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WORKMEN'S COMPENSATION

Edward Schroll*

The two year period covered by this survey has brought little statutory change in the Florida Workmen's Compensation Law. Judicial decision has, however, broadened and in some respects restricted various sections of the act.

No statutory changes were accomplished by the 1961 Florida Legislature concerning the substantive benefits conferred by the act upon injured or disabled workmen. This session of the legislature did change the status of Deputy Commissioners from part-time deputies to full-time deputies with allowance to the Florida Industrial Commission to designate any attorney employed by it to serve as a deputy pro hac vice, or on a temporary basis where the need exists. Further authority was given to the Commission in the administration of, and claims filed against, the special disability fund. Additional changes were made under the section covering safety rules and provisions.

JUDICIAL INTERPRETATION

Coverage under the Florida Workmen's Compensation Law is afforded to employees of the state, its political subdivisions, and to all private employers when three or more employees are employed by the same employer. Occasional employment of the statutory minimum number of employees will not bring the employer under the act. In determining the status of individuals as employers or employees, the courts have penetrated the veil of fictitious arrangements and have enforced responsibility on employers.

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when equitable circumstances have dictated.\textsuperscript{10} Similarly, coverage under the act has been denied to those who were, in fact, not employees;\textsuperscript{11} and it was also denied when the employee's alleged disability had no relationship to his status as an employee.\textsuperscript{12}

Coverage has been denied for damage to artificial members or prosthetic devices under the theory that they are personal property and not part of the person,\textsuperscript{13} but it was extended to cover the natural consequences which flow from medical treatment for an injury under the theory of liberal construction.\textsuperscript{14} The theory of coverage for new injuries which result as a natural consequence of the original injury was held inapplicable in \textit{Johnnie's Produce Co. v. Benedict \& Jordan}\textsuperscript{15} wherein the chain of natural consequence was broken by the injured employee's own act of negligence.

In \textit{Lobnitz v. Orange Memorial Hosp.},\textsuperscript{16} coverage was denied for the period of time the injured workman made no attempt to secure medical treatment; the court held that there was an obligation to minimize damages which the claimant failed to do.\textsuperscript{17}

When the vexing problem of dual insurance coverage exists, the Florida Industrial Commission has been held to have the power to interpret the intent of the parties to the insurance contract.\textsuperscript{18} In \textit{City of Lakeland v. Catinella}\textsuperscript{19} the claimant sustained two separate injuries with the same employer. Insurance coverage had changed after the first accident. The carrier who covered the first accident made payments for the second. Subsequently it sought determination of its responsibility and also sought reimbursement for compensation benefits paid for which the second carrier was responsible. At the time the second accident occurred, there was no statutory provision giving the Commission jurisdiction to determine this action. However, prior to the time the first carrier made a claim against the second (creating a controversy) a provision was passed giving this jurisdiction to the Commission.\textsuperscript{20} The supreme court held that the law in effect at the

\begin{thebibliography}{99}
\bibitem{10} Dyalwood, Inc. v. Thomas, 122 So.2d 314 (Fla. 1960). For placing responsibility when subcontractor contracts out work see Fidelity Constr. Co. v. Arthur J. Collins \& Son, Inc., 130 So.2d 612 (Fla. 1961).
\bibitem{11} Adams v. Wagner, 129 So.2d 129 (Fla. 1961); Florida Industrial Comm'n v. Schoenberg, 117 So.2d 538 (Fla. App. 1960).
\bibitem{12} City of Hialeah v. Warner, 128 So.2d 611 (Fla. 1961).
\bibitem{13} Southern Elec. Inc. v. Spall, 130 So.2d 279 (Fla. 1961).
\bibitem{14} Royal Palm Mkt. v. Lutz, 126 So.2d 881 (Fla. 1961); Ortkiese v. Clarson \& Ewell Eng'r, 126 So.2d 556 (Fla. 1961). Evidence insufficient to show natural consequence: Jarvis v. Miami Retreat Foundation, 128 So.2d 393 (Fla. 1961).
\bibitem{15} 120 So.2d 12 (Fla. 1960).
\bibitem{16} 126 So.2d 759 (Fla. 1961).
\bibitem{17} Violation of a safety rule without a showing of willful refusal to observe it was held insufficient to deny coverage in Smit v. Geyer Detective Agency, Inc., 130 So.2d 882 (Fla. 1961).
\bibitem{18} Hartford Acc. \& Indem. Co. v. King, 114 So.2d 184 (Fla. App. 1959).
\bibitem{19} 129 So.2d 133 (Fla. 1961).
\bibitem{20} FLA. STAT. § 440.42(3) (1961).
\end{thebibliography}
time the controversy arose governed, and that apportionment of responsibility as between the two carriers also was determined as of this date.

