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J. Gilmer Bowman, Jr.

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Workmen's Compensation—1961 Tennessee Survey (II)

J. Gilmer Bowman, Jr.*

- I. PERSONS ENTITLED TO WORKMEN'S COMPENSATION PROTECTION
- II. INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT
 - A. *Injury by Accident*
 - B. *Arising Out of and in the Course of Employment*
- III. MEDICAL BENEFITS

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I. PERSONS ENTITLED TO WORKMEN'S COMPENSATION PROTECTION

Since the workmen's compensation statute was designed to provide benefits for an employee's work-connected injury or death, it necessarily follows that there must have been an employment relationship within the coverage of the statute and that the person or persons claiming the benefits must be within the class entitled to do so. The application of this basic premise, which on its face appears simple enough, was involved in three cases before the Tennessee Supreme Court during the survey period.

*Bowling v. Whitley*¹ was a workmen's compensation suit brought by an employee against his immediate employer, a subcontractor, as well as against the general contractor and the general contractor's foreman. The employee had been engaged at the time of his injury in work which his immediate employer had contracted to perform for the general contractor, but the subcontractor employed less than five employees and therefore was not an employer covered by the statute. The court, however, affirmed an award against the general contractor since under the statute,² in the court's words,

principal contractors are made liable for injuries sustained by employees of subcontractors arising out of and in the course of their employment, whether such subcontractors be independent contractors or otherwise, provided that, at the time of the injury, the employee was engaged upon the subject

*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. 348 S.W.2d 310 (Tenn. 1961).

2. TENN. CODE ANN. § 50-915 (Supp. 1961).

matter of the general contract, and the injury occurs on, in or about the premises under the control and management of the principal contractor.³

On the other hand, the suit was dismissed as to the general contractor's foreman since he, like the immediate employer, was not an employer within the meaning of the statute.

The second case to be considered, *Smart v. Embry*,⁴ also involved the question of the liability of a general contractor and a subcontractor to an individual injured while performing work that both contractors were obligated to complete. The defendant general contractor was engaged in the business of constructing houses in accordance with plans and specifications provided by the owner. It furnished all the necessary material but subcontracted all the actual work of building the houses. In the instant case, the general contractor had subcontracted with the defendant subcontractor, who had in turn contracted with the plaintiff to do the "cornicing" work on some of the houses. The plaintiff was to perform the work in accordance with the plans and specifications and was paid a lump sum price for his work on each house. He supplied his own tools and employees, whom he paid such wages as he agreed upon with them, but neither defendant had the right to control the plaintiff's method of doing the work, though the general contractor inspected the work daily to see that it was performed as the plans and specifications required. The court affirmed the lower court's denial of compensation to the plaintiff on the ground that he was an independent contractor rather than an employee of either the general contractor or the subcontractor. In doing so, the court followed its usual approach to such cases by considering all the facts involved but reiterated the general rule that while no single factor in such a contractual relationship is necessarily determinative of the question of whether an individual is an employee within the meaning of the workmen's compensation statute or an independent contractor, the right to control the performance of the work is of major, and primary, consideration.⁵

In *Atkins v. Employers Mutual Insurance Co.*,⁶ the court was concerned with the question of dependency under the statute. The deceased employee, who died as the result of a work-connected injury, had been living in a common law relationship as man and wife with the mother of two

3. 348 S.W.2d at 312-13. The court also held that the filing of an amended petition on the last day of the one-year period allowed by the statute of limitations tolled the statute. The amended petition, which brought in the general contractor and his foreman as parties, was filed before an answer, demurrer, or any other pleading had been filed, and the court held that it could be filed without having to receive the trial judge's consent to its filing before it could effectively toll the statute of limitations.

4. 348 S.W.2d 322 (Tenn. 1961).

5. *Odom v. Sanford & Treadway*, 156 Tenn. 202, 299 S.W. 1045 (1927); 1 LARSON, WORKMEN'S COMPENSATION LAW § 48.00 (1952).

