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Workmen's Compensation

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WORKMEN'S COMPENSATION

Compensable Injuries

In 1958, the long arm of the classic decision in the *Dripps*[1] case of 1956 continued its influence. In *Dripps* a "swing line man" on a boom had been exerting greater effort to pull his unbalanced boom for nine weeks. All of a sudden a sharp pain went down his arm. No outside agency struck him. Compensation was denied.

Four lower courts specifically analyzed the *Dripps* decision in resolving the issue of what was an "injury" to create compensability. The *Dripps* rule required a "physical or traumatic damage or harm accidental in character and as a result of external and accidental means in the sense of being the result of a sudden mishap, occurring by chance, unexpectedly and not in the usual course of events, at a particular time and place."[2] Compensability was denied to three claimants because of the failure to meet the *Dripps* test: a paint spreader who received a back injury when required to carry paint pots exerting more than usual effort;[3] a worker who suffered a sudden back pain and who died three months later from a subarachnoid hemorrhage after stooping to pick up buckets weighing 20 to 30 pounds;[4] an automobile parker in a garage who turned his head while parking a car and suffered a subarachnoid hemorrhage.[5] However, one claimant last year benefited from the *Dripps* decision's statement that the *Malone*[6] case of 1942 was not being overruled. It will be recalled that *Malone* had granted death benefits to dependents of a worker who collapsed from heat exhaustion in the 113° temperature of a foundry on a hot August day and who died within 12 hours. In the instant case[7] the worker was a "shooter" in a coal mine. He was found dead in a passageway near the spot where he was discharging explosives on a day when he and his fellow crewmen were seeking to set a record. There was a higher concentration of carbon dioxide as a result of the heavier work load. The "shooter," suffering arterio-sclerosis and cardio vasculat disease, died from a coronary occlusion. His dependents contended his heart was overtaxed trying to obtain more oxygen from the poisonous

1. Dripps v. Industrial Comm'n, 165 Ohio St. 407, 135 N.E.2d 873 (1956). This case was discussed in the 1956 Survey, 8 WEST. RES. L. REV. 396 (1957).
2. Dripps v. Industrial Comm'n, 165 Ohio St. 407, 408, 135 N.E.2d 873, 874 (1956).
3. Cartwright v. General Motors Corp. 153 N.E.2d 172 (Ohio Ct. App. 1958).
4. Long v. Industrial Comm'n, 149 N.E.2d 922 (Ohio Ct. App. 1957).
5. White v. Industrial Comm'n, 149 N.E.2d 40 (Ohio Ct. App. 1957).
6. Malone v. Industrial Comm'n, 140 Ohio St. 292, 43 N.E.2d 266 (1942).
7. Picchetti v. Pittsburgh Plate Glass Co., 153 N.E.2d 209 (Ohio Ct. App. 1957).

atmosphere. The common pleas court at trial had denied this special request to charge "an injury may arise through an external means, such as working in fumes and dust and being subjected to an event wherein the air that was breathed was deprived of its ordinary oxygen content and filled with deleterious gases." To deny this request was prejudicial error. The court of appeals held that under the *Malone* rule this experience was an accident for compensability and the majority decision in *Dripps* had not overruled *Malone,* despite the concurring opinion in *Dripps* which so contended.

To reconcile *Dripps* and *Malone* is difficult. To effect just administration of the *Dripps* rule in the Bureau of Workmen's Compensation procedures in claim decisions is hard. The Workmen's Compensation Advisory Council, recognizing these problems, adopted in a 4-2 vote a resolution at its meeting June 26, 1958, which urged legislation to provide the test of what was an accident in terms similar to Judge Zimmerman's dissent in the *Dripps* case: Injury should include any injury received in the course of and arising out of the injured employee's employment, and should embrace "injuries accidental in character and result as well as those produced or caused by accidental means."