**Course of Employment**

In order to invoke the benefits afforded by the act, there must be some connection between the employment and the injury. An employee who threw a cherry bomb after an unsuccessful fishing trip and lost an eye as a result of the explosion was held to be entitled to compensation, because the fishing trip was designed to entertain the employer’s customers. However, an employee who turned to acknowledge a call from a fellow employee and fell, injuring his back, was denied benefits for failure to show that the injury arose out of the employment; while a claimant who was attacked and beaten by a fellow employee found to be an aggressor, did recover benefits under the act.

When the connection with the employment is remote the courts have denied benefits, but when substantial proof is submitted of facts warranting a reasonable inference that the employee was engaged in the employer’s business at the time of the accident, recovery is allowed.

**Disability Benefits**

Perhaps the most important judicial decision rendered in the period surveyed was the supreme court decision in the case of *Southern Bell Tel. & Tel. Co. v. Bell*, which reversed a decision of a district court of appeal. Based on a rebuttable presumption that loss of earning capacity is equal to the permanent physical functional impairment, a Deputy Commissioner awarded compensation for a permanent partial disability for a twenty percent loss of future earning capacity even though the permanently injured employee was receiving more money from his employer for his post injury endeavors. The presumption is known as the Marsiglia Rule which evolved from an Industrial Commission decision. In reversing the district court of appeal, the supreme court overruled the presumption and remanded the

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24. Aggravation of a heart condition was held noncompensable when working conditions demonstrated no exposure to danger not ordinarily risked by the public in Firestone Tire & Rubber Co. v. Hudson, 112 So.2d 29 (Fla. App. 1959). See also Continental Turpentine & Rosin Corp. v. Palmer, 129 So.2d 409 (Fla. 1961); United States Fid. & Guar. Co. v. Rowe, 126 So.2d 737 (Fla. 1961); Seabreeze Indus., Inc. v. Phily, 118 So.2d 54 (Fla. App. 1960).
26. 116 So.2d 617 (Fla. 1959).
cause to the Deputy for decision without the aid of a presumption in the proof of loss of wage earning capacity. The “open labor market” test was, however, approved while increased post injury earnings were held to be only a factor in determining wage earning capacity loss. Subsequently, in Horace Z. Brunson Plumbing & Heating Co. v. Mellander, the court stated that the intent of the act is to compensate for loss of wage earning capacity not loss of wages, and that any wage loss by the injured party while he is still temporarily disabled is not proof of permanent disability under the act.

The test of loss of wage earning capacity applies only to body injuries. Where the “body” ends and scheduled members begin has also been the topic of judicial interpretation; shoulder cuff injuries and a complete tear of the long head of the biceps tendon both have been held to be body injuries.

Of equal importance to scheduled injury claims is the decision in Magic City Bottle & Supply Co. v. Robinson. There the court affirmed an award of a thirty-five per cent loss of the use of a foot when the medical impairment ratings were five per cent. It was stated that economic factors may be considered. Medical opinion was held not to be conclusive and in proper cases, greater weight may be given to lay testimony. The impact of this decision and the Bell decision was to take the scepter from the medical profession and return it to the Deputy Commissioner.

Disability benefits prior to the award of permanency also have been touched upon by the courts. Temporary total disability was again defined as the healing period, during which one is totally disabled, unable to work and recovery is reasonably expected. An award of temporary partial disability was affirmed when an employee ceased work due to back pain and became a full time student, the fact of the full time student activity not barring recovery.

In claims for death benefits by alleged dependents actual dependency must be shown. In MacDon Lumber Co. v. Stevenson a mother was denied benefits on the basis of a lack of dependency on her deceased 17½

29. 130 So.2d 273 ( Fla. 1961).
33. 116 So.2d 240 (Fla. 1959).
35. Underwood v. Terminal-Flouge Builders, 128 So.2d 605 (Fla. 1961); see also Cheyney v. Grossberger, 115 So.2d 193 (Fla. App. 1959) for a well reasoned opinion dissenting from a denial of temporary disability benefits.
37. 117 So.2d 487 (Fla. 1960); In King v. Keller, 117 So.2d 726 (Fla. 1960) two widows competed for death benefits. The cause was remanded for more evidence.
year old son who had worked only one day with the employer when he was killed. The deceased had had no steady prior employment. The court set forth the elements necessary for dependency and stated that a partial dependent would receive full dependent benefits.

