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Workmen's Compensation - Prematurity of Claim

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other plea.[13] Likewise, the right of the defendant to have the case dismissed is waived by judgment being rendered without objection on the part of defendant.[14]

The failure of any party except the plaintiff to take active steps in the prosecution does not amount to an abandonment.[15] Consequently, abandonment for failure to take steps under Article 3519 applies only to cases in courts of original jurisdiction, where the plaintiff must carry the case forward, and not to those on appeal.[16] To hold otherwise would mean that a plaintiff-appellant would be required to take a step within five years while a defendant-appellant would not.

The instant case is merely another expression of the court evidencing an intention to carry out the legislative intent of punishing the plaintiff when he allows his case to be prolonged.[17]

M.M.H.

WORKMEN'S COMPENSATION—PREMATURITY OF CLAIM—In September of 1936 plaintiff, while performing his work, developed a hernia and submitted to an operation on February 25, 1937. He returned to work May 22, 1937; and on August 1, 1937, there was a recurrence of the rupture. Suit was filed on June 18, 1938. During this period plaintiff performed lighter duties. Nevertheless, up to the date of the trial he was paid his regular wages. He seeks compensation for permanent and total disability under Section 8(1) (b) of the Workmen's Compensation Act—compensation to run from September, 1936. *Held,* on rehearing, the plaintiff was

13. King v. Illinois Central R.R., 143 So. 95 (La. App. 1932), where the joinder of a motion to revoke an order permitting the filing of a supplemental petition was held to waive the right to have the suit dismissed.

14. Harrisonburg-Catahoula State Bank v. Meyers, 185 So. 96 (La. App. 1938), noted in (1939) 13 Tulane L. Rev. 641.

15. Reagan v. Louisiana Western R.R., 143 La. 754, 79 So. 328 (1918), where it was held that a defendant appealing to the district court from a justice of the peace court is not a plaintiff and that five years inaction on his part did not amount to an abandonment.

Likewise, only the plaintiff is precluded by abandonment from continuing the case. The abandonment by plaintiff cannot be raised against an expert seeking costs. Hibernia Bank & Trust Co. v. J. M. Dresser Co., 14 La. App. 555, 131 So. 752 (1931).

16. Verrett v. Savoie, 174 La. 844, 141 So. 854 (1932). This case expressly repudiates the contrary ruling of City of New Orleans v. New Orleans Jockey Club, 129 La. 64, 55 So. 711 (1911); Hibernia Bank & Trust Co. v. Jacob A. Zimmerman & Sons, 167 La. 751, 120 So. 283 (1929); Good v. Picone, 18 La. App. 42, 137 So. 870 (1931).

17. For a discussion of the legislative intent, see Lockhart v. Lockhart, 113 La. 872, 37 So. 860 (1905).

entitled to a judgment fixing the rate of compensation to which he is entitled, even though the defendant should not be obliged to pay the compensation so long as the employer continues to pay to the injured employee—even as a gratuity—wages equal to or exceeding in amount the compensation to which he is entitled. *Carlino v. United States Fidelity and Guaranty Company,* 196 La. 400, 199 So. 228 (1940).

On the first hearing the plaintiff's suit was dismissed as of a non-suit. The court stated that since he was suing under Section 8(1) (b)[1] for permanent total disability to do work of a reasonable character, he failed to make out his case, since the evidence showed that at the time the suit was filed, he was working and receiving wages in excess of the amount of wages received before the injury.[2] On rehearing the court admitted that the plaintiff had no cause of action, but held that he was entitled to a judgment fixing the rate of compensation.[3]

In neither opinion was Section 18(1) (B) as amended by Act 85 of 1926[4] mentioned. This section provides that a suit by an employee entitled to compensation *shall be dismissed* as premature when the employee fails to allege that the employer has refused to pay the maximum per centum of wages to which the employee is entitled under the act.

