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Workmen's Compensation

Oliver Schroeder Jr.

equivalent status of a legitimate child and, therefore, at the time of the marriage of such mother, her husband would become the legitimate stepfather of a legitimate stepchild. Such would not be the result, says Judge Taft, should the *father* of an illegitimate child marry a woman other than that child's mother and in such case, asserts the judge, such illegitimate child should not receive the benefits of section 2105.06 (I).

Statute of Frauds

The provisions of Ohio Revised Code section 2107.04 constitute a special statute of frauds relative to agreements to make wills. This section provides that no agreement to make a will, or to make a devise or bequest by will, shall be enforceable unless the same is in writing. In the case of *Frantz v. Maher*,[35] the plaintiff asked for a money judgment in an amount equal to the value of personal property which plaintiff would have received had decedent performed her alleged oral agreement not to make a will, but to die intestate. The court of appeals, reversing the judgment of the common pleas court rendered upon the pleadings, held that section 2107.04 of the Ohio Revised Code has no application to, and does not render unenforceable, an oral agreement *not* to make a will, but to die intestate.

George N. Aronoff

WORKMEN'S COMPENSATION

The year 1959 can best be described as one of transition. Major legislative changes in the Workmen's Compensation Law were enacted, comparable to the extensive 1927 and 1955 amendments.[1] Although a detailed discussion of the changes is beyond the scope of this article, suffice it to say that substantive changes, such as redefining "injury" for compensation purposes, limit the importance of 1959 court decisions which follow the rule set down in *Dripps v. Industrial Commission*.[2] The *Dripps* rule, that "injury" comprehends a physical or traumatic damage or harm accidental in character, or a sudden, unexpected, chance mishap, will be applicable only to injuries incurred prior to November 2, 1959, the effective date of the amendments. In 1959, the Ohio Supreme Court, relying upon the *Dripps* rule, twice denied compensation for injuries resulting from stress and strain.[3] With regard to injuries incurred on or after November 2, 1959, however, the courts must interpret and apply the new legislative definition, which makes a compensable "injury" one caused by external, accidental means, or one accidental in character and result.[4]

35. 106 Ohio App. 465, 155 N.E.2d 471 (1957). See also discussion in *Equity* section, p. 379 *supra*.

Suit Against Co-Employee Following Compensation Award

Perhaps the most significant judicial decision of last year was *Gee v. Horvath*.[5] In this case the court held that the negligence of a fellow-employee can be the basis of a tort suit by an employee, even though he has been awarded workmen's compensation benefits arising out of the same incident. The Ohio Supreme Court had indicated that this might be the case just a year before, in *Ellis v. Garwood*.[6] In the *Ellis* case, the New York compensation law, which bars tort actions against a co-employee, was held not to apply to an Ohio accident when both employees were non-residents of Ohio. The court, in the *Gee* case, acknowledged that some ambiguity in the tort action rule had arisen because of the *Ellis* decision. Prior to this, the supreme court, in *Morrow v. Hume*,[7] had allowed a tort action for the death of an employee in a suit brought by the employee's dependents against a co-employee, based upon his negligent driving. An earlier decision, *Landrum v. Middaugh*,[8] had denied any tort action by a compensated employee against the negligent foreman who caused the injury. The *Gee* case followed *Morrow v. Hume* and specifically overruled *Landrum*. One judge in the *Gee* case felt that this overruling was erroneous because the *Landrum* case could be distinguished on the basis that the foreman is the *alter ego* of the employer and should be cloaked with the employer's immunity from tort liability in compensation situations.[9] The other judges declined to recognize this distinction.

Injury Arising In the Course of Employment

The issue of when an injury or death arises out of and in the course of employment was considered by the courts in several cases last year. A machine shop clean-up man was found on a plant road at a point between his work station and the employer's hospital. He was unconscious, suffering from a broken leg and fractured skull. He died shortly thereafter. On the basis of these facts, plus the presumption against suicide, the appellate court affirmed the dependent's right to participate in workmen's compensation.[10] Another worker

1. Schroeder, *Legislative Enactments to Ohio Workmen's Compensation in 1959*, 20 Ohio St. L.J. 601 (1959).
2. 165 Ohio St. 407, 135 N.E.2d 873 (1956).
3. Davis v. Goodyear Tire & Rubber Co., 168 Ohio St. 482, 155 N.E.2d 889 (1959); Carbone v. General Fireproofing, 169 Ohio St. 258, 159 N.E.2d 227 (1959).
4. Ohio Rev. Code § 4123.01(C) (Supp. 1959).
5. 169 Ohio St. 14, 157 N.E.2d 354 (1959).
6. 168 Ohio St. 241, 152 N.E.2d 100 (1958), 10 West. Res. L. Rev. 318 (1959).
7. 131 Ohio St. 319, 3 N.E.2d 39 (1936).
8. 117 Ohio St. 608, 160 N.E. 691 (1927).
9. 169 Ohio St. 14, 18, 157 N.E.2d 354, 357 (1959) (concurring opinion).
10. Pilak v. Youngstown Sheet & Tube Co., 162 N.E.2d 201 (Ohio Ct. App. 1958).

