St. Mary's Law Journal

Volume 4 | Number 2 Article 7

6-1-1972

# Where an Employee Is Injured in a Case for Which Compensation Is Payable under Circumstances Creating Liability in Some Party Other Than the Compensation Subscriber, the Employee Must Make an Election to Proceed against the Third Party or the Compensation Carrier within Two Years from the Date of the Accident.

Myron E. East Jr.

underwriting from the requirement of the allegation of one discriminatory interstate sale. At the present, it may be assumed that in order to invoke the Robinson-Patman Act, a claimant has alternate avenues of procedure depending upon the forum he chooses. Along with an allegation that the defendant is engaged in an interstate concern, the Robinson-Patman claimant may either contend that one of the discriminatory sales was interstate in character, or that "the interstate operations of the defendant were used to underwrite local discriminatory pricing practices."[45] Consistency is imperative. Evidence of a need for action by the Supreme Court to clarify any existing disparity as to the jurisdictional scope of the Robinson-Patman Act was voiced by Mr. Justice Black dissenting to the denial of certiorari in the *Willard* case. He stated:

> Refusal to grant certiorari here means that this Court is allowing the economic resources and staying power of an interstate company to be used with impunity to destroy local competition, precisely the sort of thing the Robinson-Patman Act aimed to prevent. . . . Judgments like this one left standing here make it difficult indeed for small, independent, local companies to survive against the predatory assaults of their larger and more powerful interstate competitors.[46]

*Michael D. Wagner*

WORKMEN'S COMPENSATION—LIMITATION OF ACTIONS—WHERE AN EMPLOYEE IS INJURED IN A CASE FOR WHICH COMPENSATION IS PAYABLE UNDER CIRCUMSTANCES CREATING LIABILITY IN SOME PARTY OTHER THAN THE COMPENSATION SUBSCRIBER, THE EMPLOYEE MUST MAKE AN ELECTION TO PROCEED AGAINST THE THIRD PARTY OR THE COMPENSATION CARRIER WITHIN TWO YEARS FROM THE DATE OF THE ACCIDENT. *Campbell v. Sonford Chemical Company*, 480 S.W.2d 237 (Tex. Civ. App. — Beaumont 1972, writ granted).

Charles Campbell was injured on or about December 10, 1964 while working as an employee for the Texas Welding Works, a company performing work for the Sonford Chemical Company. Campbell did not file his claim for workmen's compensation until September 8, 1967, after more than two years had passed from the date of the accident. The Industrial Accident Board held that Campbell had "good cause" for not

[45] Littlejohn v. Shell Oil Co., 456 F.2d 225, 229 (5th Cir. 1972).
[46] Willard Dairy Corp. v. National Dairy Prod. Corp., 373 U.S. 934, 935, 83 S. Ct. 1534, 1535, 10 L. Ed.2d 691, 691 (1963).

filing within the six month time period as prescribed by statute,[1] and awarded him $618 in compensation. An appeal was taken from this award, and judgment was entered in Campbell's favor on May 7, 1969. Campbell then filed this suit on May 15, 1969 against the Sonford Chemical Company alleging that their negligence was the cause of his injury, and that he should recover under the doctrine of res ipsa loquitur. The Texas Employers' Insurance Association filed a petition of intervention alleging that it was the compensation carrier for the Texas Welding Works, and that it was subrogated to the rights of Charles Campbell against the Sonford Chemical Company in the amount of $618 as a result of its payment to Campbell under the provisions of the Workmen's Compensation Act.[2]