Prior to the 1926 amendment the supreme court had held that an employee was entitled to a judgment fixing the rate, the period, and the amount of compensation to which he was entitled if there was a dispute between the parties with respect to the amount due, even though at the time of the suit the employer was paying the maximum compensation.[5] The instant case is the first to appear before the supreme court since the amendment of Section 18(1) (B) in 1926. The courts of appeal in applying this section have followed the words of the provision explicitly and have uniformly held that a suit filed by an employee to fix the amount of compensation to which he is entitled at a time when

1. La. Act 20 of 1914, § 8 (1)(b), as amended [Dart's Stats. (1939) § 4398 (1)(b)].

2. Workmen's compensation is essentially insurance against loss or diminution of earning capacity; it is not a statute allowing damages for injuries sustained. Rylander v. T. Smith & Son, 177 La. 716, 149 So. 434 (1933).

3. Cf. the sixth paragraph of the opinion of Chief Justice O'Niell on rehearing, 199 So. 228, 232 (La. 1940).

4. La. Act 20 of 1914, § 18 (1)(B) as amended [Dart's Stats. (1939) § 4408(1)(B)].

5. Ford v. Fortuna Oil Co., 151 La. 489, 91 So. 849 (1922); Daniels v. Shreveport Producing & Refining Corp., 151 La. 800, 92 So. 341 (1922); Hulo v. City of New Iberia, 153 La. 284, 95 So. 719 (1923).

he is receiving an amount equal to the maximum compensation should be dismissed as premature.[6] In 1929 the court of appeal in *Moss v. Levin*[7] refused to follow the decisions of the supreme court prior to 1926.[8] The court stated that since the passage of Act 85 of 1926 those earlier cases could no longer be considered as controlling. However, the court in the present case relied on *Hulo v. City of New Iberia*,[9] decided in 1923. The reasoning of the court of appeal in the *Moss* case, which appears entirely sound, should have been applied by the supreme court in the instant case.

The decision rendered in the instant case will impose an undue hardship on the defendant, because execution thereon will be made to depend upon the action of a third person—the employer.[10]

The court did not pass on the question of whether prescription on the plaintiff's claim was interrupted by the continued payment of wages.[11] If the court felt that prescription was not interrupted, the plaintiff should be entitled to a judgment so as to preserve his claim.

Section 31 of the Workmen's Compensation statute[12] provides that claims shall be barred "unless within one year after the accident the parties shall have agreed upon the payments to be made under this act ...." This section has been liberally construed in favor of the employee as not requiring a formal agreement between the parties as to the rate or period of compensation.[13] The payments must be made as compensation, however, and not as donations or gratuities.[14] When an employer induces

6. Moss v. Levin, 10 La. App. 149 (1929); Riener v. Maryland Casualty Co., 185 So. 93 (La. App. 1938); Pitts v. M. W. Kellogg Co., 186 So. 389 (La. App. 1939); Ulmer v. E. I. Dupont de Nemours & Co., 190 So. 175 (La. App. 1939).

7. 10 La. App. 149 (1929).

8. See note 5, supra.

9. 153 La. 284, 95 So. 719 (1923).

10. The judgment does not become executory against the defendant until such time as the employer ceases to pay wages.

11. The court did not find it necessary to pass on the question of prescription, since the suit could be based on the disability resulting from the recurrence of the rupture on Aug. 1, 1937.

12. La. Act 20 of 1914, § 31 as amended [Dart's Stats. (1939) § 4420].

13. Heard v. Receivers of Parker Gravel Co., 194 So. 142 (La. App. 1938), noted in (1940) 14 Tulane L. Rev. 644; Carpenter v. E. I. Dupont de Nemours & Co., 194 So. 99 (La. App. 1940).

14. Goodwin v. Standard Oil Co. of La., 5 La. App. 737 (1926). Where an employer, in the absence of any agreement, made certain payments to employee from time to time, and these payments were entered on the employer's books as general expenses, it was held that the payments were intended as compensation and prescription was interrupted. Heard v. Receivers of Parker Gravel Co., 194 So. 142 (La. App. 1938).

his employee to forego any claim for compensation and continues to pay his wages as before the accident, prescription is interrupted and a suit filed during this period will be dismissed as premature.[15]

Following the liberal interpretation placed by the courts of appeal upon Section 31, prescription would not run on the plaintiff's claim so long as he was receiving wages. Therefore, the facts of this case do not justify giving plaintiff a judgment at this time. In view of the express provisions of Section 18(1) (B) the plaintiff's case should have been dismissed as premature.

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15. Carpenter v. E. I. Dupont de Nemours & Co., 194 So. 99 (La. App. 1940).