fell while cleaning canopies, fractured his skull, and died. He was working three feet from a 350 degree oven from which heat was escaping through cracks. He normally worked in a 78 to 80 degree environment. Even on the day of the incident the temperature in the rest of the plant was only about 100 degrees. The court of appeals held that on these facts it becomes a jury question whether the worker's death was compensable by being within the employment relation.[11] In another case, an office manager for an insurance company was killed while driving his car. On several prior days he had gone to a neighboring city to aid in the opening of a new office. When he went to his regular office he usually arrived about 8:00 a. m. He was killed at 7:30 a. m. at an intersection located between his home town and the neighboring city. His briefcase, containing employer's papers and his IBM pencil, was in the car. This pencil he rarely took from his office except for business purposes. On this evidence, his dependents were permitted to participate in compensation benefits.[12]

Medical Proof to Substantiate Claim

No year passes without judicial decisions on the weight of medical proof necessary to substantiate a workmen's compensation claim. In 1959, the supreme court twice denied compensation when the accidental injury aggravated a pre-existing disease, but the medical proof failed to demonstrate that the accident substantially accelerated the time of death.[13] Also, the medical proof for 25 per cent loss of vision was held inadequate for a permanent partial award when based solely upon claimant's testimony that, soon after the bit of steel flew into his eye, he had to wear glasses for the first time; that later, when he closed the injured eye, it felt as if grit were present; and that still later, when he closed his other eye, he could see nothing out of the injured eye.[14]

Payment of Compensation

A constant issue in workmen's compensation centers on what act constitutes "payment of compensation or benefits awarded on account of injury."[15] Continuing jurisdiction in the Industrial Commission exists for ten years from the date of the last such payment. When an injured employee of a self-insurer was provided an infra-red ray lamp to relax her muscles and relieve pain through self-administered home treatment, the supreme court held no medical treatment was in-

11. Donlin v. Industrial Comm'n, 155 N.E.2d 459 (Ohio Ct. App. 1957).

12. Finnegan v. Metropolitan Life Ins. Co., 162 N.E.2d 216 (Ohio Ct. App. 1958).

13. Messe v. Wylie, 169 Ohio St. 252, 158 N.E.2d 891 (1959) (coronary disease); Senvisky v. Truscon Steel Div., Republic Steel Corp., 168 Ohio St. 523, 156 N.E.2d 724 (1959) (Hodgkin's disease).

14. Tate v. Young, 162 N.E.2d 134 (Ohio Ct. App. 1959).

15. Ohio Rev. Code § 4123.52.

volved which would invoke the ten year period from the date of this event.[16]

PROCEDURE

In the area of procedure, one case held that a question on cross examination in a personal injury damage suit which evoked an unresponsive answer indicating the plaintiff had received workmen's compensation for a prior injury was no basis for error.[17] The provision which prohibits calling to the jury's attention the amount of compensation applies only to proceedings under the compensation act.[18]

Claimant's request for a special instruction which included the phrase "which proximately contributed to her present disability," was correctly refused by the trial court.[19] The issue of "present disability" must not be assumed. It is a jury question, so the request was improper.

The new appeals provisions of the 1955 amendments were discussed in three cases. The employer can appeal from a ruling of the Industrial Commission to the common pleas court because Ohio Revised Code section 4123.519 so provides.[20] The employer can also appeal directly to the common pleas court from an adverse ruling by the Board of Review, without going to the Industrial Commission.[21] However, there was some question as to whether a decision of the administrator adverse to the claimant was appealable directly to common pleas court prior to review by the Industrial Commission.[22] A 1959 amendment to Ohio Revised Code section 4123.519 clarified the law by expressly allowing such an appeal.[23]

Silicosis Claims

Silicosis claims, with their special procedural requirements, resulted in a large number of judicial decisions. Last year, the Industrial Commission successfully resisted a mandamus action brought to compel it to change a rule charging the cost of a silicosis claim as of the date of total disability, not the date of the injury.[24] Under Ohio

