Administrative Law--Finality of Findings by Administrative Body--Burden of Proof in Death Cases Before Workmen's Compensation Appeal Board

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Available at: https://researchrepository.wvu.edu/wvlr/vol54/iss1/7
resulting harm is almost certain to be serious. See Harper, Torts § 202 (1933). However, the position has been taken that in the modern law of negligence there are available the means of satisfying in the vast majority of cases, the interests that the doctrine of absolute liability was invoked to satisfy; namely, that if proper stress is laid on the test of "due care under the circumstances," it is apparent that liability based upon negligence will ordinarily be sufficient to carry the case to the jury. Smith, Liability for Substantial Physical Damage to Land by Blasting—The Rule of the Future, 33 Harv. L. Rev. 542, 554 (1920); accord, Salmond on Torts v (4th ed., 1916); Pollack's Law of Torts 505, 511, 671 n.s. (10th ed. 1916); Street, Foundations of Legal Liability 84, 85 (1906); Booth v. Rome, W. & O. Terminal Ry., 140 N.Y. 267, 35 N.E. 592 (1893); Whitla v. Ippolito, 102 N.J.L. 354, 131 Atl. 873 (1926).

Admitting the latter view to be true in theory, it is little consolation to a plaintiff whose house has been destroyed by the defendant's blasting to be told that because the defendant used due care, there can be no recovery. Further, in the great majority of instances, the defendant will be a business enterprise capable of protecting itself by indemnity insurance or by passing on the cost of such liability to its customers; whereas, the plaintiff is usually an individual who cannot shift to others the cost of repairs to his damaged property, and, he is not ordinarily insured against such losses.

In view of the extensive blasting in the state's expanding strip-mining industry, the instant decision and the prior holding in the Britton case, should indicate to that industry and others a possible additional cost of operation to be considered in estimating future expenses; and it should, at the same time, provide the general public with adequate protection against such ultrahazardous activities.

W. O. S.

Administrative Law—Finality of Findings by Administrative Body—Burden of Proof in Death Cases before Workmen's Compensation Appeal Board.—An order of the State Compensation Commissioner was reversed by the Workmen's Compensation Appeal Board and benefits were denied. Claimant's husband was found dead in a mine where he was employed as a pump man.
Decedent was found lying across two return ground wires for electrical current. His clothing was wet and he had vomited. There were two ways to account for his wet clothing: (1) a witness testified that it was impossible to perform the duties of a pump man without getting one's clothing wet, and (2) there was a water hole in the most direct approach to the pump. If decedent went through the hole his clothing would of necessity have become wet. The electric wire leading to the pump was immersed in this water hole. If decedent went through the water hole it can be inferred that he might have been electrocuted. The pathologist who performed the autopsy stated that the cause of death was undetermined; that there were no pathological symptoms or indications of electrocution; and that in ninety to ninety-three per cent of the cases of electrocution there are obvious marks resulting from it, but that it was possible that decedent could have been electrocuted without the body showing marks of it. The fact that decedent had vomited was completely unaccounted for. Held, on appeal, that the facts warranted the inference that death was probably due to electrocution resulting from employment, and that in the absence of evidence of disease, organic failure or other natural cause of death, dependent widow was entitled to workmen's compensation benefits. Decision of appeal board reversed. Morris v. State Compensation Comm'r, 64 S.E.2d 496 (W. Va. 1951). (3-2 decision).

The correctness of this decision can be questioned as violating two fundamental rules of law: (1) he that asserts a claim must be held to prove it, Burk v. Huntington Development & Gas Co., 58 S.E.2d 574 (W. Va. 1950), and (2) findings of fact by the workmen's compensation appeal board are not to be disturbed unless found to be clearly wrong. Vento v. Compensation Comm'r, 130 W. Va. 577, 44 S.E.2d 626 (1947).

A majority of the court seems to pass over the first of these two objections by reflecting on the known rule that liberality should be employed in applying the provisions of the Workmen's Compensation Act, Miller v. Compensation Comm'r, 126 W. Va. 78, 27 S.E.2d 586 (1943); Chiericozzi v. Compensation Comm'r, 124 W. Va. 213, 19 S.E.2d 590 (1942); and by referring to the W. Va. Code c. 23, art. 1, § 15 (Michie, 1949), which states: "The commissioner shall not be bound by the usual common law or statutory rules of evidence, but shall adopt formal rules of practice and
procedure as herein provided, and may make investigations in such manner as in his judgment is best calculated to ascertain the substantial rights of the parties and to carry out the provisions of this chapter.” It seems that this provision should be construed to require at least an explicit formal ruling by the commissioner that in such a case as this the risk of nonpersuasion shall be on the employer, before such result is reached by the Supreme Court of Appeals.