6. 347 S.W.2d 49 (Tenn. 1961).

minor children by a lawful husband. The two children, as well as the deceased employee's own legitimate minor son lived with the couple, and all three were dependent on him for support even though the father of the woman's two children had been ordered to provide support for them when he and their mother were divorced. The mother had remarried after the divorce and was still married while she was living with the deceased. The lower court had awarded compensation to the deceased's son and the woman's two children equally, and this award was affirmed. The court pointed out that actual dependency is the test under the workmen's compensation statute and held that the mother's meretricious relationship with the deceased employee could not be imputed to her children to their detriment. The court also held that under the statute a person may be an employee's dependent even though the person receives income or support from sources other than the employee. The question of dependency is one of fact in Tennessee,⁷ and the decision in the instant case is but an extension of the court's earlier decision in *Wamser, Stewart & Vaughn, Inc. v. Teasley*.⁸

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

Under the workmen's compensation statute, compensation is due if there is (1) an injury by accident (2) arising out of and (3) in the course of employment. "Arising out of" and "in the course of" are but facets of the single test of whether an accidental injury was work-connected. And seven cases during the survey period illustrate the requirement that there be a work-connected injury by accident.

A. Injury by Accident

In *Brown Shoe Co. v. Reed*,⁹ the employee suffered a disability resulting from the repeated movement of his left arm in the operation of a machine, which caused a severe strain on the arm and made the ulner nerve in his arm leave its normal position and rub across a bone in his elbow. The question was whether the resulting disability to his arm was an injury by accident. The court held that it was and in doing so said:¹⁰

In our research on the matter we have run into what we consider one of the best definitions of an injury applicable to these Workmen Compensation cases. This is: "In common speech the word 'injury,' as applied to a personal injury to a human being, includes whatever lesion or change in any part of the system [which] produces harm or pain or lessened facility of the natural

7. See generally 2 LARSON, WORKMEN'S COMPENSATION LAW § 63.00 (1952); 9 SCHNEIDER, WORKMEN'S COMPENSATION § 1901 (3d ed. 1948).

8. 325 S.W.2d 540 (Tenn. 1959).

9. 350 S.W.2d 65 (Tenn. 1961).

10. *Id.* at 68.

use of any bodily activity or capability." Burn's case, 218 Mass. 8, 105 N.E. 601, 603 (1914).

On the basis of this premise, the court, in what is perhaps one of its most significant opinions issued during the survey period, found the employee's disability to be an injury by accident and analogous in its development to an occupational disease. Consequently, it held that the notice requirements and statute of limitations should be applied in the same way as in occupational disease cases, *i.e.*, the employee need not give notice of injury and the statute of limitations will not begin to run until the injury becomes disabling or until it is apparent to the employee or could have been discovered by the exercise of reasonable care and diligence. The court quoted the following statement by Larson:¹¹

Most jurisdictions will regard the time of accident as sufficiently definite if either the cause is reasonably limited in time or the result materializes at an identifiable point. In the absence of definiteness in time of either cause or effect, as when repeated impacts or inhalations gradually produce disability, many courts find accident by treating each impact or inhalation as a separate accident.

The employee had given due notice, the court felt, when he did so at the time his injury became so painful as to impair his performance on the job rather than when he felt the first twinge of pain since

it is almost unthinkable to think that an employee would go and report such a thing to his superior if the injury was no more than it is perfectly obvious that it was in the first instance, just a little hurting, because it would give the impression that he was a baby and things of that kind.¹²

Thus, with the *Reed* case as background, the court's four decisions involving occupational diseases, a specialized statutory category of "injury by accident," may be considered.