The Sonford Chemical Company answered by pleading the two year statute of limitations.[3] Campbell and the carrier replied that there was good cause shown for not having filed the compensation claim earlier as shown in the adjudication of the compensation claim, and filed a supplemental pleading alleging that the statute of limitations was *tolled from the date of the injury until the date of the final disposition of the workmen's compensation claim*, and since two years had not elapsed from that final disposition, the suit was not barred. Sonford Chemical Company made a motion for summary judgement, arguing that *no compensation claim had been filed within two years from the date of the injury which could have tolled the statute.* The trial court sustained the defendant's motion for summary judgment. Held — *Affirmed.* Where a workman is injured in a case for which compensation is payable under circumstances creating a legal liability in some party other than the compensation subscriber, the employee must make an election to proceed against the compensation carrier or the third party within two years from the date of his injury. Otherwise his cause of action against the third party would be barred by the two year statute of limitations, and his claim for compensation would be lost as the compensation carrier would have lost its right of subrogation.[4]

The remedies available to an employee injured within the scope of his employment under circumstances giving rise to liability of some party other than his employer are controlled by article 8307, section 6a of the Workmen's Compensation Act.[5] Under this statute the courts

1 TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (1967).
2 TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (1967).
3 TEX. REV. CIV. STAT. ANN. art. 5526, § 6 (1958).
4 Campbell v. Sonford Chem. Co., 480 S.W.2d 237, 241 (Tex. Civ. App.—Beaumont 1972, writ granted).
5 TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (1967):
Where the injury for which compensation is payable under this law was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employé may at his option proceed either at law against that person to recover damages or against the association for compensation

have ruled that if the employee elects to maintain an action against the third party, he will be barred from recovery under the Workmen's Compensation Act,[6] but if he first makes his claim for compensation, he or the compensation carrier may subsequently proceed against the third party after the compensation claim is disposed of in what is generally called a third party action.[7] The compensation carrier is subrogated to the rights of the injured employee,[8] and if the employee causes the carrier to lose this right by releasing the third party,[9] or by a settlement or adverse judgement,[10] he will be precluded from receiving compensation.

Statutes of limitation are applicable to situations arising under section 6a depending upon which option the injured employee elects to follow. If the injured employee elects to pursue his common law remedy against the negligent third party, his action will fall within the ambit of article 5526, the two year statute of limitations.[11] Under this statute, limitations will begin to run from the time the cause of action arises,[12] ordinarily when an injury, however slight, is sustained in consequence

---

under this law, but not against both, and if he elects to proceed at law against the person other than the subscriber, then he shall not be entitled to compensation under this law. If compensation be claimed under this law by the injured employé or his legal beneficiaries, then the association shall be subrogated to the rights of the injured employé in so far as may be necessary and may enforce in the name of the injured employé or of his legal beneficiaries or in its own name and for the joint use and benefit of said employé or beneficiaries and the association the liability of said other person, and in the case the association recovers a sum greater than that paid or assumed by the association to the employé or his legal beneficiaries, together with a reasonable cost of enforcing such liability, which shall be determined by the court trying the case, then out of the sum so recovered the association shall reimburse itself and pay said cost and the excess so recovered shall be paid to the injured employé or his beneficiaries. The association shall not have the right to adjust or compromise such liability against such third person without notice to the injured employé or his beneficiaries and the approval of the board, upon a hearing thereof.

6 *See, e.g.*, Employers' Indem. Corp. v. Felter, 277 S.W. 376 (Tex. Comm'n App. 1925, jdgmt adopted); Fort Worth Lloyds v. Essley, 235 S.W.2d 700 (Tex. Civ. App.—Galveston 1950, writ ref'd); Stowell v. Texas Employers' Ins. Ass'n, 259 S.W. 311 (Tex. Civ. App.—Dallas 1924, no writ).

7 *See, e.g.*, Fort Worth Lloyds v. Haygood, 151 Tex. 149, 246 S.W.2d 865 (1952); Hart v. Traders & Gen. Ins. Co., 144 Tex. 146, 189 S.W.2d 493 (1945); Houston Gas & Fuel Co. v. Perry, 127 Tex. 102, 91 S.W.2d 1052 (1936); Texas Employers' Ins. Ass'n v. Brandon, 126 Tex. 636, 89 S.W.2d 982 (1936).

