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Workmens' Compensation—Requirements for Subrogation Under Section 29 of the Workmen's Compensation Law

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for eleven years under the "shape-up" system and had in the past worked several times for periods of four or more consecutive weeks as Section 203 requires, the Court held that the employment relationship existed under the terms of the statute even though the disability occurred less than two weeks following the employee's return to the job after a leave of absense.

Also relied upon by the Court was *Decker v. Dunkler*,[20] in which the Court previously denied appeal from a decision of the Workmen's Compensation Board awarding disability benefits to an employee whose disability occurred during the period the employee was disabled by reason of an accident covered by the Workmen's Compensation Law. The Board found that the employment relationship was not terminated by the period of "on the job" disability. In relying on this decision the Court here reaffirms the principle laid down in that case, that "the statute should be applied in light of the existing employer-employee relationship."[21]

Viewed in the light of existing cases interpreting the meaning of "in employment" and the employment relationship, it is clear that the Court here construed the leave to be a continuance of the claimant's employment for the purpose of disability benefits and that these terms do not have a fixed, literal meaning for all purposes. Rather, these terms require an interpretation within the context in which they are used. It would seem that in order to find that the statute applies, the Court will require but two factors to be present: that the employee have worked at some time during his employment (by the employer against whom he presently brings his claim) for a period of four or more consecutive weeks,[22] and that the employee be in contemplation of returning to work for his employer.[23]

In construing a statute, a court need not be confined to the literal meaning of the words and the intention is to be gathered from the purpose and underlying policies of the enactment.[24] Thus, this Court's liberal interpretation of the Disability Benefits Law seems to be warranted.

Requirements for Subrogation Under Section 29 of the Workmen's Compensation Law

The New York Workmen's Compensation Law provides that an employee who is injured in the course of his employment by the negligence of a third party is not required to make an election in advance between taking a compensation award or bringing an action against the third party tortfeasor. However, if he chooses to take a compensation award and later decides to pursue his common-law action against the wrongdoer, the action must be commenced not later than six months after the *awarding* of compensation or,

20. 8 A.D.2d 891, 186 N.Y.S.2d 823 (3d Dep't 1959), appeal denied 7 N.Y.2d 705, 193 N.Y.S.2d 1025 (1959).
21. Supra note 16 at 101, 195 N.Y.S.2d 656 (1959).
22. Supra note 19.
23. Supra notes 19 and 20.
24. New York Post Corp. v. Leibowtiz, 2 N.Y.2d 677, 163 N.Y.S.2d 409 (1957).

in any event, within one year from the date such action accrues.[25] If the injured employee does not commence an action within that time, the party *liable* for the payment of compensation becomes subrogated to the right of action,[26] limited by the usual three year Statute of Limitations.[27]

On September 2, 1949, while in the employ of one Rossman, plaintiff Juba suffered a serious head injury, allegedly due to the negligence of the third party defendant. Juba elected to take Workmen's Compensation and received an award on September 2, 1950. However, this award was never paid since the employer was insolvent and, contrary to law,[28] uninsured. On August 5, 1952 the injured employee brought a negligence action against the wrongdoer. Since this action was commenced more than one year after it had accrued and plaintiff had received a compensation award, defendant moved to dismiss the action on the ground that, since the employer Rossman had become subrogated to this cause of action, he alone, and not plaintiff, had standing to sue. The motion was granted, and the Appellate Division affirmed the dismissal.[29] The Court of Appeals, in *Juba v. General Builders Supply Corp.*,[30] reversed, ruling that a reasonable construction of the Workmen's Compensation Law forbids an automatic assignment of the cause of action where there has been no payment of the compensation award.

Since Section 29 of the Workmen's Compensation Law was enacted in terms of "awarding" compensation, and refers to the party "liable" for payment, rather than in terms of payment itself, the literal application of the language would result in plaintiff's employer (the party "liable" for payment of the award) becoming subrogated to the cause of action against the negligent third party without ever having paid the award, when, as here, the employee did not bring his action within a year. The employer never attempted to prosecute the claim,[31] and, since he cannot pay the award, the injured workman, the supposed beneficiary of the Workman's Compensation Law, would be left with no recovery.[32]

The Court of Appeals refused to construe the statute so as to produce a

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25. N.Y. Workmen's Comp. Law § 29(1).
26. N.Y. Workmen's Comp. Law § 29(2).
27. N.Y. Civ. Prac. Act § 49.
28. N.Y. Workmen's Comp. Law § 52.
29. Juba v. General Builders Supply Corp., 6 A.D.2d 839, 175 N.Y.S.2d 961 (2d Dep't 1959).
30. 7 N.Y.2d 48, 194 N.Y.S.2d 503 (1959).
31. ". . . the subrogated carrier or employer is free to sue, compromise, abandon or otherwise dispose of the claim for whatever reason, and the employee cannot compel him to litigate it." Id. at 55, 194 N.Y.S.2d 508 (dissent) and cases cited therein.
This decision renders academic any inquiry into what would happen to the proceeds of a successful third-party suit prosecuted by an employer who had not paid the compensation award, § 29 providing merely that two-thirds of the excess over the compensation *awarded* will be paid to the injured employee.
32. § 26 of the Workmen's Compensation Law provides for the entering of judgment against an employer who has defaulted in payment of the compensation award. However, the employer in the present case was judgment proof.

result ". . . so awkward, unnatural, and unreal that . . . the Legislature could not have intended it."[33] The majority's interpretation, which prohibits taking away the injured employee's tort cause of action until he has been paid his award, was based on rules of construction which propose considering the statute as a whole, with its obvious purpose in mind,[34] and by reading it in such a way as to avoid manifest injustice and unintended effects.[35] There is no doubt that an application of these rules supports the majority's interpretation. The question raised, therefore, is whether it is proper to apply these construction aids to a statute, the language of which is unambiguous.