In *Smith v. Tennessee Furniture Industries, Inc.*,¹³ the employee's work brought him in contact with dust and dirt, and he developed bronchitis, tuberculosis, and emphysema. The court concluded that the conditions of his employment had in fact caused the development of an occupational disease and affirmed an award of compensation. However, in *Steverson v. E. I. du Pont de Nemours & Co.*¹⁴ and *E. I. du Pont de Nemours & Co. v. Kessler*,¹⁵ the court held that there was no connection between the employees' infirmities and their employment. In the *Steverson* case, the employee was briefly exposed to a small amount of chlorine gas, which precipitated an attack of asthma. Although he later became disabled from

11. 1 LARSON, WORKMEN'S COMPENSATION LAW § 39 (1952).

12. 350 S.W.2d at 70.

13. 348 S.W.2d 290 (Tenn. 1961).

14. 345 S.W.2d 671 (Tenn. 1961).

15. 345 S.W.2d 663 (Tenn. 1961).

asthma, the medical evidence indicated that his exposure to the chlorine gas had not caused the illness and that he had completely recovered from the effects of the gas. Similarly, in the Kessler case, the court held that there was no connection between the employment and the employee's disabling heart condition. The employee had "blacked out" at work and the resulting medical examination led to the discovery of his heart disease. However, since his employment had not caused the disabling disease, compensation was denied.

The employee about whom the fourth case centered in *Brooks v. Gilman Paint Co.*¹⁶ had died of cancer which may have been reactivated by the dust he breathed at work. The court affirmed a denial of compensation on the ground that the dust had not caused an occupational disease which resulted in the employee's death. However, the court also announced that it would no longer follow part of its opinion in the earlier case of *American Bridge Division v. McClung*.¹⁷ In that case the court sustained an award when it appeared that the employment conditions could have contributed to the cause of an occupational disease but ruled, *inter alia*, that it was error to hold that compensation could be awarded if the employment contributed to the progression of an employee's disease. In the instant case, the court announced that henceforth compensation will be available when an occupational disease is a contributing or accelerating cause of disability from a nonoccupational disease. This conclusion was based in large part on an analogy to the rules with respect to disability resulting from the aggravation of a previously existing weakened condition by a work-connected injury which in itself would not ordinarily be expected to be disabling. The rule seems in accord with the court's generally liberal approach to the construction of the statute for the benefit of disabled employees, but it may well give rise to exceedingly delicate questions of evidence, as have so many of the other rules in the field, particularly those related to medical causation.

B. Arising Out of and in the Course of Employment

The employee seeking compensation in *W. S. Dickey Manufacturing Co. v. Moore*¹⁸ was found to have been physically attacked and injured at work by a fellow employee over a matter involving their working conditions. In accordance with the majority rule,¹⁹ the court affirmed the trial court's award of compensation.²⁰ After reviewing decisions in assault cases in

16. 347 S.W.2d 665 (Tenn. 1961).

17. 333 S.W.2d 557 (Tenn. 1960).

18. 347 S.W.2d 493 (Tenn. 1961).

19. 1 LARSON, WORKMEN'S COMPENSATION LAW § 11.12 (1952).

20. In doing so, the court also approved the lower court's award of compensation based on injury to the body as a whole. As the result of having been hit in the face, the employee had lost an eye, but the lower court also found that he had suffered a disability to his head and face in addition and had been unable to work since his

other jurisdictions, the court pointed out:²¹

In all of these cases there is the underlying principle running through them that causal connection is supplied when there is a showing of an environment that increases the likelihood of assault. In other words, when the employment increases the probability of quarrels among the employees and one is thus injured, then such injury is compensable under the Act for the very obvious reason that workmen, as such, carry their personal qualities, weaknesses, emotions and tempers with them to work, and the risk of having these tempers fly up is comparable in a way to overstrained machinery.

However, in *Sandlin v. Gentry*,²² the court had previously indicated that compensation would not be available to the aggressor even in an altercation arising out of the employment and reiterated the rule in that case.