8 TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (1967).

9 *See, e.g.*, Hart v. Traders & Gen. Ins. Co., 144 Tex. 146, 189 S.W.2d 493 (1945); Texas Employers' Ins. Ass'n v. Brandon, 126 Tex. 636, 89 S.W.2d 982 (1936); Warneke v. Argonaut Ins. Co., 407 S.W.2d 834 (Tex. Civ. App.—El Paso 1966, writ ref'd n.r.e.).

10 *See, e.g.*, Hart v. Traders & Gen. Ins. Co., 144 Tex. 146, 189 S.W.2d 493 (1945); Texas Employers' Ins. Ass'n v. Brandon, 126 Tex. 636, 89 S.W.2d 982 (1936); Employers' Indem. Corp. v. Felter, 277 S.W. 376 (Tex. Comm'n App. 1925, jdgmt adopted).

11 TEX. REV. CIV. STAT. ANN. art. 5526 (1958):

There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

. . . .

6. Action for injury done to the person of another.

12 *Id.*

of a wrongful act of another.[13] The running of the statute is not postponed until damages result from the wrong, even though damages are not sustained until a later date.[14] Neither the plaintiff's lack of knowledge as to his cause of action, nor his belief that his injuries are not serious will stop the statute from commencing.[15]

If the injured employee elects to proceed under the Workmen's Compensation Act, the period in which he must file his claim is prescribed by article 8307, section 4a.[16] Under this section the employee must file his claim within six months from the date of the injury unless "good cause" is shown as to why there is a failure to file within that period.[17] There are a considerable number of cases determining what constitutes good cause for delay, many of which hold that where an injury is latent or not believed serious,[18] or where there is a lack of knowledge as to a cause of action,[19] good cause is shown. In some instances

---

13 Robertson v. Texas & N.O.R.R., 122 S.W.2d 1098 (Tex. Civ. App.—San Antonio 1938, writ ref'd).

14 *See, e.g.*, Tennessee Gas Transmission Co. v. Fromme, 153 Tex. 352, 269 S.W.2d 336 (1954); Stillwell v. City of Fort Worth, 140 Tex. 560, 169 S.W.2d 486 (1943); Houston Water Works v. Kennedy, 70 Tex. 233, 8 S.W. 36 (1888); Thompson v. Barnard, 142 S.W.2d 238 (Tex. Civ. App.—Waco 1940), *aff'd*, 138 Tex. 277, 158 S.W.2d 486 (1942); Robertson v. Texas & N.O.R.R., 122 S.W.2d 1098 (Tex. Civ. App.—San Antonio 1938, writ ref'd); Bowers v. Schubert, 220 S.W. 120 (Tex. Civ. App.—San Antonio 1920, no writ); Fairbanks, Morse & Co. v. Smith, 99 S.W. 705 (Tex. Civ. App.), *aff'd*, 101 Tex. 24, 102 S.W. 908 (1907).

15 Plaintiff's lack of knowledge will not toll the statute of limitations unless fraud is present. *See generally, e.g.*, Crawford v. Davis, 148 S.W.2d 905 (Tex. Civ. App.—Eastland 1941, no writ); Wichita Nat'l Bank v. United States Fidel. & Guar. Co., 147 S.W.2d 295 (Tex. Civ. App.—Fort Worth 1941, no writ); Thompson v. Barnard, 142 S.W.2d 238 (Tex. Civ. App.—Waco 1940), *aff'd*, 138 Tex. 277, 158 S.W.2d 486 (1942); McCook v. Amarada Petr. Corp., 93 S.W.2d 482 (Tex. Civ. App.—Texarkana 1936, writ dism'd); Real Estate Land Title & Trust Co. v. Street, 85 S.W.2d 341 (Tex. Civ. App.—Fort Worth 1935, writ dism'd); Fort Worth & D.C. Ry. v. Speer, 212 S.W. 762 (Tex. Civ. App.—Fort Worth 1919, no writ).