16. Cestone v. Wylie, 169 Ohio St. 182, 158 N.E.2d 520 (1959).

17. Ricks v. Jackson, 108 Ohio App. 466, 162 N.E.2d 539 (1958), *aff'd,* 169 Ohio St. 254, 159 N.E.2d 225 (1959).

18. OHIO REV. CODE § 4123.93.

19. McCarthy v. Young, 161 N.E.2d 546 (Ohio Ct. App. 1958).

20. Holland Furnace Co. v. Schneider, 160 N.E.2d 132 (Ohio Ct. App. 1959).

21. Wine v. Summer & Co., 154 N.E.2d 674 (Ohio C.P. 1956).

22. See Moore v. General Motors Corp., 154 N.E.2d 468 (Ohio C.P. 1957), *aff'd,* 154 N.E.2d 98 (Ohio Ct. App. 1957), decided under Ohio Revised Code § 4123.519 prior to its amendment in 1959.

23. See *Administrative Law and Procedure* section, p. 337 *supra.*

24. State *ex rel.* Superior Foundry Inc. v. Industrial Comm'n, 168 Ohio St. 537, 156 N.E.2d 742 (1959).

Revised Code section 4123.68(W), specific authority for such discretionary rule in silicosis claims overrides the general language of paragraph two in the introductory portion of section 4123.68. When a silicosis claimant files his petition in a common pleas court on appeal, he must aver the first date on which a medical doctor diagnosed the disease; otherwise a motion to make definite and certain will be sustained.[25] In another case, a claimant had complained of shortness of breath and a chest condition since 1949, with periodic examinations at the county tuberculosis clinic. He was not diagnosed as silicotic by the physician until April 1955, and his claim action was filed in June 1955. In a mandamus action it was held that the claim must be accepted.[26] The remedial statutes are liberally construed and here the claimant filed within six months from the date of his diagnosis, which met the statutory requirement.[27]

The supreme court last year also construed Ohio Revised Code section 4123.68(W), which provides a specific procedure in silicosis claims, as superseding section 4123.10, which is a general statute providing that rules of evidence are not binding on the commission. The Industrial Commission may demand a medical examination by silicosis referees. If there is no record of such demand, no inference is permitted that such was made. In *State ex rel. Fulton Foundry & Machine Company v. Industrial Commission,*[28] the Board of Review reversed the deputy administrator's denial of a silicosis claim on the basis of new evidence contained in an ordinary letter. Since there was no demand on the record for an examination by silicosis referees, the allowance of the claim could not be re-examined. Thus, a request for mandamus ordering reconsideration was denied. A concurring opinion, supported by four judges, interpreted sections 4123.516-.518, which require prompt hearings and decisions, as authority for the Board of Review to decide the claim without referring new evidence back to the silicosis referees.[29] Two dissenting judges were of the opinion that section 4123.10 required full medical review of any new evidence.[30]

Ancillary Issues

When an employer insuring under the state insurance fund seeks to attack the merit rating set for the company by the Industrial Commission, mandamus will not lie unless an abuse of discretion is

25. State *ex rel.* Maxwell v. Industrial Comm'n, 159 N.E.2d 375 (Ohio Ct. App. 1958).

26. State *ex rel,* Maxwell v. Industrial Comm'n, 160 N.E.2d 346 (Ohio Ct. App. 1959). See also discussion in *Administrative Law and Procedure* section, p. 339 *supra.*

27. Ohio Rev. Code § 4123.68(W).

28. 168 Ohio St. 410, 155 N.E.2d 898 (1959).

29. *Id.* at 414, 155 N.E.2d at 901 (concurring opinion).

30. *Id.* at 415, 155 N.E.2d at 902 (dissenting opinion).

proved.[31] Because merit rating is a complex actuarial function, the Commission is deemed to have wide discretionary powers.

One case, involving lawyer's fees in compensation proceedings,[32] held that no part of the attorney's fees can be paid out of the compensation awarded the claimant.[33] Furthermore, an order from the Commission allowing $750 as attorney's fees for legal services rendered before the Industrial Commission was deemed adequate. In a claim sounding in *quantum meruit,* the lawyer had requested an additional amount measured by the value of legal services performed. In a mandamus action, the court upheld the Commission's denial of this request, recognizing that the attorney had already received $932 based upon a private contract with the claimant. The award granted the claimant, which resulted from the lawyer's services, was for permanent disability at $100 a month, in addition to the amount already allowed for temporary disability.

OLIVER SCHROEDER, JR.

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31. State *ex rel.* H. K. Porter Co. v. Klapp, 159 N.E.2d 360 (Ohio Ct. App. 1958).
32. State *ex rel.* Rice v. Industrial Comm'n, 155 N.E.2d 70 (Ohio Ct. App. 1958).
33. OHIO REV. CODE § 4123.06.