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Workmen's Compensation -- Notice to Employer -- Filing of Claims -- Action Under Federal Employers' Liability Act

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In conclusion it may be said that the vagueness of the Statute itself and the constantly varying fact situations which arise make impossible the development of adequate rules as to what constitutes a sufficient writing. Although the cases are replete with judicial utterances that the Statute must be rigidly enforced, the court at times has been extremely lenient in upholding seemingly incomplete memoranda. This occasional laxity may be explained in two ways. There may be unusual hardship in the particular case. Or, the court may be seeking an indirect means of avoiding the strict North Carolina rule regarding part performance.[21]

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Workmen's Compensation—Notice to Employer—Filing of Claims—Action Under Federal Employers' Liability Act.

Employee was killed in an accident in December, 1929, while in defendant's employ. Defendant was a self-insurer and reported the accident to the industrial commission at once, offering to pay the claim. Plaintiff, the employee's administrator, without filing a claim, notified the defendant and the commission that he would proceed under the Federal Employers' Liability Act rather than the Workmen's Compensation Act. After various rulings and an appeal under the Federal Act[1] the plaintiff took a voluntary nonsuit. In 1935 the plaintiff petitioned for an award under the Workmen's Compensation Act and requested a hearing before the industrial commission. The North Carolina Supreme Court *held* that the claim was not barred by the one year statute of limitations as it was pending before the industrial commission during the entire period.[2]

Generally, before the injured employee or his personal representative can recover compensation under the Workmen's Compensation Act he must comply with the statute in two respects. First, he must notify the employer of the accident either within a limited time after the injury or as soon thereafter as is practicable.[3] While the notice is usually

[21] North Carolina does not allow part performance of the contract to take the contract without the statute. Hall v. Misenheimer, 137 N. C. 183, 49 S. E. 104 (1904); (1922) 1 N. C. L. REV. 48.

[1] Hanks v. Utilities Co., 204 N. C. 155, 167 S. E. 560 (1933).

[2] Hanks v. Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936).

[3] The statutes vary in different jurisdictions. Only a few are listed below. ALA. CODE ANN. (Michie, 1928) §7568 (notice to employer within 5 days; no compensation if after 90 days); ARIZ. CODE ANN. (Struckmeyer, 1928) §1446 (injury to be reported at once); GA. CODE ANN. (Harrison, 1933) §114-303 (notice immediately; barred after 30 days unless reasonable excuse and employer shown not to be prejudiced by delay); IOWA CODE (1935) §1383 (notice in 15 days; if in 30 days, not barred except as to extent employer was prejudiced; bar absolute after 90 days); KY. STAT. ANN. (Carroll; Baldwin's Rev., 1936) §§4914, 4915 (notice as soon as practicable); N. C. CODE ANN. (Michie, 1935) §8081

given in writing few states rule that written notice is a condition precedent to recovery.[4] The employer's actual knowledge of the injury[5] or verbal notice to him[6] or his agent[7] has been held sufficient. Second, the employee or his personal representative must file a claim with the industrial commission or board having jurisdiction of such proceedings, within a limited time, usually one year, from the date of injury or death.[8] A failure to follow this provision usually bars recovery[9] as the statute is generally held to be mandatory.[10] That which is necessary to constitute a sufficient filing and a sufficient claim is not clear but it has been held that a letter setting out in detail the facts of the accident[11] or

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(dd) (notice as soon as practicable; barred after 30 days unless reasonable excuse and employer shown not to be prejudiced by the delay); TENN. CODE (Shannon, 1932) §6872 (notice as soon as practicable; barred after 30 days, unless cause shown); UTAH REV. STAT. ANN. (1933) §42-1-92 (notice in 48 hours, or penalty; barred after one year).

[4] Babington v. Yellow Taxi Corp., 219 App. Div. 495, 220 N. Y. Supp. 420 (1927) (failure to give employer written notice of death caused reversal of compensation award); Beech v. Keicher, 154 Tenn. 329, 289 S. W. 519 (1926) (written notice of accident condition precedent to recovery notwithstanding employer's actual knowledge).

[5] Graver Corp. v. State Industrial Comm., 114 Okla. 140, 244 Pac. 438 (1926); Dep't of Game and Inland Fisheries v. Joyce, 147 Va. 89, 136 S. E. 651 (1927).

[6] Cook County v. Industrial Comm., 327 Ill. 79, 158 N. E. 405 (1927); Hughes v. Trustees of St. Patrick's Cathedral, 245 N. Y. 201, 156 N. E. 665 (1927).