Appeals Procedures

The appeals procedures from the Industrial Commission and Bureau of Workmen's Compensation to the common pleas courts were severely amended in 1955. Several cases last year clarified these procedures. A direct appeal to the court after the Regional Board of Review disallowed a claim was upheld as proper without first appealing to the Industrial Commission.[8] However, a direct appeal to the court from the administrator's decision denying a claim was improper. Only from decisions of the Industrial Commission or Regional Board of Review can one appeal to the common pleas courts.[9]

In the 1955 amendments, appeal from Industrial Commission decisions, other than decisions regarding the "extent of disability," to the common pleas courts was granted.[10] This legislative change was remedial only, not substantive, so its retroactive operation to injuries which had

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8. Harrison v. Scanlon, 147 N.E.2d 135 (Ohio C.P. 1958).

9. Moore v. General Motors Corp., 154 N.E.2d 98 (Ohio Ct. App. 1957).

10. OHIO REV. CODE § 4123.519.

11. Stoich v. Truscon Steel Div. of Republic Steel Corp., 147 N.E.2d 861 (Ohio Ct. App. 1956); Williams v. Youngstown Sheet and Tube Co., 152 N.E.2d 711 (Ohio Ct. App. 1957).

occurred before 1955 is not error,[11] even if the application for appeal was filed prior to the effective date of the 1955 amendments.[12]

The meaning of an Industrial Commission decision on "extent of disability" was interpreted in one case not to include a Commission's finding that a generalized arthritic involvement was not the result of injury; hence, an appeal to the common pleas court was in order.[13] The petition for appeal which states only the basis for the common pleas court's jurisdiction is sufficient. Further allegations would be surplusage so a motion to make definite and certain is out of order.[14]

Causal Relationship Between Accident and Physical Condition

The traditional issue of causal relationship between the accident incident and the claimant's physical condition occurred in several cases last year. Where an employee suffered a severe pre-existing heart disease, sustained a deep cut in a finger, then died, the medical evidence stated death had been accelerated by the accident, but the extent to which death had been accelerated could not be determined. The Supreme Court held it would be sheer speculation to find a causal relationship. For death to be compensable it must be "accelerated by a substantial period of time."[15] A jury verdict was upheld, however, where compensability was determined for a worker's death when the man with a pre-existing coronary sclerosis used extra effort to stack 50 lb. boxes on a five foot pile and lost his balance which aggravated his heart condition to cause death.[16] Another worker, who injured his chest when his tractor fell over, incurred tuberculosis three years later. Although the disease was of recent origin, 3 months at most, whether the injury was a direct cause or not was still held to be a jury issue.[17] A similar result was forthcoming when an employee with a nondisabling condition of diabetes mellitus injured his ribs and died six weeks later of coronary sclerosis and arteriosclerosis.[18]

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12. Frank v. Youngstown Sheet and Tube Co., 152 N.E.2d 708 (Ohio Ct. App. 1956).

13. Carpenter v. Scanlon, 168 Ohio St. 139, 151 N.E.2d 561 (1958).

14. Keen v. General Motors Corp. 152 N.E.2d 558 (Ohio C.P. 1958), *aff'd on rehearing* 153 N.E.2d 347 (Ohio C.P. 1958).

15. McKee v. The Electric Auto-Lite Co., 168 Ohio St. 77, 151 N.E.2d 540 (1958).

16. Brickley v. General Electric Co., 150 N.E.2d 457 (Ohio Ct. App. 1956).

17. Gatewood v. Youngstown Sheet and Tube Co., 153 N.E.2d 456 (Ohio Ct. App. 1956).

18. McGary v. Industrial Comm'n, 104 Ohio App. 149, 147 N.E.2d 274 (1956).

Jurisdictional Aspects

Jurisdictional issues appeared in 1958 also. To file a petition in common pleas court more than 60 days after the Industrial Commission rejected a claim does not meet the jurisdictional requirements of Ohio Revised Code § 4123.51. This specific workmen's compensation requirement takes precedence over the general provisions of Ohio Revised Code Sections 2305.03 and 2305.19 which allow the plaintiff one year if his action is denied for reasons other than on the merits and the time limit for filing has expired.[19] Also it was not an abuse of discretion for the Industrial Commission to refuse to accept an occupational disease application filed more than one year after the disability commenced when the statute requires a filing within six months. Mandamus to force acceptance of the claim would not lie.[20]