The Court was split on this question of the permissable extent of judicial interpretation. The dissenting judges felt that it was not the Court's function to make an exception for a case which was covered by the clear and unequivocal language of the statute merely because the result was probably unintended.

Dean Pound, in a law review article based on Austin's analysis of the subject,[36] has distinguished between the use of interpretation to determine what a legislature intended to prescribe by a given statute, and its use to meet deficiencies or excesses in rules imperfectly conceived or enacted.[37] The former he considered to be a proper use of interpretation; the latter he considered "spurious" interpretation. It would seem that Dean Pound would classify the interpretation of the majority in the present case as "spurious." In an attempt to plug a loophole in the statute, the Court has assumed the role of the Legislature. This is especially so since they were dealing in a purely statutory area, with no general common-law background. However, since the time of Dean Pound's article, the volume of statutory law has increased greatly,[38] and to limit the Court's power too severely in this area could result in an agonizing slowdown in the law-making process. In cases which are not precisely covered by a statute, justice will usually be furthered by allowing the courts to make their own application, consistent with the apparent legislative intent.

The case for allowing judicial interpretation to reach a result which is contrary to the plain language of a statute is less clear. However, when, as in the present case, it is necessary in order to prevent the frustration of the Legislature's intent, and there has been no detrimental reliance by the losing party, justice would seem to be served by allowing the Court to so exercise its power. There is probably no way of being sure how the Court will view

33. Supra note 30 at 53, 194 N.Y.S.2d 506 (1959).
34. People v. Dethloff, 283 N.Y 309, 28 N.E.2d 850 (1940).
35. New York Post Corp. v. Leibowitz, 2 N.Y.2d 677, 163 N.Y.S.2d 409 (1957).
36. Pound, Spurious Interpretation, 7 Colum. L. Rev. 379 (1907).
37. ". . . inherent difficulties of expression and want of care in drafting require continual resort to this means of interpretation [genuine] for the legitimate purpose of ascertaining what the law-maker in fact meant.
"On the other hand, the object of spurious interpretation is to make, unmake, or remake, and not merely to discover." Id. at 382.
38. This observation seems to be at odds with Pound's statement that "As legislation becomes stronger and more frequent, examples of this type of so called interpretation will finally become less common." Ibid.

its function in subsequent cases, but it is to be hoped that exceptions will be made to unambiguous statutes only when the undesired result would be obviously and violently in conflict with the Legislature's clear purpose. The job of correcting ineffectively drawn statutes belongs to the Legislature.

Besides the danger of encroaching upon the legislative function, another danger is ever present when a court gives a statute a questionable interpretation in order to meet a particular situation. Namely, it oft times creates more problems than it corrects. For example, in the present case the Court appears to take the position that an injured employee can renounce a compensation award, at least where he has not received payment of it.[39] Moreover, in its anxiety to compensate this particular plaintiff, the Court apparently overlooked the fact that the Legislature had already remedied the situation. Effective as of May 1, 1959, and applying to injuries incurred from that date on, is Section 26-a of the Workmen's Compensation Law. This Section establishes an "Uninsured Employers' Fund" (and is a good example of the advantages in allowing these problems to be cured by the Legislature itself). Subdivision seven states:

> All the rights, powers, and benefits of the employer under section twenty-nine of this chapter shall become the rights, powers and benefits of the fund, in any case in which the fund has paid or is paying compensation to an injured employee or his dependents under this section.[40]

The Section provides that the Fund will pay the compensation award in a case, like the present one, where the employer is uninsured and doesn't pay the award. It will be interesting to see how subdivision seven will be interpreted, since it may be argued that the Court has in effect held, in the present case, that the employer has no "rights, powers, and benefits . . . under section twenty-nine" until he has paid the award, in which case Section 26-a would not apply.

EXTENT OF COMPENSATION CARRIER'S LIEN ON EMPLOYEE'S THIRD PARTY ACTION RECOVERY

The Workmen's Compensation Law provides, *inter alia:*

> If an employee entitled to compensation under this chapter be injured or killed by the negligence of another not in the same employ, his dependents need not elect to take compensation . . . [but may] pursue his remedy against such other.
>
> In such case . . . the . . . insurance carrier liable for the payment of such compensation . . . shall have a lien on the proceeds of

39. "Although the question is not really before us, we, for consistency, state our view that, although the workmen's compensation award is still of record, plaintiff has renounced and voided that award by asserting here his ownership of the third-party suit." Supra note 30 at 53, 194 N.Y.S.2d 506 (1959).

This raises the question of whether the injured employee can revoke the award after partial or full payment but before the assignee has brought suit. It would appear to be doubtful—see supra note 31.

40. Note how this wording avoids the problem which gave rise to the present case.