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Workmen's Compensation - Insurer Granted Employer's Immunity in Disputes Arising out of Insurer's Safety Inspections; Exclusive Jurisdiction in Industrial Accident Commission. State Compensation Insurance Fund v. Superior Court (Cal. App. 1965)

Phillip J. Myles

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Employee Breceda was permanently injured by falling lumber while operating a forklift for his employer, Arcata Lumber Services, Inc. State Compensation Insurance Fund, Arcata’s workmen’s compensation insurer, had agreed, as a term of the insurance contract, to make safety inspections of the working area and to make suggestions that might serve to reduce the number or severity of injuries. Following the receipt of compensation benefits from State Fund, Breceda brought an action in the superior court, alleging that the insurer either negligently inspected or negligently failed to conduct the promised inspections. Plaintiff claimed that, in voluntarily and contractually assuming Arcata’s obligation to inspect, defendant assumed performance of a duty not required of it by law, and thereby became bound to exercise ordinary care in the performance thereof. As a proximate result of the alleged negligence, plaintiff suffered injuries. The superior court overruled State Fund’s demurrer for lack of jurisdiction. On appeal by defendant to the District Court of Appeal, held, reversed: An employer’s workmen’s compensation insurer acts as an insurer, and not as a third person, when it assumes the employer’s duty to conduct safety inspections. Disputes between an employee and the insurer related to such inspections are within the exclusive jurisdiction of the Industrial Accident Commission. State Compensation Insurance Fund v. Superior Court (Cal. App. 1965).

1 The contract provision was as follows: "STATE COMPENSATION INSURANCE FUND . . . DOES HEREBY AGREE . . . (3) TO SERVE the Insured (a) by the inspection of work places covered by the Policy when and as deemed desirable by the Fund and thereupon to suggest to the Insured such changes and improvements as may operate to reduce the number or severity of injuries during work . . ." 237 Cal. App. 2d 416, 419 n.2, 46 Cal. Rptr. 891, 892 n.2.

2 The primary purpose of the workmen’s compensation laws, which were unknown at common law, is to secure immediate and continuing assistance to employees injured in the course of their employment, irrespective of the fault of any party. Contributory negligence, the “fellow worker” rule, and assumption of risk are no longer available to an employer as defenses against his employee’s claim for compensation. Except where an employer fails to insure against his liability for compensation, a claim for compensation is the employee’s sole remedy against his employer, such remedy being within the exclusive jurisdiction of the Industrial Accident Commission. Thus the common law rights of employer and employee were abrogated. See generally 2 WITKIN, SUMMARY OF CALIF. LAW 1649-57 (7th ed. 1960); 55 CAL. JUR. 2d WORKMEN'S COMPENSATION § 1-12 (1960).
Breceda recognized that the Compensation Act grants to an employer immunity from the employee’s common law action for damages where the injury arises out of his employment.\(^3\) Breceda further conceded that the immunity is extended to his employer’s insurer whenever the insurer is substituted for the employer under the compensation laws.\(^4\) However, since the duty to conduct safety inspections of the employment area is imposed upon the employer alone, Breceda argued that in assuming this duty,\(^5\) the insurer steps from its role as an insurer and is not substituted for the employer nor cloaked with the employer’s mantle of immunity. Accordingly, Breceda asserted that State Compensation Fund became a “person other than the employer” within the meaning of Cal. Labor Code sections 3852 and 3601\(^6\) and therefore was subject to liability in a court of law.

In deciding that the insurer could be substituted for the employer in the instant case, and that the insurer was protected by the employer’s statutory immunity, the State Fund court concluded that safety inspections are “inextricably interwoven” with the insurer’s status.\(^7\) In further holding that an insurer acts within its role in assuming the employer’s duty to inspect, the court found that the

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\(^3\) **CAL. LABOR CODE** § 3601.

Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is . . . the exclusive remedy against the employer for the injury or death.

\(^4\) **CAL. LABOR CODE** § 3755.

If the employer is insured against liability for compensation, and if after the suffering of any injury the insurer causes to be served upon any compensation claimant a notice that it has assumed and agreed to pay any compensation to the claimant for which the employer is liable, such employer shall be relieved from liability for compensation to such claimant . . . . The insurer shall, without further notice, be substituted in place of the employer in any proceeding therefore or thereafter instituted by such claimant to recover such compensation, and the employer shall be dismissed therefrom. . . . (Emphasis added.)

