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WORKMEN'S COMPENSATION — LIABILITIES OF THIRD PARTIES

INTRODUCTION

The primary concern of this comment is an analysis of the rights against and liabilities of third-party tortfeasors under the Florida Workmen's Compensation Act. Since the Florida decisions under this section are limited in number, and in view of the fact that the 1959 Legislature has enacted substantial amendments to this section, it will at times be necessary to discuss analogous cases under similar statutes from other jurisdictions.

WHO IS A THIRD PARTY UNDER THE ACT?

Since the Florida Act does not define “third-party tortfeasor,” but merely states the rights which may be asserted against him, it is necessary to resort to judicial decisions in determining the parties included within that phrase.

Strangers:

An employee does not lose his common law right of action for negligence against a stranger who caused his injury, unless the act expressly prohibits such actions. “From a reading of the Act, it is perfectly evident that the legislature contemplated that third parties might be responsible for commensurable injuries.”

Fellow-Employees:

Fellow-employees are held to be third-party tortfeasors within the meaning of the Florida act, and thus are subject to liability for their negligent acts causing injuries to other workers, even though the common-employer's liability is limited by the statute. The court stated in Frantz v. McBee Co.:

We hold ... in accordance with the almost universal rule in those jurisdictions where there is no express legislative mandate to the contrary, that a co-employee or fellow servant is a “third-party tort-feasor” within the meaning of our Workmen's Compensation Act.

3. Hartquist v. Tamiami Trail Tours, 139 Fla. 328, 190 So. 533 (1939).
5. 77 So.2d 796, 800 (Fla. 1955).
At common law one servant is liable to another for his own misfeasance. Under the terms of the Compensation Act the liability of the employer is specifically set forth, thus substituting a limited statutory liability for a common law liability. Since there is no corresponding statutory requirement imposed upon fellow servants, there is no reason why any implied exemption from suit should be read into the statute.²

General Contractors:

There are three views on the question of whether or not a general contractor is a third-party tortfeasor under the applicable terms of workmen's compensation acts:

1. Under the terms of some statutes, the general contractor is subject to statutory liability only in the event that the subcontractor does not comply with the statutory requirements.⁷ This has the effect of making the subcontractor primarily liable for compensation benefits to the injured employee, whereas the general contractor is now only secondarily liable.⁸ Thus, in the event an employee of a subcontractor is negligently injured by the general contractor or his employees, and the subcontractor is covered under the act, the general contractor is liable as a third-party tortfeasor.

Under section 56 of the New York Workmen's Compensation Law it was held in Sweezey v. Arc Elec. Constr. Co.⁹ that an employee of a subcontractor whose injury arose out of and in the course of employment was not precluded from bringing a common law action for negligence against the general contractor. The court held:

Since the general contractor has always been deemed to be a third party with respect to the sub contractor's employee, it follows that the latter can bring an action for negligence against the general contractor under the Workmen's Compensation Law, § 29, subd. 1. . . .

It is difficult to find in section 56 any expression of legislative intent to destroy this common law negligence action. . . .¹⁰

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10. Id. at 311, 67 N.E.2d at 371.
In the case of Anderson v. Sanderson & Porter, the Arkansas court, in interpreting its Workmen’s Compensation Statute, which is similar to the New York statute discussed in the Sweezey case, stated:

The courts which have considered the question of the “third party” liability of a general contractor to the employees of an insured subcontractor... have usually held that since the general contractor is not the employer of the employees of his subcontractors and is liable for compensation only to the employees of an uninsured subcontractor, the general contractor is as to the employees of an insured subcontractor, a “third party.”

The policy behind this result appears to be that since the general contractor is no longer subject to statutory liability, it is only just that he be subject to common law liability.

2. A minority of jurisdictions have held a general contractor liable as a third-party tortfeasor in an action by the injured employee of a subcontractor. It has been recognized that on the one hand, there are employers “endeavoring to escape the effect of the Compensation Act” in order to avoid paying compensation; and on the other hand, the same employers “strive vigorously to come under the sheltering protection of the act.” While this leads to an equitable result in some cases, it also leads to confusion since there might be a tendency for the courts to construe these statutes more in accordance with their own individual notions of justice, rather than in accordance with the intent of the legislature. This might, on numerous occasions, frustrate the true legislative determination of the word “employer.”