16 TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (1967):

> Unless the Association or subscriber have notice of the injury, no proceeding for compensation for injury under this law shall be maintained unless a notice of the injury shall have been given to the Association or subscriber within thirty (30) days after the happening of an injury or the first distinct manifestation of an occupational disease, and unless a claim for compensation with respect to such injury shall have been made within six (6) months after the occurrence of the injury or of the first distinct manifestation of an occupational disease; or, in the case of death of the employee or in the event of his physical or mental incapacity, within six (6) months after death or the removal of such physical or mental incapacity. For good cause the Board may, in meritorious cases, waive the strict compliance with the foregoing limitations as to notice, and the filing of the claim before the Board.

17 *Id.*

18 *See, e.g.*, Aetna Cas. & Sur. Co. v. Brown, 463 S.W.2d 473 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Sapien, 458 S.W.2d 203 (Tex. Civ. App.—El Paso 1970, writ ref'd n.r.e.); King v. Texas Employers' Ins. Ass'n, 416 S.W.2d 533 (Tex. Civ. App.—Amarillo 1967, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Chambers, 233 S.W.2d 893 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.).

19 *See, e.g.*, Allstate Ins. Co. v. Maines, 468 S.W.2d 496 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ); Texas Gen. Indem. Co. v. Youngblood, 466 S.W.2d 329 (Tex. Civ. App. —Fort Worth 1971, writ ref'd n.r.e.); Consolidated Underwriters v. Pittman, 388 S.W.2d 315 (Tex. Civ. App.—Beaumont 1964, no writ); Texas Employers' Ins. Ass'n v. Clark, 23 S.W.2d 405 (Tex. Civ. App.—Eastland 1929, writ dism'd). *But see, e.g.*, Allstate Ins. Co. v. King, 444 S.W.2d 602 (Tex. Sup. 1969); Consolidated Cas. Ins. Co. v. Perkins, 154 Tex. 424,

there has been good cause for delay when compensation claims were not filed within two years of the accident.[20] Because of the good cause provision, limitations may in effect be waived under section 4a. There is no provision within the two year statute of limitation which has the same effect.[21]

The court in the instant case was confronted with the task of construing the aforementioned statutes in a situation in which a conflict developed between them. The court sought to determine how section 4a, which waived limitations for good cause, affected the applicability of the two year statute of limitations in a third party action where more than two years had elapsed from the time of the accident before a claim for compensation was filed.

The court's approach was to qualify section 4a by article 5526 so that limitations could be waived on the compensation claim for good cause shown; but limited the extent of good cause to a two year period of time in third party actions.[22] To reach this decision the court conceded that the filing of a compensation claim has the effect of tolling the statute of limitations on a third party action, and that the limitations remained tolled until the ultimate disposition of the compensation claim.[23] The filing of a claim however, cannot revive a cause of action already barred.[24] Surely if the employee elected to sue the third party after two years had passed from the date on which the accident occurred, his cause of action would be barred by limitations.[25] For the same reason, the compensation carrier would fail in the subrogation suit to recover the amount of compensation paid to the injured employee, and since the right of subrogation is a valuable right,[26] granted by statute,[27] the employee must make his election to proceed under the Workmen's Compensation Act within two years from the date of the accident to

279 S.W.2d 299 (1955); United States Fidel. & Guar. Co. v. Herzik, 359 S.W.2d 914 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.).

20 *See, e.g.*, Maryland Cas. Co. v. Cobb, 131 F.2d 603 (5th Cir. 1943); Traveler's Ins. Co. v. Price, 111 F.2d 776 (5th Cir.), *cert. denied*, 311 U.S. 676, 61 S. Ct. 43, 85 L. Ed. 435 (1940); Texas Employers' Ins. Ass'n v. Little, 96 S.W.2d 677 (Tex. Civ. App.—Eastland 1936, writ dism'd); Texas Employers' Ins. Ass'n v. Fricker, 16 S.W.2d 390 (Tex. Civ. App.—Amarillo 1929, writ ref'd).

