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Workmen's Compensation—Compensation Award Following Second Industrial Disability

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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.*

ployers who have contributed to the ultimate disability to be relieved of all money contributions simply because the claimant's wages have risen.

In the recently decided case of *In re Crawley's Claim*,[24] the Court of Appeals had occasion to limit the rule so that it is inapplicable in the converse situation, *i.e.*, where the subsequent pay rate is *lower* than in that at the time of the prior injury.

The claimant had been a beautician and became disabled in 1947 due to an occupational disease. At this time she was earning $57 per week. She left her job and found employment as a manicurist at $40 per week and received compensation based upon the difference between the two pay scales. In 1954, she was again disabled by the same occupational disease and was awarded compensation by the Board based upon earnings of $57, *i.e.*, her $40 salary plus the amount of her compensation.[25] The Board made a supplemental decision in 1957 affirming its original determination on the theory that in successive industrial accidents, each contributing to the claimant's ultimate disability, the compensation should be based on claimant's highest weekly wage in *any* of the contributing accidents. The Appellate Division affirmed, but on the theory that the term "wages" included the $17 compensation, therefore the amount of the award was not violative of Section 15(6).[26] In reversing the award, the Court of Appeals determined that both theories relied upon below were incorrect. As to the inclusion of the prior compensation award in the term "wages," the Court pointed out that the term is precisely defined in Section 2(9) of the Workmen's Compensation Law.[27] In regard to the proposition of the Board that the weekly average wage should be based upon the highest rate under *any* of the contributing injuries, the Court specifically limited its prior holding to that given fact situation, *i.e.*, where the wages are *higher* on the job where the last injury occurred.[28]

The decision in the instant case appears to be a sound one. As for the Court's interpretation of "wages," the weight of authority seems to be that in order for something to qualify for that characteristic under Workmen's Compensation statutes, there should be something of value received as consideration for the work; *e.g.* tips and bonuses.[29]

As to the limitation of the weekly average wage to that rate received on the job where the last injury occurred, there are two possible justifications. In the first place, the rule permitting the above situation is based on the

24. 6 N.Y.2d 57, 188 N.Y.S.2d 175 (1959).

25. The Court points out that the figure of $17 is plainly incorrect as it amounts to the full difference between the wages rather than two-thirds. The distinction has no effect, however, on the reasoning of the Court.

26. In re Crawley's Claim, 5 A.D.2d 896, 171 N.Y.S.2d 1 (3d Dep't 1958).

27. N.Y. WORKMEN'S COMP. LAW § 2(9).
> Wages means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer. . . .

28. *Supra* note 22.

29. LARSON, WORKMEN'S COMPENSATION LAW § 60.12.

theory that to hold *contra* would permit prior employers to escape their share of liability for the injury. Where the last rate is smaller than the prior one, there is no possibility that the amount received as compensation will exceed the total amount of wages received on the last job, thus the prior employer will have to pay his *pro rata* share. Another justification may be based upon one of the public policies behind Workmen's Compensation laws. For example, Section 15(8) which provides for a special disability fund to be set up by the state, declares that

> any plan which will reasonably, equitably and practically operate to break down hinderances, and remove obstacles to the employment of partially disabled persons honorably discharged from our armed forces, or any other physically handicapped persons, is of vital importance to the state and its people and is of concern to this legislature.[30]

Applying that policy to the instant case, if a prospective employer felt that he might be forced to contribute compensation at a higher rate for a person who has been disabled on a higher paying previous job than he pays for his other employees, then there would be a natural hesitation in hiring such people.[31] In the instant case, the Court of Appeals has helped to carry out the policy announced above.

REOPENING OF PREVIOUSLY DENIED CLAIM

Section 123 of the New York Workmen's Compensation Law provides that the Workmen's Compensation Board shall have continuing jurisdiction to modify its decisions and awards, but that no claim that has once been disallowed shall be reopened after seven years from the date of the accident or death upon which the claim is based.[32]

In *Stimburis v. Leviton Mfg. Co.*[33] the Court of Appeals confined the application of Section 123. In this case a claim based upon disability due to silicosis was dismissed by the Workmen's Compensation Board in 1944.[34] The dismissal was grounded upon the written report of a member of the Board's impartial chest panel, which stated that claimant was not totally disabled.[35] Four months later, claimant filed an application for a reopening of the case, which was denied. Ten years later in 1954, the case was reopened and another

30. N.Y. WORKMEN'S COMP. LAW § 15(8).

31. This of course would be reflected in higher insurance premiums rather than in direct payments.

32. N.Y. WORKMEN'S COMP. LAW § 123 provides that the jurisdiction of the board as to each case shall be continuing, except that "no claim for compensation or for death benefits that has been disallowed after a trial on the merits, or that has been otherwise disposed of without an award after the parties in interest have been given due notice of hearing or hearings and opportunity to be heard and for which no determination was made on the merits, shall be reopened after a lapse of seven years from the date of the accident or death."

33. 5 N.Y.2d 360, 184 N.Y.S.2d 632 (1959).

34. WORKMEN'S COMP. LAW § 3(2) Col. 1 No. 28.

35. N.Y. WORKMEN'S COMP. LAW § 66 provides that compensation shall not be payable for partial disability due to silicosis.