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Workmen's Compensation—Compensation Award for Death Caused by Emotional Stress

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a finding, of likelihood of confusion, must be founded on a true similarity, and not merely incidental business competition.

The Lanham act,[15] which added to the scope of trade mark infringement, allowing descriptive words to be registered if they were so indicative of their owner as to have acquired a secondary meaning, does not go so far as to prohibit the use of a portion of that title, by another, when it itself is descriptive of content. "In order to establish a trade mark it must be shown that 'the primary significance of the term in the minds of the consuming public is not the product but the producer'."[16] It is evident that here the word modern has not become so identified in the minds of the public, as to warrant a finding that use by another would be unfair competition. The Court pointed out that if a buyer went to a newstand and asked for a "Modern" he very likely would not receive it.

D. R. K.

WORKMEN'S COMPENSATION

Compensation Award for Death Caused by Emotional Stress

Does the New York Workmen's Compensation Law provide benefits for worrying yourself to death over your job? Purportedly, the Court of Appeals has answered this question affirmatively in the case of *Klimas v. Trans Caribbean Airways, Inc.*[1] It is this writer's belief, and this note will seek to show, that the jury is not in yet.

Edward Klimas was maintenance supervisor for the defendant airline. When one of the defendant's two airplanes was grounded by the Civil Aeronautics Authority for wing corrosion in November 1955, Klimas was publicly blamed and chastised for the incident by the defendant's president. From then until the time of his death, March 10, 1956, he was under great pressure to get the plane back in the air. The testimony was that he suffered great emotional and mental anxiety because of the twin burdens of the threat to his job and the responsibility for the plane. His deadline was the end of February 1956. On March 3, 1956, the plane was still not ready; so, Klimas went personally to expedite the repair effort. At this time he was handed a bill for $266,000 (representing 25% of the plane's value). From March 3rd until his death, he worked all day and into the night in an effort to get the bill reduced as well as to speed the plane's repair. His efforts were unsuccessful in both respects and the testimony of those who were there with him at this time was

15. 15 U.S.C. §§ 1051-1127 (1958).
16. Supra note 10 at 137, 211 N.Y.S.2d at 402.

1. 10 N.Y.2d 209, 219 N.Y.S.2d 14 (1961). The order of the referee, reviewed and affirmed by the Board, awarding death benefits to the plaintiff, the widow of decedent, was reversed by the Appellate Division, 12 A.D.2d 551, 207 N.Y.S.2d 72 (3d Dep't 1960), on the ground that no physical strain or exertion was shown.

that he was very tired, very upset and very nervous. On the afternoon of his death, following another fruitless bargaining session, Klimas, while resting at the side of a swimming pool, suffered a coronary thrombosis, resulting in his death from a myocardial infarction.

The Court held that previous awards of compensation for physical injuries resulting from mental or emotional strain had been sustained; however, the cases on which the majority relied, although mental and emotional stress was a factor in each of them, went off on either the ground of fright[2] or physical exertion.[3]

A tough hurdle for the majority was the case of *Lesnik v. National Carloading Corp.*,[4] where death occurred at a racetrack while the decedent was shepherding clients. That record did not have the quality of testimony indicating both *mental* and *physical* stress that the present case contains, and the decision then was that an industrial accident had not been made out. The Court here distinguished the case on the quality of testimony and on the basis that in *Lesnik* there was no evidence that the anxiety "went along" to the race track; whereas, in *Klimas* the testimony was that decedent bore his burden to the swimming pool.

The dissent relied on the *Lesnik* precedent, but placed its primary emphasis on the point that it is not for the Court of Appeals to eradicate the concept of "accident" from the Workmen's Compensation Law. This note cannot attempt to deal with the raging controversy[5] as to whether decisions such as this serve to convert the compensation format into a health insurance scheme, although this is probably the most serious question in the case. Rather, it must be limited to the holding.

That holding, although clearly expressed by the Court, is qualified by these three features of the opinion. First, the Court went to considerable pains in establishing that *physical exertion* was present. Second, emphasis was placed on the point that the gradual building up of pressure reached a *climax* in the last week. Last, the cases cited by the Court deal with *climactic occurrences and physical exertion*, thus discrediting the theory that this case opens a new area of compensation liability.