21 TEX. REV. CIV. STAT. ANN. art. 5526, § 6 (1958).

22 Campbell v. Sonford Chem. Co., 480 S.W.2d 237, 241 (Tex. Civ. App.—Beaumont 1972, writ granted).

23 *Id.* at 241.

24 *Id.* at 241.

25 *Id.* at 239.

26 A release of the third party by the injured employee, a settlement, or adverse judgment will bar the injured employee from receiving workmen's compensation. *See, e.g.*, Hart v. Traders & Gen. Ins. Co., 144 Tex. 146, 189 S.W.2d 493 (1945); Texas Employers' Ins. Ass'n v. Brandon, 126 Tex. 636, 89 S.W.2d 982 (1936); Employers' Indem. Corp. v. Felter, 277 S.W. 376 (Tex. Comm'n App. 1925, jdgmt adopted); Warneke v. Argonaut Ins. Co., 407 S.W.2d 834 (Tex. Civ. App.—El Paso 1966, writ ref'd n.r.e.).

27 TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (1967).

prevent the carrier from being divested of his statutory right.[28] The court felt that such a solution would put the provisions of the Workmen's Compensation Act in harmony with the two year statute of limitations rather than in conflict.[29]

Although not mentioned in the instant case, *Employers' Indemnity Corp. v. Felter*[30] presented a situation in which these statutes were construed. What the Texas Commission of Appeals said as to the application of the two year limitation statute when in conflict with good cause shown for delay is particularly relevant:

> It is not necessary for us, in view of what we have just stated, to determine whether or not the Accident Board can, by virtue of the last part of section 4a of part 2 of the act, permit a party to recover compensation when such party delays beginning proceedings so long that the insurance company's rights under the subrogation section of the same act would be lost by limitation. . . . We do not pass upon the point, but will say that these two sections of the same act should be so construed as to give effect to both, if possible. . . . That can be done by not permitting such delay under section 4a as will deprive the company of its rights of subrogation under section 6a.[31]

Basic to the decision in the instant case and the dicta in *Felter* is the assumption that the cause of action accrues and the statute of limitations begins to run when an employee is injured.[32] In a common law tort action, no doubt this is the case.[33] There is considerable conflict however, as to whether or not this is the situation in a third party action. Many decisions have agreed with the contention in *Campbell*; the cause of action accrues at the time of the accident and limitations begin to run from this time, and the filing of a claim for compensation will simply toll the statute from running.[34] Other decisions have held, however,

---

28 Campbell v. Sonford Chem. Co., 480 S.W.2d 237 (Tex. Civ. App.—Beaumont 1972, writ granted).

29 *Id.*

30 277 S.W. 376 (Tex. Comm'n App. 1925, jdgmt adopted).

31 *Id.* at 379. The court's decision in *Felter* was based upon the premise that res judicata would be successfully pleaded by the third party in a subrogation suit by the compensation carrier since Mrs. Felter had sued the third party and received an adverse judgment before she made her claim for compensation.

32 Campbell v. Sonford Chem. Co., 480 S.W.2d 237 (Tex. Civ. App.—Beaumont 1972, writ granted).

33 *See, e.g.*, Atkins v. Crosland, 417 S.W.2d 150 (Tex. Sup. 1967); Houston-Am. Fin. Corp. v. Travis, 343 S.W.2d 323 (Tex. Civ. App.—Dallas 1960, writ ref'd n.r.e.); Missouri-K.-T. Ry. v. Hamilton, 314 S.W.2d 114 (Tex. Civ. App.—Dallas 1958, writ ref'd n.r.e.); Robertson v. Texas & N.O.R.R., 122 S.W.2d 1098 (Tex. Civ. App.—San Antonio 1938, writ ref'd).