MEDICAL BENEFITS

In Cook v. Georgia Grocery, Inc., a Deputy Commissioner awarded payment for home nursing care for a completely incapacitated workman. The award was reversed by the full Commission which found the award to be excessive when compared to the alleged cost of providing the same services by a nursing home. The Commission allowed these costs only. On certiorari, the supreme court quashed the order of the full Commission, reinstated the award of the Deputy, and held there to be no monetary limit on medical care.

ATTORNEYS' FEES

The attorneys' fees section of the act has been frequently attacked during the period surveyed. Although recognizing the experience of agencies assessing fees as well as the importance of the record in determining value of services rendered, the supreme court held in Florida Silica Sand Co. v. Parker that there must be evidence as to the reasonable value of attorneys' fees either by testimony or affidavit. Various fee schedules were mentioned and Canon 12 of the Code of Ethics was stated to be a safe guide. Contingent future recovery was held to be an unrealistic basis for an attorney's fee in Port Everglades Terminal Co. v. Canty.

Injured workmen are now obligated to pay their own attorneys when their claim is accepted by the employer or carrier within twenty-one days after it is filed with the Industrial Commission. In Carillon Hotel v. Rodriguez the court held the twenty-one day rule applicable even though the employer and carrier were aware of the claimant's lost time, due to an industrial accident, for a twenty-one day period prior to the time the claimant hired an attorney who filed the claim.

The assessment of an attorney's fee was denied when no application was made for more than a year after the court had determined the cause.
These fees were similarly denied for prohibition proceedings under the theory that it was not a review of the award under the statute. 46

Procedure

The authority of the Deputy Commissioner as the sole finder of fact and that of the full Commission as an appellate review body has been reaffirmed on numerous occasions. 47 The Deputy Commissioner must consider all of the evidence presented to him and his findings must accord with logic and reason. 48 Findings made contrary to uncontradicted evidence have been struck down, 49 as has medical testimony based on facts not supported by the evidence. 50 A Deputy's acceptance or rejection of medical testimony when there is a conflict must be based on some logical reason. 51 The Deputy's order must contain adequate findings of fact, 52 although the failure to do so has been held harmless error. 53 Findings have been found in substantial compliance with judicial requirements when the order demonstrated that the Deputy had given careful consideration to the award. 54

When no proper record has been made, the full Commission may not refer to its file in order to review the order of the Deputy, but must remand the cause to the Deputy. 55 Reviews by the full Commission have been denied by the courts when the procedural requirement as to bonds for uninsured employers has not been timely met and when additional grounds have been added to the application for review after the Deputy's order became final. 56 However, Deputies may vacate their own orders within twenty days. 57

The court's holding that the Deputy lacked authority to grant lump sums prior to the 1959 legislative amendment, was affirmed by virtue of

46. State v. Johnson, 118 So.2d 223 (Fla. 1960); no fee allowed on review against successful special disability fund, James v. Food Fair Stores, Inc., 116 So.2d 805 (Fla. App. 1960); see also Miami Beach Awnng Co. v. Socialis, 129 So.2d 414 (Fla. 1961).
the amendment\(^{59}\) giving the Deputy this authority. The court held the amendment to be a substantive change rather than a procedural one.\(^{60}\)

In reviewing orders of the full Commission, the supreme court has stated that the Industrial Commission’s construction of a statute is entitled to great weight and unless cogent reasons appear, the court will not depart therefrom.\(^{61}\) In order to give the court jurisdiction, there must be sufficient finality in the order of the full Commission.\(^{62}\)

**Singular Decisions**

The dismissal of a claim for want of prosecution can not be raised as an adjudication on the merits. The court held in *Florida Tel. Corp. v. Oliver*\(^{63}\) that the employer-carrier could have presented its case when the claimant failed to appear. In affirming a Deputy’s excusing a claimant for failure to give proper notice, the supreme court stated in *Tomberlin v. City of Miami*\(^{64}\) that the determination of whether a claimant has prosecuted his claim with the degree of care of an ordinary prudent person under similar circumstances is one of fact. Although determination of the average weekly wage is to include, by statute,\(^{65}\) a determination by the Commission of the reasonable value of meals, the supreme court held in *Bienvenido v. Fontainebleau Hotel*\(^{66}\) that the Deputy can only fix a value on additional emoluments when not fixed by the employment contract, the employer having already determined the value of the meals in this situation.