3. The third view, with which Florida is in accord, is that a general contractor is not a third-party tortfeasor within the meaning of the Act.

11. 146 F.2d 58 (8th Cir. 1945).
12. Id. at 60.
This view appears to be the one followed in the majority of jurisdictions which have statutes, the effect of which is similar to that of the Florida Workmen's Compensation Act, under which the general employer is deemed to be the "statutory employer" of all employees of subcontractors.16

Florida Statute, section 440.10 (1957) provides:

In case a contractor sublets any part or parts of his contract work to a sub-contractor or sub-contractors, all of the employees engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be liable for and shall secure the payment of compensation to all such employees. . . .

Under Florida Statute, section 440.11 (1957) this liability of the general contractor is exclusive of all other liability. In Brickley v. Gulf Coast Constr. Co.,17 the widow of a deceased employee of a subcontractor brought a common law action against the general contractor to recover damages for negligence. Dismissal of the action was affirmed by the supreme court on the ground that the remedy under the act was exclusive, since the provisions of the Workmen's Compensation Law "make it entirely clear" that all employees of subcontractors are statutory employees of the general contractor. Although it is not so stated by the court, the inference to be drawn is that a general contractor is not a third-party tortfeasor within the meaning of the act.

Under a similar statute the court, in Bogratt v. Pratt & Whitney Aircraft Co.,18 held that an employee of a subcontractor who received compensation, could not recover at common law from the general contractor. The court indicated that the provisions of section 5226 of the Connecticut act made it "entirely clear" that as between employees and employers the remedy under the act is exclusive of all other remedies, and that under the act the general contractor is the employer of all employees engaged in the common enterprise.

The same result has been reached under the Missouri statute,19 which is similar to the New York statute20 in making the general contractor

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16. See, e.g., CONN. GEN. STAT. § 31-154 (1958) (principal employer liable to pay all compensation to same extent as if work were done without intervention of subcontractor); IDAHO CODE ANN. § 72-1010 (1949) ("employer" includes proprietor of business who by reason of there being an independent contractor, or for any other reason, is not the direct employer of workmen there employed); OKLA. STAT. tit. 85, § 11(2) (Supp. 1958) (if principal employer fails to secure compliance with act by his independent contractor, employee may proceed against principal employer); PA. STAT. tit. 77, § 52 (1952) (employer liable to laborers of subcontractors to same extent as to his own employees).
17. 153 Fla. 216, 14 So.2d 265 (1943).
20. N.Y. WORKMEN'S COMP. LAW § 56.
secondarily liable for compensation. However, under the Missouri statute it was expressly provided that a general contractor "shall be deemed" to be the employer of his subcontractor's employees. 21

The purpose of such provisions is to protect employees from irresponsible employers who might attempt to evade their responsibility by hiring incompetent subcontractors, or by parcelling out their work to subcontractors not employing enough workmen to bring them under the act. A holding that a general contractor is a "third-party" would in effect be either: (1) a holding that he is not an "employer," thus defeating the legislative intent; or (2) a holding that he is subject to a double liability, which definitely does not appear to be the legislative intent.

Subcontractors:

The Florida Supreme Court held, in Younger v. Giller Contracting Co., 22 that the provisions of the Workmen's Compensation Act have changed the common law rule, so that an employee of a general contractor may no longer bring a tort action against a subcontractor, either for his own negligence or for the negligence of his employees. The court stated:

The intention of the legislature . . . was to abrogate the common law to the extent of making all of the employees engaged in a common enterprise statutory fellow servants. . . . We cannot garner any other meaning from the statute except that the employees of the subcontractor and the general contractor were to be on an equal footing. . . .