34 Mendiola v. United States, 401 F.2d 695 (5th Cir. 1968); Standard Oil Co. v. Swinney, 201 F.2d 133 (5th Cir. 1953); Bruner v. Skibsaktieselskabet Hilda Knudsen, 123 F. Supp. 903 (S.D. Tex. 1954); Webster v. Isbell, 71 S.W.2d 342 (Tex. Civ. App.—Galveston 1934),

that rather than the statute of limitations being tolled during the pendency of the compensation claim, the cause of action has not accrued, and therefore limitations have not initially begun to run until the final disposition of the compensation claim.[35]

The decisions holding that limitations do not begin to run until final disposition of the compensation claim are based upon the theory that the right to sue the negligent third party is a contingent one, and that the compensation carrier has no right to maintain an action for the benefit of the injured employee, and to recoup its compensation payments until they have paid or assumed to pay the compensation claim.[36] "Where a party's right depends on the happening of an event in the future, the cause of action accrues, and the statute of limitations begins to run, only at the time when the event happens."[37] If one has no legal right to sue, he has no cause of action.[38] Not only is the carrier's right to sue contingent upon a future event, so is the apportionment of damages. In a third party action the compensation carrier is allowed to recover the amount of compensation paid to the injured employee, and the employee is entitled to recover any excess above his compensation award.[39] Damages cannot therefore be apportioned between the carrier and the employee until compensation has been paid or assumed.[40]

---

*rev'd on other grounds*, 128 Tex. 626, 100 S.W.2d 350 (1937); Fidelity Union Cas. Co. v. Texas Power & Light Co., 35 S.W.2d 782 (Tex. Civ. App.—Dallas 1931, writ ref'd). *See also* cases holding that where there is a legislative prohibition which prevents one from asserting his rights, the law of limitations is suspended: T. B. Meeks Co. v. Hudgins, 22 S.W.2d 764 (Tex. Civ. App.—Austin 1929, no writ); Manes v. J.I. Case Threshing Mach. Co., 295 S.W. 281 (Tex. Civ. App.—Eastland 1927, writ ref'd); Lippsitz v. First Nat'l Bank, 288 S.W. 609 (Tex. Civ. App.—Eastland 1926), *aff'd*, 293 S.W. 563 (Tex. Comm'n App. 1927, jdgmt adopted).

35 Steele v. Wiedemann Mach. Co., 128 F. Supp. 633 (E.D. Pa. 1957); Mourning v. Crown Stevedoring Co., 417 S.W.2d 725 (Tex. Civ. App.—Waco 1967, no writ); Judice v. Sumner Sollitt Co., 346 S.W.2d 135 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.); Derr v. Argonaut Underwriters Ins. Co., 339 S.W.2d 718 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.); Thompson v. Graham, 318 S.W.2d 102 (Tex. Civ. App.—Eastland 1958, writ ref'd n.r.e.); Hollins v. Lone Star Gas Co., 308 S.W.2d 276 (Tex. Civ. App.—Beaumont 1958, writ ref'd n.r.e.); Brooks v. Lucky, 308 S.W.2d 273 (Tex. Civ. App.—Beaumont 1957, writ ref'd n.r.e.); Yeary v. Hinojosa, 307 S.W.2d 325 (Tex. Civ. App.—Houston 1957, writ ref'd n.r.e.); Buss v. Robison, 255 S.W.2d 339 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Texas & P. Ry., 129 S.W.2d 746 (Tex. Civ. App.—Eastland 1939, writ dism'd jdgmt cor.); Fidelity Union Cas. Co. v. Texas Power & Light Co., 35 S.W.2d 782 (Tex. Civ. App.—Dallas 1931, writ ref'd): "If we be mistaken in our conclusion that the statute of limitation did not begin to run until the entry of final judgment . . . . the [statute] is [at least] suspended." *Id.* at 784.