\(^5\) **CAL. LABOR CODE** § 6400.

Every employer shall furnish employment and a place of employment which are safe for the employees therein.

Hall v. Burton, 201 Cal. App. 2d 72, 80-81, 19 Cal. Rptr. 797, 802 (1962) (His duty is of a continuing nature, requiring reasonably careful inspection at reasonable intervals.); **32 CAL. JUR. 2d Master & Servant** § 95.

\(^6\) **CAL. LABOR CODE** § 3852.

The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation . . . may likewise make a claim or bring an action against such third person. . . . See **CAL. LABOR CODE** § 3601, note 5 supra.

\(^7\) 237 Cal. App 2d at 424, 46 Cal. Rptr. at 896.
Compensation Act raised a bar to Breceda's superior court action. The court relied heavily upon *Sarber v. Aetna Life Ins. Co.*, *Fitzpatrick v. Fidelity & Casualty Co.*, and succeeding decisions to support its conclusion that the insurer is subrogated to all the rights and duties of the employer, and that the Industrial Accident Commission has exclusive jurisdiction where recovery for an injury comes within the provisions of the Workmen's Compensation Act.

In *Sarber*, the plaintiff employee, injured in the course of his employment when a small piece of steel penetrated his leg, demanded that his employer's compensation insurer, who had assumed the employer's duty of medical treatment under the Compensation Act, arrange for the removal of the steel splinter. Although the insurer's selected physician advised him that the splinter had been removed, Sarber was later compelled to undergo a second operation for its actual removal. Plaintiff alleged increased pain and disability by this deceit and prayed for damages against the insurer. The judgment sustaining defendant's demurrer was affirmed; jurisdiction over the dispute was held to be vested exclusively in the Industrial Accident Commission by virtue of the provisions of the Compensation Act. The *Sarber* court ultimately held that where the employee's injury has been aggravated or his disability extended through the unskilfulness of the physician selected by the insurer, the Workmen's Compensation Act will provide additional benefits to compensate the employee for his increased suffering. *Sarber* concluded that an employer is liable for all such consequences following an accident, and that compensation benefits are an injured employee's exclusive remedy against his employer. The court further declared that:

> It should be stated at the outset that, when the insurance carrier is substituted for the employer under the provisions of the Compensation Act, the carrier is subrogated to all the rights and duties of the employer. (Emphasis added.)

Although the defendant insurer was accorded the employer's immunity from an action at law, the *Sarber* court recognized that substi-

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8 23 F.2d 434 (9th Cir. 1928).
9 7 Cal. 2d 230, 60 P.2d 276 (1956).
11 23 F.2d at 435.
12 Ibid.
tion of the insurer for the employer is a condition precedent to the insurer's becoming subrogated to the employer's immunity.

Fitzpatrick v. Fidelity & Casualty Co., another case involving medical unskillfulness by the insurer's selected physician, added that an aggravation of an injury or the inflicting of a new injury arising out of examination or treatment are compensable, and therefore within the exclusive jurisdiction of the Industrial Accident Commission. The superior court may not, Fitzpatrick continues, entertain an action for damages against the employer or his insurance carrier.

The State Fund court interpreted Fitzpatrick as holding that a legislative intent to connect the employer and the insurer must be inferred whenever the insurer stays within its role. Reasoning that the insurer, because of its greater resources, can better perform the employer's duty of safety inspection, and that safety and insurance are both part of the complete system of workmen's compensation, the State Fund court concluded that the performance of safety inspections is "inextricably interwoven" with the insurer's status as an insurer. The insurer therefore acts within its role when it contractually assumes the duty to inspect, performing it with the same statutory immunity granted the employer. Furthermore, the State Fund court concluded that the Legislature, in enacting Cal. Labor Code sections 3850 and 3852, explicitly "conferred" the right upon an injured employee to bring an action against a person other than