The subcontractor is not "some person other than the employer" against which "third person" a common-law action for damages may be maintained. . . 23

In Miami Roofing & Sheet Metal Co. v. Kindt 24, the holding of the Younger case 25 was extended to include a third-party action by an employee of one subcontractor against another subcontractor engaged in a common enterprise. The court observed:

[T]here would appear to be no basis for giving a greater right or benefit to an employee, simply because his injury happened to occur by reason of the negligence of the employee of another subcontractor, rather than by the negligence of an employee of the general contractor. . . 26

An employee of a general contractor engaged in the construction of a housing development was injured when struck by a concrete mixer

21. New Amsterdam Cas. Co. v. Boaz-Kiel Constr. Co., 115 F.2d 950 (8th Cir. 1940); Jones v. Lily Tulip Cup Corp., 138 F. Supp. 944 (W.D. Mo. 1958); Montgomery v. Mine La Motte Corp., 304 S.W.2d 885 (Mo. 1957); Bunner v. Patti, 343 Mo. 274, 121 S.W.2d 153 (1938).
22. 143 Fla. 335, 196 So. 690 (1940).
23. Id. at 341-42, 196 So. at 693.
24. 48 So.2d 840 (Fla. 1950).
25. 143 Fla. 335, 196 So. 690 (1940).
26. Miami Roofing & Sheet Metal Co. v. Kindt, 48 So.2d 840, 842 (Fla. 1950).
owned by the defendant. An action at law was brought by the injured employee on the ground that the defendant was a "third-party" and not a subcontractor. The defendant, at the time of the injury, was engaged in delivering ready-mix concrete to the project under a contract with the general contractor. In view of the fact that the rule restricting employees of general contractors and subcontractors to the provisions of the Workmen's Compensation Act is a harsh one, the supreme court refused to extend it further, and held the defendant to be a "materialman" rather than a subcontractor. This had the effect of limiting the decision of the Younger case by making it possible to distinguish factual situations, thus enabling the court to find that a subcontractor is not a "subcontractor."

Although a minority of jurisdictions are in accord with the Florida view that a subcontractor is not a third party within the meaning of the act, a majority of courts hold that a subcontractor is subject to common law liability as a third-party tortfeasor.

In considering these cases one becomes aware of the perplexing uncertainties which may arise when trying to ascertain whether or not a defendant in a common law action brought by an employee is a contractor, subcontractor, or third-party tortfeasor. It therefore appears that a further clarification of these issues by the legislature would be most helpful.

Independent Contractors:

Under Florida Statute section 440.10 (1957), which has the effect of making a general contractor the statutory employer of employees of subcontractors, no mention is made of "independent contractors"; under Florida Statute 440.02(c)(1) the term "employee" does not include independent contractors. The inference from these sections is that the legislature did not intend the independent contractor to be immune from common law actions by employees of those parties with whom he deals in the course of his business. The courts have carried out this legislative intent by allowing actions against independent contractors as third parties. Although decisions on this point have not been too...
numerous, the courts have indicated that to hold otherwise would put an unreason-able restraint upon the rights of injured employees.\textsuperscript{32}

A contrary result has been reached in jurisdictions having similar statutes, but which, unlike Florida, have the effect of making a general contractor the statutory employer not only of employees of his sub-contractors, but also of employees of independent contractors engaged in the common enterprise.\textsuperscript{33}

Because of the restricted monetary benefits available to employees under such acts, it appears that the Florida Act gives rise to a more equitable solution of the problem by insuring a minimum recovery for injuries, and at the same time allowing an opportunity to recover greater damages from a third-party tortfeasor.

**CONCURRENT RIGHT TO COMPENSATION AND ACTION AT LAW**

Prior to 1951, the injured employee was required to elect whether to accept compensation benefits, or to pursue his remedy at law against the third party.\textsuperscript{34} Once an employee elected to accept compensation, he lost his right to maintain or control any action against a third party. Many times this resulted in an injustice to the employee, particularly in situations where the workmen’s compensation carrier was also the carrier for the negligent third party. In such situations it was to the interest of the insurance carrier in collecting from the third party to limit the damages to the amount it was required to pay under the act; whereas, it was to the interest of the employee to recover fully for injuries not covered by the act.\textsuperscript{35} Presently under the Florida Act an employee may accept compensation benefits and at the same time bring an action at law against a third-party tortfeasor.\textsuperscript{36} In *Fidelity & Cas. Co. of N.Y. v. Bedingfield*,\textsuperscript{37} the court stated:

> The 1951 amendment . . . made drastic changes. It abolished the election requirement, and provides that an injured employee may claim workmen’s compensation benefits and at the same time institute suit against a third-party tortfeasor . . . This amendment simply gives the injured employee the right to control his own suit against a third-party tortfeasor, and provides for limited subrogation on an equitable basis.