The above mentioned liberality rule is carried to an extreme by its application in the principal case. Here a mere conjecture, and not a very strong one, due to the undisputed testimony of the pathologist, is used to make a finding for the claimant, after the appeal board had found against such claimant. This should not be law, and if accepted as a precedent, it is assuredly dangerous. In civil cases where it clearly appears that the verdict of the jury could have been reached only by a resort to conjecture as to the controlling facts in the case, it is held that the same will be set aside and a new trial awarded. *Burk v. Huntington Development & Gas Co.*, supra. In *Williams v. Compensation Comm'r*, 127 W. Va. 78, 31 S.E.2d 546 (1944), it was stated that although informality in the presentation of evidence is permitted in compensation cases and liberality in favor of the claimant will be indulged in when appraising the evidence, yet the burden of establishing the claim still remains with the one who asserts it, and no rule of liberality will take the place of required proof. It appears that the principal case is in conflict with the above statement and if such statement had not been dictum it would be certain that the principal case was wrongly decided on the basis of this point alone.

It has been repeatedly stated in West Virginia cases that the findings of the appeal board are to be considered as the primary findings of fact on appeal to the court; that the appeal board displaces the commissioner and becomes the sole fact-finding body to be considered in the case; and that the order of the appeal board supersedes that of the commissioner for all purposes. *Vento v. Compensation Comm'r*, supra; *Manning v. Compensation Comm'r*, 124 W. Va. 620, 22 S.E.2d 299 (1942). Although this point was not discussed by the court, the result of the principal case may lead the way to adoption in West Virginia of the federal view. In was held in *Universal Camera Corp. v. NLRB*, 71 S. Ct. 456 (1951), that as the hearing commissioner has heard the evi-
dence and seen the witnesses he is best qualified to decide, and thus the reviewing board should be reluctant to disturb his findings unless error is clearly shown. Also it was held that the findings of the examiner, on judicial review of the agency's order, may be considered along with the rest of the record.

In support of the principle that the order of the appeal board should not be overruled unless clearly wrong is the W. Va Code c. 23, art. 5, § 5 (Michie, 1949), which provides that findings of fact of the appeal board shall be given like weight as that accorded to the findings of fact of a trial chancellor or judge in equity procedure. It seems that the decision of the principal case is in conflict with that provision. It is clear, perhaps too clear to require statement, that if, under the evidence of this case, a trial judge had found that decedent's death did not result from his employment, the Supreme Court of Appeals would not have disturbed such finding. Unfortunately neither the majority nor the dissenting opinions of this case cited or construed that apparently clear and controlling code provision.

It seems that the trend is for the Supreme Court of Appeals to use the "clearly wrong rule" to uphold doubtful decisions of the appeal board where such decisions have been for the claimant, Vento v. Compensation Comm'r, supra; Prince v. Compensation Comm'r, 123 W. Va. 67, 13 S.E.2d 396 (1941); but cf. Williams v. Compensation Comm'r, supra; and then conveniently distinguish the "clearly wrong rule" or evolve other rules to countervail it where the decision of the appeal board has been against the claimant. Pannell v. Compensation Comm'r, 126 W. Va. 725, 30 S.E.2d 396 (1944); Ramus v. Compensation Comm'r, 117 W. Va. 55, 184 S.E. 250 (1936).

It seems that the West Virginia court has given great weight, perhaps undue weight, to the humanitarian motive which is acknowledged to be behind the Workmen's Compensation Act and has allowed humanitarian ideas to cause it to overlook stringent rules of law. Thus the principal case, in the light of its forerunners, seems to indicate that in result, if not in words, the burden of proof in workmen's compensation cases, where death occurred in the course of employment, is on the employer to show that such death was not a result of employment. A corollary to this would be the observation that the "clearly wrong rule" in such case is of little benefit to an employer.

S. F. B.