*West Tennessee Mix-A-Mite Systems, Inc. v. Funderburk*²³ involved the question of whether the death of an employee occurred in the course of his employment. The employee was a truck driver and had been directed by his employer to drive from Union City to Jackson, Tennessee. At Jackson, his employer contacted him and instructed him to go to Memphis by way of Humboldt. He was shown to have been virtually, or totally, without funds in Humboldt, where he attempted to borrow money for food and gasoline for the trip, and on the return trip that night from Memphis to Union City, he left the highway at Obion, Tennessee, to go approximately one-tenth of a mile to the American Legion Hall in Obion. He apparently stayed there for at least two hours, was observed to have consumed two bottles of beer, and borrowed three dollars to buy his supper when he reached Union City. He left the hall and returned to the direct route between Memphis and Union City, and on the way to Union City, his truck went off the road, causing his death.

The court, in accordance with the usual rule in deviation cases,²⁴ affirmed an award of compensation on the ground that the employee had returned from his deviation to the direct route to his destination, or, in other words, the employee had returned to the course of his employment when he was killed. Although the case the court cited in support of its holding²⁵ was primarily concerned with the length of time an employee had spent on a deviation, the Tennessee court made no direct reference to the amount of time which passed during the employee's deviation in the

injury. The court, citing *Plumlee v. Maryland Cas. Co.*, 184 Tenn. 497, 201 S.W.2d 644 (1947), and *Smith v. Morristown Poultry Co.*, 198 Tenn. 412, 280 S.W.2d 929 (1955), approved the award based on this finding even though there was a specific statutory loss of an eye.

21. 347 S.W.2d at 496.

22. 201 Tenn. 509, 300 S.W.2d 897 (1957).

23. 346 S.W.2d 250 (Tenn. 1961).

24. 1 LARSON, WORKMEN'S COMPENSATION LAW § 19.32 (1952).

25. *Sherrill & La Follette v. Herring*, 78 Ariz. 332, 279 P.2d 907 (1955).

instant case other than to note its approximate duration in passing. However, it does not appear that the deceased employee had spent so much time on his deviation that he could be said to have removed himself effectively from his employment even after he returned to the direct route to his destination.

III. MEDICAL BENEFITS²⁶

The employee in *Laughlin Clinic, Inc. v. Henley*²⁷ had suffered a fall at work and had thereby further injured her back, which had previously been damaged prior to the commencement of her employment. Several points were at issue in the case, such as notice of injury to the employer and possible apportionment of the award on the basis of the pre-employment back disability and the work-connected injury, all of which were decided adversely to the employer. But perhaps the most interesting question was that of the employer's liability for medical treatment which the employee obtained without notice to or consultation with her employer. The clinic where she was employed had provided her with medical treatment following her fall, but she had been unable to return to work because of the condition of her back. Thereafter, she went to a doctor of her own selection and underwent surgery on her back. The lower court included the costs connected with that operation in the recovery awarded against the employer for medical expenses, but the Tennessee Supreme Court held that those costs must be excluded from the award²⁸ on the ground that the statute contemplated prior consultation with the employer before an employee incurred medical expenses for which the employer would be expected to pay. There was no indication in the decision, however, as to whether or not the employer had informed the employee that further treatment was unwarranted or unnecessary or had failed to proffer the medical benefits provided for by the statute.²⁹

26. It was interesting to note that in *Martin v. Ribicoff*, 195 F. Supp 761 (E.D. Tenn. 1961), a United States district court relied on *Edwards v. Travelers Ins. Co.*, 202 Tenn. 364, 304 S.W.2d (1957), as worthy of consideration, but not binding, of course, in holding that a plaintiff with a ruptured intervertebral disc could have a period of disability established under the Social Security Act even though he refused to undergo a major operation which might correct the condition because of his fear of the operation and its possibly detrimental effects.

27. 345 S.W.2d 675 (Tenn. 1961).

28. The court cited *Proctor & Gamble Defense Corp. v. West*, 203 Tenn. 138, 310 S.W.2d 175 (1958).

29. See *Holston Valley Community Hosp. v. Dykes*, 326 S.W.2d 486 (Tenn. 1959); *Atlas Powder Co. v. Grant*, 293 S.W.2d 180 (Tenn. 1956).