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Workmens' Compensation—Extent of Compensation Carrier's Lien on Employee's Third Party Action Recovery

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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.

> any recovery from such other . . . to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid or to be paid by it."[41]

If a dependent should accept the option and make a recovery, the effect would be to excuse the compensation carrier from making further payments, to the extent to which such recovery reduced the total amount of payments the carrier was liable for under the Act.

The widow of Vito Campanelli, after receiving benefit payments and funeral expenses totaling $5,000, brought suit under the above quoted provision. A judgment,[42] for $150,000, was thereafter reduced to $105,000 by the Appellate Division,[43] and a compromise settlement for that amount was affected while appeal was pending to the Court of Appeals.

As administratrix of the estate of her husband, the widow moved in Surrogate's Court to have the settlement approved and the proceeds distributed. At this point petitioner, the compensation carrier, applied (under Section 29 quoted above) for a lien against so much of the widow's share of the settlement as would reimburse it for money already paid out as funeral expense and benefits, and further, for all money the Compensation Board would require it to pay into the "Aggregate Trust Fund."[44] Section 27 of the Workmen's Compensation Law provides that upon the death of a covered employee, the Compensation Board shall determine, by the use of mortality and remarriage tables, the present value of all the payments which the carrier will be liable to make as death benefits payable to the dependent. The Board shall direct the carrier to pay a lump sum representing the total of such payments into an Aggregate Trust Fund. The Section also provides that if a recovery is made by the dependent (under Section 29), the carrier will then be liable only for that portion of the lump sum payment which would remain after deducting the amount of the dependent's recovery. In any event the carrier is discharged from further liability upon making the prescribed payment, while the Fund assumes the risk that the dependent will live longer than the calculated time.

There was no dispute as to the appropriateness of the carrier's claim to reimbursement for the $5,000 already paid out. The controversy was in regard to the claim for reimbursement of the "deficiency payment." The carrier maintained that the language of Section 29, ". . . a lien . . . to the total amount of compensation awarded . . . or estimated . . .", included the amount which it would be required by the Board to pay into the Fund. The widow contended that such a literal construction of the language was inconsistent with the purposes of the statute.

In affirming decisions of the Surrogate and the Appellate Division

41. N.Y. Workmen's Comp. Law § 29.
42. Campanelli v. Kretzer, — Misc. —, 142 N.Y.S.2d 895 (Sup. Ct. 1955).
43. 1 A.D.2d 1024, 151 N.Y.S.2d 516 (2d Dep't 1956).
44. In re Campanelli's Estate, 15 Misc. 2d 663, 181 N.Y.S.2d 829 (Surr. Ct. 1958).

denying the carrier's lien for reimbursement of the deficiency payment,[45] the Court of Appeals, in *In re Campenelli's Estate*,[46] held that although a literal construction of the language of Section 29 would bear out the carrier's position, still it could not have been the Legislature's intent to provide a lien for monies which the carrier had an inescapable duty to pay in the first instance.

The Court's reasoning, in this case of first impression, leaves little room for doubt as to its correctness. There are two main grounds for the decision. First, the Court emphasizes the fact that were it not for the recovery made in the wrongful death action, the carrier would be liable for the entire amount necessary to cover payments over the widow's expected life span. Thus, the carrier should not be heard to complain when the amount of the recovery does not fully relieve this burden. Second, simple mathematics demonstrates the proposition that "such an unreasonable result could not possibly have been within the legislative design."[47] If the widow's recovery was insufficient to maintain payments over her life span, the carrier would have to make up the deficiency. If the widow suffered a lien on the recovery to the extent of that payment, it is apparent that the size of the recovery would be reduced a like amount. When so reduced, the recovery would no longer be sufficient to cover the period originally determined to be its limit.

By so deciding, the Court has avoided a rather odd result. A contrary decision would have forced the widow, in effect, to pay her own compensation.

Special Fund for Reopened Cases not Liable for Reopened Workmen's Compensation Award

On April 27, 1942, claimant's compensation claim, arising out of an industrial accident in 1940, was closed with a lump sum award as a settlement in the amount of $3,000 plus an award at a weekly rate of $9.23 for disability from the date of the accident to the date of the hearing. The medical report at the hearing disclosed that claimant, who had received an average weekly wage of $13.85 before the accident, was partially disabled. On May 4, 1954, claimant requested a reopening of his claim for further consideration. The request was granted and the Board subsequently made the award appealed from for disability over a period of 25½ weeks from October 31, 1954 to April 13, 1955, at the same rate as originally paid of $9.23 a week.[48]

The sole question presented by *Weyzk v. Town of Stafford*[49] is whether the compensation award of May 4, 1954 should be borne by the employer's carrier, as in the usual case, or by the Special Fund for Reopened Cases. The statutory law as to the division of responsibility seems clear, but it's application presents difficulty in this case. Under the Workmen's Compensation Law,

45. 9 A.D.2d 937, 196 N.Y.S.2d 572 (2d Dep't 1959).
46. 8 N.Y.2d 173, 203 N.Y.S.2d 80 (1960).
47. Id. at 177, 203 N.Y.S.2d 83.
48. Weyzk v. Town of Stafford, 8 A.D.2d 560, 183 N.Y.S.2d 481 (3d Dep't 1959).
49. 7 N.Y.2d 121, 195 N.Y.S.2d 841 (1959).