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Workmen's Compensation—Apportionment of Cost of Operation Among Six Injuries

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heart attack. However, an impartial heart expert, designated by the Board to examine the claimant and report on this issue of causation, stated that, in his opinion, the heart attack suffered by the claimant was directly related to the unusual exertion and strains undergone by claimant in the seven weeks prior to the attack.

Thus, the Court held that the Board having determined that the claimant was entitled to compensation, and the evidence presented being such that a reasonable mind might accept it as adequate to support the conclusion of the Board, there were no grounds present to justify a reversal of the Board's determination.

APPORTIONMENT OF COST OF OPERATION AMONG SIX INJURIES

Section 10 of the New York Workmen's Compensation Law charges employers with the duty of providing compensation for injuries "arising out of and in the course of the employment." Section 15 Subdivision 7 of the same law amplifies the dictate of Section 10 as it relates to previous disabilities and provides generally that the compensation for a later injury shall not be "in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability." Section 15 Subdivision 8 makes special provision for workers who are employed after they have suffered some degree of permanent disability. It provides that they shall receive full compensation for subsequent injuries, but that the employer so paying shall receive partial reimbursement from a special fund, for such compensation paid. These three provisions are the statutory dictates which control the payment of claims resulting from successive injuries to employees covered by the Workmen's Compensation Law.

In 1954 the Workmen's Compensation Board awarded a claimant one sixth of the disability compensation and surgical and hospital expense associated with an operation on his shoulder. The claimant had suffered six shoulder dislocations, only the fourth of which was an industrial injury. On appeal this award was affirmed by the Court of Appeals in *Engle v. Niagara Mohawk Power Corp.*[14]

No cases prior to this one have concerned an apportionment of compensation between an industrial injury and other injuries which were not industrial, so as to allow only partial recovery. However, in many instances awards apportioning damages between a number of compensable accidents so that the various employers each pay a part of the compensation have been upheld by the courts.[15] The fact of this history of apportionment between compensable injuries, coupled with the policy evidenced by Section 15 Subdivision 7 concerning awards to be made for successive injuries, supported the Board's determination in the *Engle* case. If the Board had found that the industrial

14. 6 N.Y.2d 449, 190 N.Y.S.2d 348 (1959), *affirming* 6 A.D.2d 631, 180 N.Y.S.2d 422 (3d Dep't 1958).

15. Anderson v. Babcock and Wilcox Co., 256 N.Y. 146, 175 N.E. 654 (1931); Fichtner v. Bloomingdale Bros., 4 N.Y.2d 914, 174 N.Y.S.2d 663 (1958).

accident had aggravated a pre-existing condition of the claimant's shoulder, it would then have been in keeping with prior decisions to hold that the industrial accident should bear the entire cost of the required operation.[16] The Board did not, however, find any aggravation, and both the Appellate Division and the Court of Appeals indicated that such a holding was reasonable from the evidence adduced at the hearing.

Similarly, if the employee had had a permanent disability when he was hired by the defendant employer he should have been allowed full compensation for the subsequent operation under the provisions of Section 15 Subdivision 8.[17] According to the Board's findings as accepted by both Courts, he was not, however, permanently disabled at the time of his hiring by the defendant employer. Neither did the Court find it unreasonable for the Board to apportion the costs of the operation equally between the six injuries which had combined to require it. In the past, in the absence of special circumstances to substantiate a different apportionment, equal apportionment has been the rule applied.[18]

It thus appears that while there is no precedent for the Board's award in the *Engle* case, there is no statutory provision or case law disallowing it. For this reason the Court's acceptance of the findings and determination of the Board statutorily charged with the administration of the Workmen's Compensation Law is justified.[19]

COMPENSATION AWARD FOLLOWING SECOND INDUSTRIAL DISABILITY

Section 15(5) of the New York Workmen's Compensation Law provides that in case of temporary partial disability resulting in a decrease of earning capacity, the compensation shall be two-thirds of the difference between the injured employee's weekly wages before the accident and his wage earning capacity after the accident in the same or another employment.[20] Section 15(6) of the same law provides, *inter alia,* that in no event shall compensation when combined with decreased earnings or earning capacity exceed the amount of wages which the employee was receiving at the time the injury occurred.[21] Where there has been more than one accident, each occurring while working for a different employer, it has been held that the injury referred to in Section 15(6) is the one occurring latest in time.[22] Thus, even though the rate of pay is higher on the second job than on the first, the first employer must pay his *pro rata* share based upon the higher rate.[23] The theory behind the rule seems to be that a different interpretation would permit prior em-

16. Schwab v. Emporium Forestry Co., 216 N.Y. 712, 111 N.E. 1099 (1915).
17. Mastrodonato v. Pfaudler Co., 307 N.Y. 592, 123 N.E.2d 83 (1954).
18. Anderson v. Babcock & Wilcox Co., *supra* note 15; Fitchner v. Bloomingdale Bros., *supra* note 15. Conklin v. Arden Farms Dairy Co., 3 N.Y.2d 860, 166 N.Y.S.2d 308 (1957).
19. N.Y. WORKMEN'S COMP. LAW § 20.
20. N.Y. WORKMEN'S COMP. LAW § 15(5).
21. *Id.* § 15(6).
22. Meszaros v. Goldman, 307 N.Y. 296, 121 N.E.2d 232 (1954).
23. *Ibid.*