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# Workmens' Compensation—Special Fund for Reopened Cases Not Liable for Reopened Workmen's Compensation Award

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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).

when application for reopening is made more than seven years after injury and more than three years from the date of the last payment of compensation, the award must be paid by the Special Fund for Reopened Cases.[50] It also provides

> that where the case is disposed of by the payment of a lump sum, the date of last payment for the purposes of this section shall be considered as the date to which the amount paid in the lump sum settlement would extend if the award had been made on the date the lump sum payment was approved at the *maximum compensation rate which is warranted* by *the employee's earning capacity* as determined by the Board under Section 15 of this chapter.[51] (Emphasis added.)

That is, extend the lump sum payment as if it had been paid weekly at the rate warranted by the claimant's disability.

The Board, by using an $8 rate for partial disability, minimum amount permitted by law at the time of the lump sum payment,[52] discharged the Special Fund from liability, since, at this rate, the lump sum payment would not be exhausted for 375 weeks, or late in 1954.[53] The Appellate Division reversed the Board's discharge of the Special Fund,[54] because it felt the rate applied in computing the extension of the lump sum should have been the established $9.23 disability rate, rather than the $8 rate used by the Board. At a rate of $9.23, the last payment of compensation to claimant was paid more than three years prior to the date of the application to reopen the case. The Court of Appeals reversed,[55] holding that the Compensation Board properly found a rate of $8 a week for the purpose of computing the extension of the lump settlement.

The case appears to have no particular significance except as to the parties immediately concerned. The Court of Appeals reversed because they felt that the established $9.23 disability rate was the rate for total disability and therefore was not warranted by the employee's earning capacity since he was only found to be partially disabled. They then used the minimum rate ($8) permitted by law for a partial disability in computing the date of the last payment in regard to the lump sum payment. Although the Court's formula is obviously

50. Workmen's Comp. Law § 25-a(1).
51. Id. § 25-a(7).
52. N.Y. Workmen's Comp. Law § 15(6):
If the accident occurs on or after June 1, 1946, the minimum amount of compensation permitted by law, except in cases of permanent total disability, is $12 per week.
53. Obviously this is not mathematically correct. The Board, as well as the Appellate Division and Court of Appeals is excluding certain weeks during which claimant worked at pre-injury wages. The later point (the exclusion), however, is not pertinent on appeal since the carrier, which has contested that the lump sum settlement cannot be extended indefinitely by excluding weeks during which the claimant worked at pre-injury wages, has nonetheless conceded that if the $8 rate was properly established the Special Fund should be discharged from liability. The point in controversy is the rate to be used in computing the date of the last payment.
54. Supra note 48.
55. Supra note 49.

sound,[56] it's conclusions appear to be based on an inarticulated assumption. To wit, that a rate of $9.23 on a weekly salary of $13.85 is unwarranted for an employee who is only partially disabled. Under the Workmen's Compensation Law, a rate of $9.23 on a weekly salary of $13.85 would be warranted for a partially disabled employee if the disability were not only "partial in character but permanent in quality."[57] The distinction between a temporary and permanent partial disability is not made by the Court.

There is even some indication that the partial disability was permanent. That is, the Board Panel, which discharged the Special Fund, stated that the medical evidence in the record showed that there was a continuing partial disability.[58] If the partial disability was only temporary in character, the established rate of $9.23 was not warranted and the decision to discharge the Special Fund appears sound. However, it further appears that the Court should have fully defined the partial disability so as to give judicial support to their decision.

## ZONING

VALIDITY OF CONDITIONED ZONING AMENDMENT

In *Church v. Town of Islip*[1] an action was brought for a declaratory judgment, voiding the rezoning of the defendant's property in the Town of Islip from Residence A to Business, and for injunctive relief. The Supreme Court[2] rendered judgment declaring the rezoning amendment invalid and unconstitutional, which decision was reversed by the Appellate Division.[3] The Court of Appeals held that this legislative zoning change granted upon condition that the owner of the property execute certain restrictive covenants as to maximum area occupied by the building located thereon and certain other restrictions was valid and constitutional and not subject to attack on any theory that the rezoning constituted contract zoning or spot zoning.

While stability and regularity are undoubtedly essential to the operation of zoning plans, zoning is by no means static. Changed or changing conditions, as experienced by the town in question, call for revised plans. A person who owns property in a particular zone or use district enjoys no eternally vested right to that classification if the public interest demands otherwise.[4]

The Court here is asked to decide whether the Town of Islip validly

56. The statute requires the Board to spread the lump sum settlement at the rate applicable to the disability found at the time of the approval of the lump sum settlement by the Referee.
57. N.Y. Workmen's Comp. Law § 15(3).
58. Supra note 48.

1. 8 N.Y.2d 254, 203 N.Y.S.2d 866 (1960).
2. 6 Misc. 2d 810, 160 N.Y.S.2d 45 (Sup. Ct. 1956).
3. 8 A.D.2d 962, 190 N.Y.S.2d 927 (2d Dep't 1959).
4. Rodger v. Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951).