**Modification**

Under the act, a Deputy may review a compensation case at any time prior to two years after the last payment of compensation or after an order has been entered, when a change of condition or mistake in a determination of fact can be shown.\(^{67}\) In *Power v. Joseph G. Moretti, Inc.*\(^{68}\) the court held that the change of opinion of the medical expert upon whom the Deputy originally relied was not sufficient to invoke the modification section of the act, the mistake not having been committed by the Deputy or the full Commission. The use of evidence which previously had been known also was held insufficient to show a mistake of fact in *Beaty v. M & S*
However, in Orme v. M. R. Harrison Constr. Co., the claimant fell twenty-two feet injuring his right knee. Three years later a claim was made for an injury to the left knee for which no claim had previously been made and which had never been adjudicated in the prior order. The Deputy's granting of the modification and denial of the defense of an intervening accident was upheld by the supreme court under the "logical cause" theory.

Third Parties and Subrogation

All of the decisions on third party actions and subrogation rights are from the various district courts of appeal. In construing the act, the exclusive remedy doctrine was held to be applicable to the loss of a testicle which is not scheduled and the loss of which manifested no loss of wage earning capacity. The doctrine was also applied to actions by injured employees whose cause of action was predicated on breach of warranty rather than tort.

The fact that the employer was not a general contractor was held crucial in allowing an injured employee of the owner of a convalescent home to sue an independent contractor and an employee of the City of Miami Beach to maintain an action against the owner-operator of a crane, an independent contractor for the city. The court used as an additional basis in the latter case the inapplicability of the exclusive remedy doctrine to actions between co-employees.

The doctrine was held applicable to an employer who under a breach of warranty action sought to recover from the owner of a leased crane the amount of compensation paid by the employer to his injured employees less the amount recovered under equitable distribution. The employer had participated in the damages awarded the employees in suits by these employees against the lessor of the crane by filing its lien in accordance with the act. The court held that the statute provides the exclusive remedy available to the employer.

69. 124 So.2d 868 (Fla. 1960).
70. 127 So.2d 104 (Fla. 1961).
71. For the "logical cause" theory see Ortkiese v. Clarson & Ewell Eng'r, 126 So.2d 556 (Fla. 1961). The theory is not applicable to diseases or physical defects; Harris v. Josephs, Inc., 122 So.2d 561 (Fla. 1960).
The subrogation rights of the employer or carrier are not affected by settlement between the third party and the injured employee,\textsuperscript{79} nor is the subrogation lien extinguished by the settlement, the third party responsibility still remaining.\textsuperscript{80} In \textit{Russell v. Shelby Mut. Ins. Co.},\textsuperscript{81} no compensation benefits were paid until after the third party claim had been settled. The majority of the court held that the action of the carrier against the third party could not be maintained in that no subrogation interest existed when the settlement was made.\textsuperscript{82}

**CONCLUSION**

The greatest impact in the period surveyed has been on the Deputy Commissioner. His obligation to consider all of the evidence and accept or reject portions thereof on some logical basis has been emphasized. Most striking, however, have been those decisions involving expert medical opinion as not being decisive and the Deputy, rather than the medical expert, being the only person under the act able to determine the degree of permanent disability under both scheduled and non-scheduled injuries.

Increased activity as to claimants' attorneys' fees and the right to have the fee assessed against the employer and carrier is also evident.

The act has remained unchanged with only minor exceptions. Here again the change of most significance affected the Deputy Commissioner, changing his status from a part-time officer to a full-time one.

\textsuperscript{79} Brosnahan Constr. Co. v. City of Miami Beach, 121 So.2d 827 (Fla. App. 1960); United States Cas. Co. v. Humc, 112 So.2d 49 (Fla. App. 1959).
\textsuperscript{81} 128 So.2d 161 (Fla. App. 1961).
\textsuperscript{82} The law in existence at the time of the injury governs the extent of subrogation. Aaron v. Florida Power & Light Co., 126 So.2d 889 (Fla. App. 1961); Employers Ins. Co. v. Miller, 121 So.2d 813 (Fla. App. 1960).