[7] Sloss-Sheffield Steel and Iron Co. v. Foote, 231 Ala. 275, 164 So. 379 (1935) (report to employer's surgeon held sufficient); Wilson v. Clement Co., 207 N. C. 541, 177 S. E. 797 (1935) (compensation denied on other grounds); Ware v. Illinois Cent. Ry. Co., 153 Tenn. 144, 281 S. W. 927 (1926).

[8] ALA. CODE ANN. (Michie, 1928) §7570 (claim in one year); ARIZ. CODE ANN. (Struckmeyer, 1928) §1447 (claim in one year); GA. CODE ANN. (Harrison, 1933) §114-305 (claim in one year); IOWA CODE (1935) §1386 (claim in two years); KY. STAT. ANN. (Carroll; Baldwin's Rev., 1936) §4914 (claim in one year); N. C. CODE ANN. (Michie, 1935) §8081 (ff) (claim in one year); TENN. CODE (Shannon, 1932) §6874 (claim in one year); UTAH REV. STAT. ANN. (1933) §42-1-64 (death claims barred after one year).

[9] Hilty v. Fairbanks Exploration Co., 82 F. (2d) 77 (C. C. A. 9th, 1936); White v. U. S. Fidelity & Guaranty Co., 41 Ga. App. 514, 153 S. E. 574 (1930); Tricomo v. Ford Motor Co., 275 Mich. 541, 267 N. W. 731 (1936); Kaplan v. Kaplan Knitting Mills, 221 App. Div. 484, 224 N. Y. Supp. 262 (1927); Wilson v. Clement Co., 207 N. C. 541, 177 S. E. 797 (1935); State *ex rel.* Carr v. Industrial Comm. of Ohio, 130 Ohio St. 185, 198 N. E. 480 (1935); Menna v. Mathewson, 48 R. I. 310, 137 Atl. 907 (1927). *Cf.* Pacific Employers' Insurance Co. v. Pillsbury, 14 F. Supp. 156 (D. C. Cal., 1936) (failure to file claim within statutory time held to be no bar to recovery under the Longshoremen's and Harbor Workers' Compensation Act); *In re* Pahlke, 53 P. (2d) 1177 (Idaho, 1936) (state barred from recovering non-dependent compensation where claim was not filed within the statutory time).

[10] Bushnell v. Industrial Board, 276 Ill. 262, 114 N. E. 496 (1916); Kalucki v. American Car and Foundry Co., 200 Mich. 604, 166 N. W. 1011 (1918); Chmielewska v. Butte and Superior Mining Co., 81 Mont. 36, 261 Pac. 616 (1927); Wray v. Woollen Mills, 205 N. C. 782, 172 S. E. 487 (1934); 2 SCHNEIDER, WORKMAN'S COMPENSATION LAW (2d ed. 1932) §545.

[11] Williams v. Cities Service Gas Co., 139 Kan. 166, 30 P. (2d) 97 (1934); Roach v. Durham Const. Co., 52 S. W. (2d) 593 (Mo., 1932); Higgenbotham v. Oklahoma Portland Cement Co., 155 Okla. 264, 9 P. (2d) 15 (1932); Barwin v. Independent School Dist. of Sioux Falls, 61 S. D. 275, 248 N. W. 257 (1933); Hardy v. Industrial Comm. of Utah, 58 P. (2d) 15 (Utah, 1936). *Contra:*

an oral report to the commission[12] is enough. In North Carolina mere notice by the employer is an adequate compliance with the statute.[13] The courts have generally ruled that a common law action by the injured employee for damages is neither a claim nor notice of a claim.[14] After the accident is once reported and the commission recognizes the claim, its jurisdiction attaches and continues until the case is decided.[15]

In the principal case the plaintiff denied the validity of the Compensation Act and sought recovery under the Federal Act, waiting five years before making a formal claim for compensation under the State Act. The employer's notice, upon which the commission assumed jurisdiction, was held to be sufficient to preserve the rights of the plaintiff. Since the commission cannot dispose of a case except by some award, order, or judgment, final in its effect,[16] it follows that the plaintiff was entitled to a hearing. The bringing of the action under the Federal Act did not constitute an election of remedies or estop the plaintiff from thereafter asserting his rights under the Workmen's Compensation Act.[17]

The court by its liberal interpretation of the statute reading, "The right to compensation under this article shall be forever barred unless a claim be filed with the industrial commission within one year after the accident . . . ,"[18] is departing from the apparent intent of the legislature. However, the court is following the general tendency of promot-

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Higgins v. Heine Boiler Co., 328 Mo. 493, 41 S. W. (2d) 565 (1931); Murphy v. Burlington Overall Co., 225 Mo. App. 866, 34 S. W. (2d) 1035 (1931).