\textsuperscript{32} Goldstein v. Acme Concrete Corp., 103 So.2d 202, 205 (Fla. 1958).
\textsuperscript{33} See, e.g. LA. REV. STAT. § 23:1061 (1950); O\textsuperscript{K}\textsuperscript{A}. STAT. tit. 88, § 11 (1958).
\textsuperscript{34} Haverty Furniture Co. v. McKesson & Robbins, Inc., 154 Fla. 772, 19 So.2d 59 (1944); Plunkett v. Florida Power & Light Co., 1 F.C.R. 35 (Fla. Ind. Comm. 1954) (injury occurred prior to amendment).
\textsuperscript{35} Fidelity & Cas. Co. of N. Y. v. Bedingfield, 60 So.2d 489 (Fla. 1952).
\textsuperscript{36} Plunkett v. Florida Power & Light Co., 1 F.C.R. 35 (Fla. Ind. Comm. 1954) (injury occurred prior to amendment).
\textsuperscript{37} Goldstein v. Acme Concrete Corp., 103 So.2d 202, 205 (Fla. 1958).
\textsuperscript{38} See, e.g. LA. REV. STAT. § 23:1061 (1950); O\textsuperscript{K}\textsuperscript{A}. STAT. tit. 88, § 11 (1958).
\textsuperscript{39} Haverty Furniture Co. v. McKesson & Robbins, Inc., 154 Fla. 772, 19 So.2d 59 (1944); Plunkett v. Florida Power & Light Co., 1 F.C.R. 35 (Fla. Ind. Comm. 1954) (injury occurred prior to amendment).
\textsuperscript{40} Fidelity & Cas. Co. of N. Y. v. Bedingfield, 60 So.2d 489 (Fla. 1952).
\textsuperscript{41} Plunkett v. Florida Power & Light Co., 1 F.C.R. 35 (Fla. Ind. Comm. 1954) (injury occurred prior to amendment).
\textsuperscript{42} 60 So.2d 489, 493-94 (Fla. 1952).
Formerly, some jurisdictions chose not to give the employee a concurrent right against his employer and the third party responsible for the injury. However, the current trend is in accord with the Florida view. One of the first major states to provide a concurrent right for employees was New York. Thus, today under section 29 of the New York Workmen's Compensation Law it is unnecessary for the injured employee to choose between taking compensation and bringing an action against the third party. It was several years before the Florida legislature condescended to follow in the footsteps of New York.

**Subrogation of the Employer or Insurance Carrier to the Rights of the Employee**

Although, as stated above, an injured employee has a concurrent right to compensation and to pursue his remedy in an action at law against a third party, if he accepts compensation or other benefits, then under section 440.39(2) his employer or insurance carrier is subrogated to his rights.

Formerly this section read, exclusive of parenthetical phrases, substantially as follows:

If the employee or his dependents shall accept compensation (or other) benefits . . . the employer or, . . . the insurer, shall be subrogated to the rights of the employee . . . against such third-party tortfeasor, to the extent of the amount of compensation benefits paid (or to be paid) . . .

The 1959 session of the legislature in amending the act, added the above phrases enclosed in the parenthesis.

In *Arex Indem. Co. v. Radin*, the carrier paid compensation to an injured employee and received subrogation in an action by the employee against the third-party tortfeasor. Thereafter the carrier refused to pay further benefits. The Industrial Commission awarded continued payments, and the carrier sought additional subrogation. This was disallowed by the court on the ground that the statute failed to provide for subrogation to the extent of benefits payable in the future. The court was explicit in stressing that:


43. 77 So.2d 839 (Fla. 1955).

The claim is for a benefit or remedy which the legislature has not provided, and one which, subrogation being a matter of grace, rests entirely within its (the legislature's) discretion to grant or withhold. . . . (Emphasis added.)

Since the legislature has now exercised its discretion to grant the additional subrogation which was sought in the Arex Indem. case, it is apparent that the protection afforded insurance carriers and employers has been further broadened by this progressive move on the part of the Florida Legislature.

