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Workmen's Compensation—Reopening of Previously Denied Claim

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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.

examination was conducted by the board's impartial panel of chest examiners. Subsequently, at hearings in 1956, the doctor relied on in the 1944 proceedings admitted that his 1944 diagnosis had been wrong and that he was now convinced that claimant had been totally disabled at that time. (The doctor's 1954 opinion was based upon a re-examination of 1944 X-rays and other records.) At the 1956 hearing, the Board awarded claimant compensation based upon the finding that there had been total disability as a result of silicosis in 1944.

The Appellate Division unanimously reversed and dismissed the claim, basing its decision on Section 123.[36]

The Court of Appeals in a 4-3 decision, reversed and held that in reopening the case in 1954 the Board was merely reconsidering its previous denial of an application for rehearing made less than seven years after the accident.[37] The precedent relied on by the Court was *Roder v. Northern Maytag Co.*[38] In *Roder* the claim was first disallowed by the Board on the ground that claimant had failed to establish a causal connection. A month before Section 123's seven year period expired, an application to reopen the case was made, and this was denied just after the expiration of that period. One week later, a motion for reconsideration or reargument was made, and the Board rescinded its denial of the previous week and noted that it was reconsidering the previous application for rehearing which had been filed within the seven year period. The Court of Appeals affirmed this determination.

In *Stimburis,* the majority indicated that its decision necessarily follows from *Roder.* However, the dissent *per* Judge Fuld, considered the resemblance between the two cases to be only superficial. In *Roder,* the second application for a rehearing was filed just one week after the board's denial of the previous application, while in *Stimburis* the second application was made ten years after the first.

The *Stimburis* decision writes even more of an exception into Section 123 than *Roder* did, and it would seem that the dissent's fear of *Stimburis* construing the section out of existence is justified. The Board is given the power to reopen a claim at any time, provided only that the initial request to reopen was made some-time within the seven year period. This could be used to circumvent the finality policy adopted by the legislature.

PREREQUISITES TO INDEMNITY UNDER LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

The statutory immunity given by the Longshoremen's and Harbor Workers' Compensation Act to an employer from common law tort liability to an employee, and the "right-over" against an employee's recovery from a negli-

36. 5 A.D.2d 209, 171 N.Y.S.2d 153 (3d Dep't 1958).
37. N.Y. WORKMEN'S COMP. LAW § 38 provides that the disablement of an employee resulting from an occupational disease shall be treated as the happening of an accident.
38. 297 N.Y. 196, 78 N.E.2d 470 (1948).