The extent of workmen's compensation coverage challenged Ohio courts several times. A brewer's truck driver who returned to his employer's taproom to make his daily report argued with another driver's helper over each other's ability as a beer salesman. A fight ensued, the argumentative driver was injured and later died. The incident was not within his employment relationship so his death was not compensable.[21] An employer was held not amenable to the Act where he operated a junkyard with two regular employees and occasionaly asked bystanders to lend a hand to unload trucks without paying them. He was not an employer of three or more which was necessary to come under the Act.[22] Grandchildren who received only sporadic financial help from their working grandmother who was killed did not sustain their burden of proving dependency.[23]

The Matter of Proof

Certain matters involving proof either at the administrative or judicial levels confronted the court. A silicosis compensation claimant refused to go before the Board of Silicosis referees. X-rays, however, were provided by the claimant. The Silicosis Board denied the claim. The Board of Review upheld the claim after hearing other evidence. The Industrial Commission could not be subjected to mandamus to set aside its award

19. Purtee v. General Motors Corp., 151 N.E.2d 747 (Ohio Ct. App. 1956).

20. State *ex rel.* Willis v. Industrial Comm'n, 152 N.E.2d 440 (Ohio Ct. App. 1958).

21. Davis v. Industrial Comm'n, 148 N.E.2d 100 (Ohio Ct. App. 1957).

22. Hanes v. Ticatch, 104 Ohio App. 523, 150 N.E.2d 493 (1957).

23. Pierson v. Scanlon, 106 Ohio App. 410, 150 N.E.2d 302 (1958).

to the claimant because he did not personally appear before the Silicosis Board.[24]

Also it was not error to admit as evidence for the jury the Physician's Certificate in Proof of Death filed with the Industrial Commission by the employee's doctor. The certificate revealed no history of injury and showed that the employee's doctor had no opinion concerning the causal relationship between the accident and death.[25]

In a jury trial at which a special verdict was requested, the jury found that the plaintiff was injured accidentally, in the course of and arising out of his employment. A court majority found these to be ultimate facts supporting plaintiff's judgment. The dissent contended that the fact of accidental injury had not been resolved by this general finding which was more a statement of law than of fact.[26]

Prior Recovery Under Another State's Act

An employee of New York was killed on an Ohio highway while riding as a passenger with a co-employee driver. Both were non-residents of Ohio and were covered by New York's workmen's compensation laws. New York provided compensation as the exclusive remedy. The Ohio Supreme Court, however, permitted a common law tort action by the decedent's widow against the co-employee. *Lex loci delicti* in Ohio applies despite the New York statutory exclusion of common law actions.[27]

Failure of Union To Prosecute Widow's Claim

A widow of a decedent union member sought common law recovery against the union for failure to prosecute her death claim under workmen's compensation. A union member represented to her that the union would do so. The court held that the petition failed to allege a lawful claim (employer amenable, an accidental death, in the scope of and arising out of employment) and that the union representative was acting in the scope of the union's employment when he made the promise to the widow. In the absence of a duty on the union to prosecute the claim, failure to make these allegations was fatal to the widow's petition.[28]

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24. State *ex rel.* The Fulton Foundry and Machine Co. v. Industrial Comm'n, 153 N.E.2d 711 (Ohio Ct. App. 1957).

25. Huckle v. Youngstown Sheet and Tube Co., 146 N.E.2d 464 (Ohio Ct. App. 1956).

26. Brust v. International Harvester Co., 148 N.E.2d 65 (Ohio Ct. App. 1956).

27. Ellis v. Garwood, 168 Ohio St. 241, 152 N.E.2d 100 (1958), 10 WEST. RES. L. REV. 318 (1959). See also CONFLICTS and TORTS sections, *supra.*

28. Dillow v. Phalen, 153 N.E.2d 687 (Ohio Ct. App. 1957).

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