The majority of jurisdictions are in accord with Florida in providing for subrogation of the employer or insurance carrier. However, some states, such as New Jersey, have limited the right of subrogation to the employer. It is interesting to note that some jurisdictions, such as Massachusetts, have taken the position that the right of an insurance carrier under the Workmen's Compensation Act, is wholly a creature of statute, and is not dependent upon the principle of subrogation.

Under a statute similar to the previous Florida statute, the harshness of the provision requiring that compensation must have been actually paid before the right of subrogation accrued to the carrier or employer was avoided. In Furlong v. Cronan, the court held that payment of compensation was not a condition precedent to maintaining the action against the tortfeasor, since the court itself could stay proceedings, or otherwise exercise control over the action, until compensation had actually been paid.

Although the courts have used various phraseology in arriving at their conclusions, the results reached, as a practical matter, have given rise to subrogation of the employer or insurance carrier.

**PARTIES ENTITLED TO SUE; REQUIREMENT OF NOTICE OF PAYMENT OF COMPENSATION; DISTRIBUTION OF RECOVERY**

The 1959 session of the Florida Legislature, in amending section 440.39(3) (a), added the following phrases enclosed in parentheses:

In (all claims or) actions at law against a third-party tortfeasor . . . .

Upon suit being filed . . . . the court may determine to be their pro rata share for compensation benefits paid (or to be paid) . . . .

This section of the statute specifically provides that the parties entitled to sue a third-party tortfeasor are: the employee, his dependents, or "those entitled by law to sue in the event he is deceased."

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46. 77 So.2d 839 (Fla. 1955).
The purpose of this provision, as noted in McCoy v. Florida Power & Light Co., is to protect workers and their dependents from the hardships which occur when the worker is injured or killed in the course of his employment, and to prevent the dependents "from becoming charges upon the community." In that case the widow and the dependent mother of the deceased employee received compensation benefits. Subsequently the widow and mother brought an action against the third-party tortfeasor. The widow dismissed her suit, and the question arose as to whether the dependent mother could maintain the action alone. In affirming a summary judgment for the defendant, the court held that section 440.39 did not grant any special concessions irrespective of the Wrongful Death Statute.

As pointed out by the court, the decision seems to be consistent with the legislative intent, but since compensation benefits are limited in amount, a more liberal construction of the statutes might have better served to prevent the mother from becoming a "charge upon the community."

Under the act the employer or insurance carrier may file a notice of compensation paid in a suit by the employee against the third party. Upon filing and recording of such notice, the employer or carrier has a lien upon any "judgment recovered" and is entitled to a pro rata share of the recovery. In United States Cas. Co. v. Hume, after notice had been filed by the carrier, the trial court denied the carrier's motion for an order of distribution of its pro rata share on the ground there was no "judgment recovered" as provided by the act. The trial court had approved a settlement between the plaintiff-employee and the defendant-tortfeasor. On appeal, it was held that a court-approved settlement was a "judgment recovered" within the meaning of section 440.39(3). Although the above decision undoubtedly reached a just result, this problem will no longer arise since the legislature has now seen fit, through the addition of subsection (b), to alleviate any further difficulty in this area. If any settlement is made with a third-party tortfeasor, either before or after filing suit, the circuit court now has authority to determine the amount payable out of the settlement to the employer or carrier.

Difficulty at times arises in determining the amount of the pro rata share to be distributed. In Arex Indem. Co. v. Radin, an employer's insurance carrier brought an action for its pro rata share of a partial recovery by the employee from a third-party tortfeasor. The court stated:

[T]he words "pro rata" . . . when considered in the light of the remainder of the paragraph and its evident purpose, must be construed in its broadest aspect and not in a technical manner . . . . (Emphasis added.)

51. 87 So.2d 809 (Fla. 1956).
52. FLA. STAT. § 768.02 (1953); cf. Vanlandingham v. Florida Power & Light Co., 154 Fla. 628, 18 So.2d 678 (1944) (Workmen's Compensation Act did not impliedly repeal Wrongful Death Statute).
53. 112 So.2d 49 (Fla. 1959).
54. 72 So.2d 393 (Fla. 1954).
55. Id. at 395.
The court refused to set up any formula for determining a pro rata share, and indicated that if the standard of "equitable distribution" was inadequate, any change should be by the legislature and not the courts. The legislative standard of "equitable distribution" thus gives rise to a large amount of discretion in the trial courts.