36 *See, e.g.*, Texas Employers' Ins. Ass'n v. Texas & P. Ry., 129 S.W.2d 746 (Tex. Civ. App.—Eastland 1939, writ dism'd jdgmt cor.); Fidelity Union Cas. Co. v. Texas Power & Light Co., 35 S.W.2d 782 (Tex. Civ. App.—Dallas 1931, writ ref'd).

37 37 C.J. *Limitation of Actions* § 154 (1919) [now 54 C.J.S. *Limitations of Actions* § 110 (1948)], *cited in* Webster v. Isbell, 71 S.W.2d 342 (Tex. Civ. App.—Galveston 1934), *rev'd on other grounds*, 128 Tex. 626, 100 S.W.2d 350 (1937); Fidelity Union Cas. Co. v. Texas Power & Light Co., 35 S.W.2d 782 (Tex. Civ. App.—Dallas 1931, writ ref'd).

38 Borger v. Hazelwood, 199 S.W.2d 223 (Tex. Civ. App.—Texarkana 1946, no writ).

39 TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (1967).

40 Fidelity Union Cas. Co. v. Texas Power & Light Co., 35 S.W.2d 782 (Tex. Civ. App.—

Had the court in the instant case followed the reasoning that the cause of action does not accrue until compensation has been paid or assumed, they would have avoided what it appears they feared most; that the compensation carrier would lose its right of subrogation.[41] The court could have then allowed injured employees to recover compensation, rather than compelling them to sustain the expense of their injuries themselves, and given effect to the provisions of the Workmen's Compensation Act, both the carrier's right to subrogation and the good cause provision without a conflict with the two year statute of limitations.

Three prior decisions by the Beaumont Court of Civil Appeals, the jurisdiction deciding *Campbell*, apparently followed this theory.[42] These cases, involving compromise settlement agreements of compensation claims, held that limitations against the third party action began to run when the compromise settlements were approved by the Industrial Accident Board.[43] It is interesting that the court said the cause of action does not accrue until compensation is paid or assumed,[44] and that there is two years from this date in which to file against the negligent third party,[45] rather than holding that the cause of action accrued at the date of the accident, and that limitations were simply tolled during the pendency of the compensation claim. Given the facts in these cases however,[46] the decisions would be the same regardless of which theory was applied. Possibly the court did not feel obligated to draw a distinction, or even consider whether or not one existed, until a factual situation such as that of *Campbell* arose where over two years had passed from the date of the accident before a compensation claim was even filed.

Dallas 1931, writ ref'd); Fidelity Union Cas. Co. v. Riley, 26 S.W.2d 682 (Tex. Civ. App. —Dallas 1930, no writ).

41 Campbell v. Sonford Chem. Co., 480 S.W.2d 237, 240 (Tex. Civ. App.—Beaumont 1972, writ granted).

42 Judice v. Sumner Sollitt Co., 346 S.W.2d 135 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.); Hollins v. Lone Star Gas Co., 308 S.W.2d 276 (Tex. Civ. App.—Beaumont 1958, writ ref'd n.r.e.); Brooks v. Lucky, 308 S.W.2d 273 (Tex. Civ. App.—Beaumont 1957, writ ref'd n.r.e.).

43 Judice v. Sumner Sollitt Co., 346 S.W.2d 135 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.); Hollins v. Lone Star Gas Co., 308 S.W.2d 276 (Tex. Civ. App.—Beaumont 1958, writ ref'd n.r.e.); Brooks v. Lucky, 308 S.W.2d 273 (Tex. Civ. App.—Beaumont 1957, writ ref'd n.r.e.).

44 Judice v. Sumner Sollitt Co., 346 S.W.2d 135 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.); Hollins v. Lone Star Gas Co., 308 S.W.2d 276 (Tex. Civ. App.—Beaumont 1958, writ ref'd n.r.e.); Brooks v. Lucky, 308 S.W.2d 273 (Tex. Civ. App.—Beaumont 1957, writ ref'd n.r.e.).