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13 7 Cal. 2d 230, 60 P.2d 276. In Fitzpatrick, the plaintiff alleged agency and attempted to prove that, in providing treatment through its physician, the insurer was a "third person" within the meaning of Cal. Labor Code section 3852. Statute cited note 6 supra. Held, an aggravation of an injury due to negligent medical treatment or examination is within the Compensation Act, and the Industrial Accident Commission has exclusive jurisdiction over any action against the employer or his insurer. Fitzpatrick also affirms the rule that a doctor is liable for his own acts, and an award to an employee against his employer or his insurance carrier does not raise a bar to an action against the doctor for negligence or malpractice. Fitzpatrick also cited Sarber v. Aetna Life Ins. Co. as authority for the proposition that injury or disability arising out of negligent medical treatment is compensable, and an action for damages will not lie against an insurance carrier.

14 Id. at 233, 60 P.2d at 278.

15 "But, as we have shown, the California Supreme Court in Fitzpatrick v. Fidelity & Casualty Co. . . . has held—and without any reference to legislation expressly tying together the insurer and the employer—that a legislative intent to do so must be inferred from the whole legislative scheme whenever the insurer stays within its role of 'insurer qua insurer.'" 237 Cal. App. 2d at 426, 46 Cal. Rptr. at 897.

16 "Thus we assert that when an insurer assumes by contract the duty to inspect, it acts as an insurer and the Industrial Accident Commission has exclusive jurisdiction to determine controversies between the employee and the insurer relating to the latter's performance of that obligation." Id. at 425, 46 Cal. Rptr. at 896-97.

17 CAL. LABOR CODE § 3850 (Employer includes insurer as defined in this division); see CAL. LABOR CODE § 3852 note 6 supra.
his employer, but "denied" this right when the action is against the employer's compensation insurer.\textsuperscript{18}

The Compensation Act provides that an insurer may be substituted for the employer for the issuance of compensation benefits \textit{after} the occurrence of an injury,\textsuperscript{19} but here, State Fund's alleged negligence occurred prior to Breceda's injury. Furthermore, "insurer" is consistently defined throughout the Compensation Act as "one authorized to insure employers against liability for compensation."\textsuperscript{20} Also, "compensation" encompasses those benefits owed by an employer to an injured employee;\textsuperscript{21} "compensation" does not include an employer's duties associated with safety in employment. And, unlike the duty to provide compensation to an injured employee where the requisite conditions exist,\textsuperscript{22} it has been held that the duties of the employer related to safety in employment are nondelegable.\textsuperscript{23} Thus, although the complete system of workmen's compensation embodies provisions for insurance and safety in employment,\textsuperscript{24} it is the ex-

\begin{footnotes}
\item[18] 237 Cal. App. 2d at 426, 46 Cal. Rptr. at 897.
\item[19] See statute cited note 4 \textit{infra}.
\item[20] CAL. LABOR CODE § 3211 ("'Insurer' includes the State Compensation Insurance Fund, and any private company . . . authorized . . . to insure employers against liability for compensation . . . ."); CAL. LABOR CODE § 6300 ("'Insurer' includes the State Compensation Fund and any private company . . . authorized . . . to insure employers against liability for compensation under Part 1 of this division and under Division 4 . . . ."); see CAL. INS. CODE § 23 ("The person who undertakes to indemnify another by insurance is the insurer . . . ."); cf. CAL. INS. CODE § 109 ("Workmen's compensation insurance includes insurance against loss from liability imposed by law upon employers to compensate employees and their dependents for injury sustained by the employees arising out of and in the course of the employment, irrespective of negligence or of the fault of either party.").
\item[21] CAL. LABOR CODE § 3207.
\item[22] "Compensation" includes expenditures for medical and hospital treatment as well as for disability benefits awarded.); Hawthorn v. Beverly Hills, 111 Cal. App. 2d 723, 728, 245 P.2d 352, 355 (1952) ("'Compensation' is a technical term and includes all payments conferred by the Workmen's Compensation Act on an injured employee.").
\item[23] CAL. LABOR CODE § 3600 provides in part:
\item[25] CAL. CONST. art. XX, § 21 (1918) provides in part:
\item[26] A complete system of workmen's compensation includes adequate provision for the comfort, health and safety and general welfare of any and all workmen and those dependent upon them for support to the extent of relieving-
\end{footnotes}
pressed intent of the Legislature that the role of the insurer be limited to substitution for the employer for the issuance of compensation benefits following an injury to an employee.