The legislature has remedied the inequitable results of cases such as Baughman v. Aetna Cas. & Sur. Co.,[56] by providing, as indicated above, that the pro rata share of recovery shall include not only amounts of compensation which have been actually paid, but also those which are to be paid. In the Baughman case[57] it was held that in actions by the employee under section 440.39(3) the court is only empowered to determine the pro rata share for benefits paid.

In a negligence action by the employee against the tortfeasor, some of the elements of damages to be considered are future pain and suffering, future loss of earnings, future medical expenses, etc. Likewise, in workmen's compensation proceedings the carrier (or employer) may be burdened with future expenses from injuries sustained by the employee. It therefore appears that in view of these potential burdens which may be thrust upon the shoulders of those responsible under the act, the Florida Legislature in amending this section has taken a most realistic and equitable approach.

Under section 440.39(4)(a) if an employee fails to bring an action against a third-party tortfeasor within one year after the cause of action accrues, the cause of action is automatically assigned to the employer or insurance carrier, whichever the case may be. In the event of a recovery against or settlement with the third party, the employer (or carrier) is entitled to retain all amounts paid as compensation to the employee, together with "the present value of all future compensation benefits payable," to be held as a trust fund from which to make future payments of compensation. Any excess is to be paid to the employee. Sub-section (b), which was added by the 1959 legislature, in effect provides that if the employer (or carrier) does not bring suit within two years following the accrual of the cause of action, the right of action reverts to the employee. The result of this section is to limit the employer's right of action to one year.

This time limitation provision in the Florida act is in accord with the provisions of a number of other jurisdictions.[58] Since the employer

56. 78 So.2d 694 (Fla. 1955).
57. Ibid.
58. Ill. Rev. Stat. ch. 48, § 166 (1950) (any time prior to three months before said action would be barred at law); Mass. Gen. Laws ch. 152, § 15 (1958) ("if, in any case where the employee has claimed or received compensation within six months of the injury, the insurer does not proceed to enforce such liability within a period of nine months after said injury, the employee may so proceed."); N.J. Rev. Stat.
or insurance carrier is given a right of subrogation under the act, it seems only just that he should be given an opportunity to protect that right. Otherwise, an employee — either through inadvertence or neglect — might be able to defeat the employer's right of subrogation by failure to pursue the remedy against the third party.

Under section 440.39(5), if suit is instituted by employer or carrier, a settlement with the third party is prohibited unless the employee's consent is obtained.

CONCLUSION

The major deficiency under this section of the Workmen's Compensation Act is the failure of the legislature to define in any way the phrase "third-party tortfeasor." There is a need for a definition of this term in order to avoid the many hazy areas which now are clouded by uncertainties. A possible solution to this problem would lie in an addition to the definition section of the act.

The purpose of the Workmen's Compensation Act as a whole is:

[S]o that employees could be at least partially compensated for injuries received in highly organized and hazardous industries of modern times whether the injury was caused by negligence of the employer or otherwise. . . . (Emphasis added.)

It is suggested that the Florida act should be extended by making the general contractor the statutory employer not only of employees of his subcontractors (as now provided) but also of employees of independent contractors. This would not only better effectuate the purpose of the act, but would also eliminate the difficulties presented to the courts, parties involved, and attorneys in determining whether or not a particular individual is a subcontractor or independent contractor. If this were done, the need for the distinction would no longer exist.

In general, it can be said that the legislature over the years has made notable strides in the furtherance of fitting the usefulness of the Workmen's Compensation Act to the needs of modern times. The 1959 session of the legislature is evidence of this trend.

It is hoped that in years to come Florida will continue to make an effort in gauging its compensation laws to the ever increasing needs of a community which is one of the fastest growing in the United States.

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§ 34:15-40(f) (1959) (one year after the accident); N.Y. Workmen's Comp. Law § 29 (not later than six months after the awarding of compensation and in any event before the expiration of one year from the date such action accrues).

59. Fidelity & Cas. Co. of N.Y. v. Bedingfield, 60 So.2d 489, 492 (Fla. 1952); Larson, Workmen's Compensation § 2.20 (1952).