To recapitulate, we have a decision that mental and emotional anxiety resulting from on the job problems, causing a heart attack, is enough to make

2. Pickerell v. Schumacher, 242 N.Y. 577, 152 N.E. 434 (1926); Wachsstock v. Skyview Transp. Co., 279 App. Div. 831, 109 N.Y.S.2d 206 (3d Dep't 1952); Krawczyk v. Jefferson Hotel, 278 App. Div. 731, 103 N.Y.S.2d 40 (3d Dep't 1951); Church v. County of Westchester, 253 App. Div. 859 (3d Dep't 1938); Thompson v. City of Binghamton, 218 App. Div. 451, 218 N.Y. Supp. 355 (3d Dep't 1926).

3. Anderson v. New York State Dep't of Labor, 275 App. Div. 1010, 91 N.Y.S.2d 710 (3d Dep't 1949); Furtado v. American Export Airlines, 274 App. Div. 954, 83 N.Y.S.2d 745 (3d Dep't 1948).

4. 285 App. Div. 649, 140 N.Y.S.2d 907 (3d Dep't 1955), aff'd, 309 N.Y. 958, 132 N.E.2d 326 (1956).

5. See the Report of the Special Committee of the New York State Bar Association to Study the Workmen's Compensation Law, January 1957, pp. 14-24.

out an industrial accident. With all this, the Court relies on cases stating that *physical exertion or climactic incidents* (in the nature of fright) are sufficient to constitute an industrial accident, while saying that they are doing no more than following precent.

It may well be that the headnote reader may feel assured that his client can take his ulcer case to the Workmen's Compensation Board, but he had best be prepared to show that something more than anxiety over business contributed to its causation.

E. H.

"THIRD-PARTY" ACTIONS LIMITED TO IN-THE-COURSE OF EMPLOYMENT INJURIES—STATE COMPENSATION BOARD'S JURISDICTION OVER INJURIES OCCURRING IN INTERSTATE COMMERCE EMPLOYMENT UPHELD

The case of *Meachem v. New York Central R.R. Co.*[6] arose from a disputed workmen's compensation death benefits award. The decedent-employee had been injured in an in-the-course of employment accident in 1945, which left him with an ulcer condition. Later, in 1948, the employee was involved in an automobile collision, and his death from a perforated ulcer followed four months later. The first defense the self-insured employer posed to the compensation claim was that the claimants had settled a third-party action without its consent, contrary to Section 29 of the Workmen's Compensation Law,[7] by their compromise of a wrongful death action based upon the automobile collision. Next, the employer objected to the jurisdiction of the Compensation Board to entertain a claim based upon an accident met with in interstate commerce employment since the federal remedy for such accidents provided by the Federal Employers' Liability Act[8] was exclusive.[9] The Appellate Division decided in favor of the employer, although expressly only upon the Section 29 ground.[10]

The first defense raised a question as to what constitutes a proper third-party action within the meaning of Section 29. That section merely requires that the action be one which lies against a party "not in the same employ" as the "employee" for that party's "wrong or negligence," which has "injured or killed" the "employee," and for which injury the "employee" is "entitled to compensation."[11] This description leaves undertermined whether the wrong committed by the third party is limited to a wrong causing an in-the-course of employment injury only, or extends to any wrong causing a subsequent injury for which the employer is obligated in compensation. In-the-course of employment wrongs have been the almost singular subject of third-party actions, and

6. 8 N.Y.2d 293, 206 N.Y.S.2d 569 (1960).
7. N.Y. Workmen's Comp. Law § 29(1).
8. Federal Employers' Liability Act, 45 U.S.C. § 56 (1958).
9. New York Central R.R. Co. v. Winfield, 244 U.S. 147 (1917).
10. Meachem v. New York Central R.R. Co., 7 A.D.2d 253, 182 N.Y.S.2d 501 (3d Dep't 1959).
11. Supra note 7.