The question of whether the Compensation Act could be construed to enlarge the employee's rights was answered by the California Supreme Court in the 1927 decision of *De La Torre v. Johnson.*

There, the court stated:

> The compensation provided for in said act is not damages in the sense that the latter term is used in ordinary tort actions. The right to recover damages for personal injury is not a right of action established by the Workman's Compensation Insurance and Safety Act, but a common law right established long before the adoption of the Workmen's Compensation Act. . . . It was the new rights and liabilities created by the Compensation Act which were nonexistent that were the concern of the lawmakers in framing the act.

An employee is, therefore, entitled to his common law remedy against persons, other than his employer, who proximately cause his injury. Further, the employee's common law right of action is independent of and in addition to the protection afforded by the Compensation Act for injuries arising out of his employment. While this would seemingly amount to a twofold remedy, the equitable doctrine of subrogation operates to limit an employee to a single recovery by allowing his employer or the insurer reimbursement for the compensation benefits provided.

Cal. Labor Code sections 3850 and 3852 neither "confer" nor "deny" to an injured employee the right to bring an action for damages against a wrongdoer. Rather, the two sections affirm the existence of an employee's common law rights against persons other from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of either party; also full provision for securing safety in places of employment; . . . full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects . . . (Emphasis added.)


26 200 Cal. at 759, 254 Pac. at 1107.

27 The general definition of "employer" does not include "insurer." See CAL. LABOR CODE § 3300.


29 Statutes cited notes 6 and 16 supra.
than his employer. Considered within the context of the subrogation chapter,\textsuperscript{30} the provision that the insurer is included in the definition of "employer" is clearly for the purpose of allowing an insurer to pursue its right of subrogation where appropriate. Although Cal. Labor Code section 3850 defines "employer" as including "insurer" only for purposes of the subrogation chapter, the State Fund court considered this section beyond the stated bounds of applicability, and within the context of the entire Compensation Act.\textsuperscript{31} This section, and Cal. Labor Code section 3852, were construed as supplementing Cal. Labor Code section 3601 and as explicit mandates denying court jurisdiction over claims against an insurer acting within its role.\textsuperscript{32}

A more straightforward conclusion appears to be that the subrogation chapter,\textsuperscript{33} and specifically Cal. Labor Code sections 3850 and 3852, pertain only to subrogation claims by the employer or his insurer. Had the State Fund court so held, Breceda could have identified himself with the rule of \textit{Mays v. Liberty Mutual Ins. Co.}\textsuperscript{34} In \textit{Mays}, the Third Circuit Court of Appeals addressed itself to the same question confronting the State Fund court and concluded that the compensation statutes of Pennsylvania unambiguously defined "employer" as not including the term "insurer."\textsuperscript{35} The \textit{Mays} court gave full effect to the language of a later section of the Pennsylvania compensation statutes related solely to the procedure of subrogation. There, the definition of employer included the insurer, and the court held that the insurer was equated with the employer only for purposes of subrogation.\textsuperscript{36} Thus, this latter definition could not be ex-

\textsuperscript{30} CAL. LABOR CODE DIV. IV, Pt. 1, ch. 5, entitled "Subrogation of Employer," and containing CAL. LABOR CODE sections 3850 and 3852, grants to an employer or his compensation insurer the right to recover from a responsible third party the amount of compensation issued on behalf of an employee. Where the employee has concluded settlement of the entire claim with the responsible party, the employer or his insurer may recover directly from the employee. See 37 CAL. S.B.J. 743 (1962).

\textsuperscript{31} CAL. LABOR CODE section 3850, cited note 17 supra, is expressly applicable to the subrogation chapter, whereas the general definition of "employer," CAL. LABOR CODE section 3300, cited note 27 supra, does not include "insurer."

\textsuperscript{32} 237 Cal. App. 2d at 426-27, 45 Cal. Rptr. at 897-98.

\textsuperscript{33} See material cited note 30 supra.

\textsuperscript{34} 323 F.2d 174 (3rd Cir. 1963) (Mays alleged injuries resulting from the negligence of his employer's compensation insurer for failing to properly inspect the area of employment under a voluntary contractual promise similar to the contract provision involved in the instant case.).

