

Wesley Lee

vs.

No. 27 Swain.

American Enka Corporation and Fred Baker.

Appeal by plaintiff from Phillips, J., at March Term, 1937, of the Superior Court of Swain County. Affirmed.

This is an action to recover damages for personal injuries suffered by the plaintiff which resulted from a disease, to-wit: tuberculosis, which plaintiff contracted while at work as an employee of the defendant, American Enka Corporation, in Swain County, North Carolina, under the supervision of the defendant, Fred Baker, Superintendent of the defendant corporation.

The action was begun in the Superior Court of Swain County.

In his complaint the plaintiff for his cause of action against the defendants, alleged:-

1. That the plaintiff is a citizen of North Carolina and a resident of Swain County in said State.
2. That the defendant, American Enka Corporation, is a corporation, duly created, organized and existing and at the time of the grievances hereinafter complained of, was, and still is engaged in the manufacture of rayon from paper and wood pulp, and other ingredients, and has and maintains its principal office and place of business at Enka, Buncombe County, North Carolina, where it owns, has, maintains and operates a large factory and plant for the purposes aforesaid.
3. That at the time of the grievances hereinafter complained of, the defendant Fred Baker was in the employ of the defendant corporation as a foreman and as superintendent of the said rayon plant, and was in charge of what is known as the spinning room and acid room, and at the time aforesaid, the defendant corporation had invested the said Fred Baker with power to supervise, control and direct the operations in said plant, and to supervise, order and direct the employees employed and working in said department, and in like manner had invested the said Fred Baker with power and authority to employ and discharge hands and

laborers and to report them for disobedience of orders and thereby procure their discharge and at the time aforesaid the said Fred Baker was a citizen of North Carolina, and a resident of the City of Asheville, in Buncombe County, North Carolina.

4. That the plaintiff was employed by the defendant corporation in June 1933 and remained continuously in the employment of the defendant corporation until the -- day of --, 1934, at which time the plaintiff, because of the diseases and grievances hereinafter complained of, which were caused and sustained by reason of the wrongful, careless and negligent acts and omissions of the defendants, was forced to give up and abandon his said employment with the defendant corporation.

5. That when the plaintiff entered the employment of the defendant corporation, he was ordered and directed by the defendants and each of them to work in the spinning department of said acid room, and in the course of his employment was required by the defendants and each of them, to assist in cleaning out large tanks, holding thousands of gallons of sulphuric acid and other chemicals, that the plaintiff was required to work in and around said large tanks or vats, containing chemicals and sulphuric acid and other acids, which were used in said manufacturing plant, and plaintiff was ordered and directed and required to work in the spinning room in said plant and to handle pulp frisco, which was then and there manufactured in said plant from wood fibre, and other materials which were soaked and treated with the aforesaid chemicals, sulphuric acid and other acids, which were stored in said large tanks or vats.

6. That in cleaning the said tanks and vats, plaintiff was ordered and required to get inside same and it was impossible to clean out said tanks and vats in any other manner, and in working in said spinning room it was necessary for plaintiff to move and handle the aforesaid frisco pulp which had been treated with said sulphuric acid and other chemicals. That said sulphuric acid and chemicals used by defendants in defendant corporation's said plant as aforesaid, gave off and emitted poisonous and deleterious fumes and gases, which were irri-

tating and injurious to human flesh and tissues, and in coming in contact with human flesh or the human body, naturally and in the course of events, caused serious and permanent injuries and said fumes and poisonous gasses are particularly injurious and irritating to the throat and lungs, and if inhaled and breathed over a long period of time will cause tuberculosis of the lungs and throat, all of which was well known to the defendant.

7. That in the manufacture of rayon in said plant of the defendant corporation, it became and was necessary for the defendant to use said sulphuric acid and other chemicals in the treatment of wood pulp and other fibre which they thereby converted into rayon or artificial silk, and that no other process or means could be used by the defendants in said plant in the manufacture of rayon or artificial silk, that on account of the composition and inherent nature of said sulphuric acid and other chemicals, hereinafter referred to, irritating and dangerous fumes and gasses were constantly thrown off and emitted by same, and on account of the peculiar composition and nature of said sulphuric acid and other chemicals, when same were used in the manufacture of rayon, it was impossible to prevent said poisonous fumes and gasses from being thrown off and emitted therefrom.

8. That the defendants and each of them well knew of the essential nature and composition of said sulphuric acid and other chemicals used by the said plant in the manufacture of rayon, or artificial silk, and it was well known to the defendants and each of them that said sulphuric acid and other chemicals, constantly and in the usual course of events, throw off and emitted poisonous gasses and fumes which were injurious to human flesh and tissues, and were especially dangerous, irritating and injurious to the throat and lungs of any person inhaling and breathing the said fumes and gasses.

That the plaintiff was inexperienced in work of the aforesaid kind and character in and around rayon plants and was ignorant of the nature and composition of said sulphuric acid and other chemicals, and defendants and each of them negligently, carelessly and recklessly failed

to warn and notify the plaintiff that said poisonous and irritating fumes and gasses were constantly thrown off and emitted by the said sulphuric acid and other chemicals as aforesaid, and of the danger to the plaintiff from breathing and inhaling same.

