before it an action instituted under the authority of section 6877.[56] Involved was an appeal in error from a circuit court action dismissing a petition by the claimant to have the court set aside a prior order approving a settlement agreement entered into by the parties and to grant him a judgment for additional benefits. Holding that, where the findings of fact by the trial judge are supported by material evidence, the Supreme Court will not disturb the judgment, the Court affirmed the action of the lower court in dismissing the petition.

CONCLUSION

Thus, a review of the workmen's compensation field in Tennessee for the past year leads to agreement that, "[a]lthough the basic theory and principles of workmen's compensation are relatively simple, their practical application involves a greater number and variety of important administrative details than any other comparable piece of legislation. The actual operation of a workmen's compensation law, so that it substantially fulfills its designed purposes and objectives, is a difficult job which calls for a high degree of talent and for alert, diligent effort."[57] The courts of Tennessee, taking their cue from the legislative mandate — the command of liberal construction — continue in the vanguard of the majority of state courts in giving a liberal construction to the Compensation Act, thus insuring that it fulfills its designed humane purposes and objectives.

53. Flatt v. Tennessee Handle Co., 190 Tenn. 190, 228 S.W.2d 110 (1950).
54. Lucey Boiler & Mfg. Corp. v. Hicks, 188 Tenn. 700, 222 S.W.2d 19 (1949); Swift & Co. v. Howard, 186 Tenn. 584, 212 S.W.2d 388 (1948).
55. Opinion by Prewitt, J., filed April 25, 1953.
56. TENN. CODE ANN. § 6877 (Williams Supp. 1952).
57. Zimmer, *Introduction* in HOROWITZ, WORKMEN'S COMPENSATION xiii (1944).