\textsuperscript{35} Id. at 176; 77 PURDON'S PA. STAT. ANN. § 21.

The term "employer," as used in this act, is declared to be synonymous with master, and to include natural persons, partnerships, joint stock companies, corporations for profit, municipal corporations, the Commonwealth, and all governmental agencies created by it.

\textsuperscript{36} 323 F.2d at 176; 77 PURDON'S PA. STAT. ANN. § 701.

The term "Employer," when used in this article, shall mean the employer as
tended to derogate from Mays' common law right to bring an action for damages against one other than his employer, in that case the insurer.

The argument of public policy advanced by the insurer in the instant case parallels that made in similar cases in other jurisdictions. Basically, it was postulated that the effect of permitting Breceda to proceed would be that compensation carriers would either be compelled to cease performing safety inspections or to substantially increase their premiums. Although the State Fund court admits that the argument is impressive, it does not state that considerations of public policy were a deciding factor in its opinion.

Regardless of the ease with which it might have concluded that the insurer was not substituted for the employer, or that the rule of Mays was persuasive to Breceda's case, the State Fund court held otherwise. It has ruled that an insurer conducts safety inspections accompanied by the same immunity to actions at law as is granted to the employer by statute. Although State Fund contended that the contract provision did not obligate it to assume Arcata's duty to inspect, one effect of the instant decision is an expansion of the role of the workmen's compensation insurer to include the performance of this duty when the insurer should choose to assume it.

In effectively holding that an insurer is vested with the employer's

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37 Mays v. Liberty Mutual Ins. Co., 323 F.2d 174 (3d Cir. 1963); Nelson v. Union Wire Rope Corporation, 31 Ill. 2d 69, 199 N.E.2d 769 (1964). In Nelson, a construction hoist fell six floors, killing seven workmen and injuring others. Plaintiff employees alleged that American Mutual Liability Ins. Co. negligently performed gratuitous safety inspections. In holding that the insurer's duties and immunities extend solely to the payment of compensation under the Illinois Compensation Act, the Illinois Supreme Court affirmed the plaintiff's trial court judgment. Fabricus v. Montgomery Elevator Co., 254 Iowa 1319, 121 N.W.2d 361 (1963). The Iowa Supreme Court, interpreting that state's compensation act, held that the insurer was a third party under the act on similar facts, and that the act abolished only common law actions between the employee and employer. Smith v. American Employers Ins. Co., 102 N.H. 530, 163 A.2d 564 (1960). The Supreme Court of New Hampshire held that the insurer was a person other than the employer under the New Hampshire Act, and was therefore liable at common law for its negligence. It is noteworthy that the Legislature, at its next session, amended the definition of "employer" as follows: "Except where the context specifically indicates otherwise, the term 'employer' shall be deemed to include the employer's insurance carrier." N.H. REV. STAT. ANN. § 281:3 (1961).

See also 14 SYRACUSE L. REV. 710 (1963), and 26 NACCA L.J. 223 (1961), for commentaries on the Smith decision, and 51 VA. L. REV. 347 (1964), for a discussion of the Nelson case. Contra, Williams v. U.S. Fidelity and Guaranty Co., 358 F.2d 799 (4th Cir. 1966), holding that the insurer is not a stranger to the business of the employer under the Virginia Compensation Act, and that the insurer is an employer whenever the claim is one for which compensation benefits are payable.

38 237 Cal. App. 2d at 425, 46 Cal. Rptr. at 896.
statutory immunity *whenever* it chooses to assume the latter’s duty to inspect, the decision of the *State Fund* court is inconsistent with the Compensation Act. Duties imposed upon the employer by the Compensation Act are specific and absolute. The act does not provide for the substitution of the insurer for the employer for performance of any of the latter’s duties other than the issuance of compensation benefits to an injured employee. There is no provision that the insurer may be substituted for the employer for the performance of any other duty that the insurer may choose to assume. The *State Fund* court might well have concluded from its review of the complete system of workmen’s compensation that the Legislature has not considered the subjects of substitution and immunity presented by the factual circumstances of the instant case.

**Phillip J. Myles**