9. That from the time of his employment in June 1933, plaintiff worked as aforesaid in said rayon plant for a period of about one year and six months, and during all of said time was constantly subjected to the aforesaid poisonous and irritating gasses, and constantly breathed and inhaled same, without any warning from defendants, until plaintiff's lungs were injured and weakened and plaintiff was caused thereby to contract tuberculosis of the lungs, which was directly and proximately caused by plaintiff's breathing and inhaling said poisonous fumes and gasses, and during the period of his aforesaid employment plaintiff alleges that if he had known of the danger of breathing and inhaling said poisonous fumes and gasses, or had had any knowledge of the effect of breathing and inhaling said fumes and gasses in his lungs, he would have immediately left said employment and not encountered or subjected himself to the peril and hazard of working in and around said sulphuric acid and other chemicals.

10. That the disease of tuberculosis of the lungs which plaintiff contracted as aforesaid, was caused and brought about in the usual and ordinary course of events and was incidental and essential to the particular employment in which the plaintiff was engaged. That the plaintiff was not accidentally injured, but contracted and acquired tuberculosis which was proximately caused and produced by the constant breathing and inhalation of said poisonous fumes and gasses for a long period of time and plaintiff's lungs were thereby weakened and impaired gradually without his knowledge and tuberculosis of the lungs was thereby caused and developed as aforesaid.

11. That the defendants and each of them, carelessly, negligently and wrongfully failed to warn and notify the plaintiff that the said sulphuric acid and other chemicals emitted said poisonous fumes and gasses, although this was well known to the defendants and each of them,

by the negligence of the employer. An injury is not compensable, however, under the provisions of the Act, where it was not the result of an accident which arose out of and in the course of the employment, nor where the injury is a disease in any form, unless such disease resulted naturally and unavoidably from an accident.

By his acceptance of the Act as binding upon him in all its provisions, an employee surrenders his right in the event his injury was caused by the negligence of his employer, without fault on his part, to recover of his employer damages for his injury to be assessed by a jury in accordance with well settled principles of law, and the employer agrees to pay compensation to his employee for his injury, without regard to whether the injury was caused by his negligence, and in such case surrenders his right to invoke certain defences which are well recognized in the law of this State as bars to a recovery by the employee of damages for his injury, although the injury was caused by the negligence of the employer. The validity of the North Carolina Workmen's Compensation Act has been upheld because of the mutual concessions of employer and employee under its provisions. The Act is not compulsory. It is expressly provided therein that it shall be binding on an employer and an employee, only when it has been accepted by both. Either may reject its provisions as applicable to him.

The remedy provided by the North Carolina Workmen's Compensation Act for the enforcement by both an employer and an employee of their mutual rights under its provisions is a proceeding begun and prosecuted before the North Carolina Industrial Commission, which is created by the Act. It is provided in the Act that processes and procedure in a proceeding before the Industrial Commission shall be as summary and simple as reasonably may be. The proceeding is conducted under rules prescribed by the Industrial Commission and is usually expeditious and satisfactory in its results to both employer and employee. An award made by the Industrial Commission in accordance with its findings of fact and conclusions of law is ordinarily conclusive and final. Only its conclusions of law may be reviewed by the Courts on an appeal from its award in a proceeding begun and prosecuted before the Industrial Commission for

compensation under the provisions of the North Carolina Workmen's Compensation Act.

The question presented by this appeal is whether in a case where both an employee and his employer are subject to the provisions of the North Carolina Workmen's Compensation Act, neither having rejected said provisions, it being conclusively presumed for that reason that both have accepted said provisions, and where the employee has suffered an injury while engaged in the performance of the duties of his employment, which is not compensable under the provisions of the Act, because the injury was not by accident which arose out of and in the course of the employment, but is a disease which did not result naturally and unavoidably from an accident, but was the result of conditions which are not attributable to negligence on the part of the employer, has the employee the right to recover damages of the employer to be assessed by a jury, and for that purpose to maintain an action in the Superior Court against the employer?

The answer to this question requires a consideration of a provision of the North Carolina Workmen's Compensation Act which is as follows:-

"The rights and remedies herein granted to an employee, where he and his employer have accepted the provisions of this Act, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representatives, parents, dependents, or next of kin, as against his employer, at common law or otherwise, on account of such injury, loss of service, or death". Sec. 11, N.C. Code of 1935, section 8081(r).

When the plaintiff in this action failed to reject the North Carolina Workmen's Compensation Act, as applicable to his employment by the defendant, American Enka Corporation, and thereby became subject to its provisions, in consideration of the liability assumed by the said defendant to pay to him compensation for an injury which he might suffer by an accident arising out of and in the course of the employment, without regard to whether the accident and resulting injury were caused by its

negligence, he surrendered his right to recover of the defendant damages for an injury caused by the negligence of his employer, and waived his right to maintain an action in the Superior Courts of this State to recover such damages. See Pilley vs. Cotton Mills, 201 N.C. 425, 160 S.E. 479 and Francis vs. Wood Turning Co., 208 N.C. 517, 181 S.E. 628.

The validity of the North Carolina Workmen's Compensation Act, by which rights are conferred upon employees and liabilities imposed upon employers in this State upon the principle of mutual concessions, is largely dependent upon the foregoing provision of the Act.

In view of said provision, there is no error in the judgment dismissing this action. The judgment is

Affirmed.