[12] Duford v. Escanaba Veneer Co., 246 Mich. 191, 224 N. W. 390 (1929); France v. Workmen's Compensation Appeal Board, 186 S. E. 601 (W. Va., 1936). *Contra:* Murphy v. Burlington Overall Co., 225 Mo. App. 866, 34 S. W. (2d) 1035 (1931). *Cf.* Yeaver v. State Compensation Comm., 113 W. Va. 257, 167 S. E. 617 (1933) (commission electing to investigate claim in which no report had been filed, must dispose of cases on merits); Cole v. State Compensation Comm., 113 W. Va. 579, 169 S. E. 165 (1933).

[13] Hardison v. Hampton and Sons, 203 N. C. 187, 165 S. E. 355 (1932); Hanks v. Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936).

[14] Greeley Gas & Fuel Co. v. Thomas, 87 Colo. 486, 288 Pac. 1051 (1930); Pallanck v. Donovan, 109 Conn. 469, 147 Atl. 14 (1929); Cruse v. Chicago, R. I. and P. Ry. Co., 140 Kan. 704, 38 P. (2d) 672 (1934); Schild v. Pere Marquette R. Co., 200 Mich. 614, 166 N. W. 1018 (1918). *Contra:* Ackerson v. National Zinc Co., 96 Kan. 781, 153 Pac. 530 (1915).

[15] Kennedy v. Industrial Accident Comm., 50 Cal. App. 184, 195 Pac. 267 (1921); Choctaw Portland Cement Co. v. Lamb, 79 Okla. 109, 189 Pac. 750 (1920).

[16] Texas Employers' Ins. Ass'n v. Shilling, 259 S. W. 236 (Texas, 1923); Todd v. Southern Casualty Co., 18 S. W. (2d) 695 (Texas, 1929).

[17] McLead v. Southern Pac. Co., 64 Utah 409, 231 Pac. 440 (1924) (bringing action in another state under Federal Employers' Liability Act held not evidence of abandonment of claim for compensation); Utah Idaho Cent. Ry. Co. v. Industrial Comm., 84 Utah 364, 35 P. (2d) 842 (1934) (plaintiff who misconceived his remedy and brought action under Federal Employers' Liability Act held not estopped from pursuing legal remedy under State Workmen's Compensation Laws).

[18] N. C. CODE ANN. (Michie, 1935) §8081(ff)a.

ing the remedial nature of workmen's compensation laws. As most accidents are reported[19] the employees or their personal representatives will hereafter usually be privileged to institute experimental suits before seeking compensation under the Act. How can this undesirable situation be met? Though the commission has the power to call a hearing on its own motion[20] or on the motion of either party,[21] the burden of bringing contestable claims to a speedy settlement should not be placed on the commission, the employer, or the insurance carrier. To protect the employer and the insurance carrier from dormant claims an amendment is proposed[22] by which the employee or his personal representative would be compelled to take action on the claim within one year after its filing or his rights thereunder would be forever barred. This proposed amendment would not prejudice the rights of the plaintiff where he is seeking recovery under the Federal Act, as acceptance of the state compensation is not a bar to recovery under the Federal Act.[23] A further protection is given the plaintiff by the 1933 Amendment which allows the employee or his personal representative one year in which to commence an action at law in the event of an adverse judgment under the Workmen's Compensation Act.[24]

E. C. SANDERSON.

[19] The employer is under a statutory duty to report all injuries. N. C. CODE ANN. (Michie, 1935) §§8081(vvv)a, 8081(vvv)e.

[20] The Commission is not expressly given power to call a hearing on its own motion, but it is given express authority to make rules and regulations for carry-out the provisions of the Act. N. C. CODE ANN. (Michie, 1935) §8081(jjj)a. The commission claims to have the power. Rules and Regulations, no. 14. See American Employers' Insurance Co. v. Huffman, 187 N. E. 410 (Ind. App., 1933), where the compensation board was allowed to order that additional parties be joined. Hence it seems that the commission would not be exceeding its authority by acting on its own motion.

[21] N. C. CODE ANN. (Michie, 1935) 8081(mmm).

[22] Following is a proposal for the Amendment, N. C. CODE ANN. (Michie, 1935) §8081(ff)a: "The right to compensation under this Act shall be forever barred unless a claim be filed with the Industrial Commission within one year after the accident, and if death results from the accident, unless a claim be filed with the Commission within one year thereafter: and all claims upon which action is not taken under this statute by the claimant within one year after the date of filing shall be forever barred."

[23] New York Central R. R. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. ed. 1045 (1917); Neumann v. Morse Dry Docks and Repair Co., 255 Fed. 97 (E. D., N. Y. 1918); Wetterer v. Atchison, T. and S. F. Ry., 277 Ill. App. 275 (1934).

[24] P. L. N. C. 1933, c. 449.