45 Judice v. Sumner Sollitt Co., 346 S.W.2d 135 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.); Hollins v. Lone Star Gas Co., 308 S.W.2d 276 (Tex. Civ. App.—Beaumont 1958, writ ref'd n.r.e.); Brooks v. Lucky, 308 S.W.2d 273 (Tex. Civ. App.—Beaumont 1957, writ ref'd n.r.e.).

46 All compensation claims were filed within a two year period from the date of the accident.

Even if limitations could be plead successfully against a carrier in a subrogation suit as the court feared in the instant case, the more reasonable rule in the light of statutory intent would be to allow recovery by the injured employee under workmen's compensation. In *Holloway v. Texas Indemnity Insurance Co.*[47] the court stated:

> Clearly this provision [article 8307, section 4a] operates to remove all cases arising under the Workmen's Compensation Law from the statute of limitations applicable in ordinary personal injury cases.[48]

In other decisions time and again the Texas courts have held that the primary purpose of the Workmen's Compensation Act is to benefit and to protect the employee,[49] and that the Act should be construed liberally in favor of the injured workman.[50] In *Woolsey v. Panhandle Refining Co.* [51] this sentiment was well expressed:

> Workmen's compensation laws have become part of our public policy. The object of the laws was to do away with the issues of negligence, unavoidable accident, assumed risk, contributory negligence, and other like issues, and to fix the amount recoverable *free from any uncertainty*. The old system of settling disputes was unsatisfactory, and modern business methods demanded that compensation for injuries to employees be not controlled by the fault or negligence of the employer, but should rest upon broader, more humane, and certain rules.[52]

In effect, the decision in *Campbell* places the carrier's rights paramount to that of the employee in situations where there is good cause for delay in filing for compensation and a period of two or more years has elasped from the time of an accident. Only when the injured employee takes affirmative action which causes the carrier to lose his right

---

47 40 S.W.2d 75 (Tex. Comm'n App. 1931, jdgmt adopted).

48 *Id.* at 78; *accord*, Texas Employers' Ins. Ass'n v. Guidry, 128 Tex. 433, 437, 99 S.W.2d 900, 902 (1937); *cf.* Gilley v. Aetna Life Ins. Co, 35 S.W.2d 136, 138 (Tex. Comm'n App. 1931, holding approved) in which it was held that the provisions of the Workmen's Compensation Act are special laws relating to a special subject, and should be given effect even though a different conclusion might be reached under the general law. It could possibly be argued that article 8307, section 4a is a special law which waives limitations for good cause without restriction, and should prevail over the general law, the two year statute of limitations. Mingus v. Wadley, 115 Tex. 551, 557, 285 S.W. 1084, 1087 (1926).

49 *See, e.g.*, Fidelity & Union Cas. Co. v. McLaughlin, 134 Tex. 613, 135 S.W.2d 955 (1940); Woolsey v. Panhandle Ref. Co., 131 Tex. 449, 116 S.W.2d 675 (1938); Brinkley v. Liberty Mut. Ins. Co., 331 S.W.2d 423 (Tex. Civ. App.—Texarkana 1959, no writ); Texas Employers' Ins. Ass'n v. Peppers, 133 S.W.2d 165 (Tex. Civ. App.—Galveston 1939, writ dism'd jdgmt cor.).

50 *See, e.g.*, Miears v. Industrial Acc. Bd., 149 Tex. 270, 232 S.W.2d 671 (1950); Huffman v. Southern Underwriters Co., 133 Tex. 354, 128 S.W.2d 4 (1939); Industrial Acc. Bd. v. Parker, 348 S.W.2d 188 (Tex. Civ. App.—Texarkana 1960, writ ref'd n.r.e.).

51 131 Tex. 449, 116 S.W.2d 675 (1938).

52 *Id.* at 453, 116 S.W.2d at 676 (emphasis added).