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Miscellaneous—Workmen's Compensation—Non-Scheduled Adjustments

Vincent P. Furlong

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they come to be associated solely with a particular business or product.⁶¹ The Court held it was probable that, because of the extensive advertising and long period of doing business, secondary meaning had attached to the words and symbol in issue and were understood in the locality involved to refer solely to plaintiff's business; thus there was a probability of resultant deception.

In reaching the particular conclusions as to intent and probability of deception, the Court acted correctly, for no other conclusions could reasonably be inferred from the facts presented in plaintiff's affidavits.

Workmen's Compensation—Non-Scheduled Adjustments

A lump sum non-scheduled adjustment of future compensation as provided for under section 15 (5-b) of the Workmen's Compensation Law⁶² is binding on neither the employer nor the employee until it has been approved by the Workmen's Compensation Board.⁶³

In *Zielinski v. General Motors Corporation*,⁶⁴ the question arose as to when such approval may be considered to have been rendered. The employer and the employee had made such an agreement and upon application to the Workmen's Compensation Board, "tentative" approval was obtained. Prior to the issuance of a written opinion, the employee died. The employer, unaware of this fact, sent a check to the deceased employee for the amount of the agreed adjustment upon receipt of the Board's approval. The deceased employee's wife, as administratrix, deposited the check to the account of the estate. In this action of interpleader,⁶⁵ wherein both the employer and the administratrix claimed the right to the funds, the Court held (4-3), reversing the Appellate Division,⁶⁶ that the deceased employee's estate had no right to the proceeds of the check.

Though a wife can recover any compensation due her husband at the time of his death,⁶⁷ it is an elementary principle that the estate of a deceased person

61. *G. & C. Merrison Co. v. Saalfield*, 198 Fed. 369 (6th Cir. 1912), *aff'd. and modified*, 238 Fed. 1 (6th Cir. 1917), *cert. denied*, 243 U. S. 651 (1917).

62. N. Y. WORKMEN'S COMPENSATION LAW §15 (5-b). Non-scheduled Adjustments. . . . The board may, in the interests of justice, approve a non-schedule adjustment agreed to between the claimant and the employer or his insurance carrier.

63. *Dodson v. Healy Co.*, 275 App. Div. 130, 89 N. Y. S. 2d 410 (3d Dep't 1949), *leave to appeal den.*, 300 N. Y. 760, 88 N. E. 2d 534 (1949).

64. 1 N. Y. 2d 424, 135 N. E. 2d 808 (1956).

65. N. Y. CIV. PRAC. ACT §285; A bank may maintain interpleader where the controversy is with respect to a deposit. *Herpe v. Herpe*, 225 N. Y. 323, 122 N. E. 204 (1919).

66. *Zielinski v. General Motors Corporation*, 285 App. Div. 407, 143 N. Y. S. 2d 228 (4th Dep't 1955).

67. N. Y. WORKMEN'S COMPENSATION LAW §33. . . . (I)n the case of the death of an injured employee to whom there was due at the time of his or her death any compensation under the provisions of this chapter, the amount of such compensation shall be payable to the surviving wife or husband. . . .

cannot recover upon a cause of action which had not accrued to the deceased prior to his death.⁶⁸ It is a similarly basic proposition that a person who pays money under a mistake of fact may recover from the payee.⁶⁹ Since the adjustment was a *future* compensation, the deceased employee's right to this money at the time of his death necessarily depended upon the agreement between him and his employer. The question, therefore, resolves itself to a determination of when the agreement was "approved".

It has been held that the formal writing of an opinion is merely an administrative function and that the time of approval is the date upon which it is actually pronounced.⁷⁰ In the instant case, however, only "tentative" approval was given prior to the death of the employee. This would tend to indicate that the Board intended to postpone its approval until the date of its formal written opinion and thus support the holding of the majority. Were this the only consideration, no further examination of the law would be necessary. The dissent, however, raises a point which, although not persuasive to this writer, is worthy of more than passing notice.

The awards of the Workmen's Compensation Board, as opposed to the determinations of other administrative bodies, are not subject to review except through an appeal.⁷¹ In this respect they are quite similar to judgments. Section 478 of the Civil Practice Act states in effect that where there has been an offer to allow judgment and the party making such an offer dies prior to the rendering of judgment, a judgment may be entered in the names of the original parties.⁷² By analogy it would seem that a person who has submitted a non-scheduled adjustment to the Workmen's Compensation Board for approval has "made an offer to allow judgment". Here the analogy ends, however. In the ordinary action it is not inconsistent to enter such a judgment since the decedent's estate could maintain an action in his behalf.⁷³ However, in the situation at hand, as pointed out above, the deceased employee's cause of action depended upon approval by the Board which was not forthcoming until after the death of the employee. The Workmen's Compensation Board has no provision similar

68. *Fontheim v. Third Ave. Ry. Co.*, 257 App. Div. 147, 12 N. Y. S. 2d 90 (1st Dep't 1939), *appeal den.*, 281 N. Y. 392, 24 N. E. 2d 95 (1939) *appeal dismissed*, 289 N. Y. 624, 43 N. E. 2d 840 (1942).

69. *Schleider v. Maryland Casualty Co.*, 226 App. Div. 50, 234 N. Y. Supp. 144 (1st Dep't 1929), *aff'd.*, 252 N. Y. 598, 170 N. E. 158 (1930).

70. See note 63 *supra*.

71. *Doca v. Federal Stevedoring Co.*, 280 App. Div. 940, 116 N. Y. S. 2d 25 (2d Dep't 1952), *aff'd.*, 305 N. Y. 648, 112 N. E. 2d 424 (1953).

72. N. Y. CIV. PRAC. ACT §478. If either party to an action dies after an accepted offer to allow judgment to be taken or after a verdict, report or decision, or an interlocutory judgment, but before final judgment is entered, the court must enter final judgment in the names of the original parties unless the offer, verdict, report or decision is set aside. . . . (A) judgment shall not be entered against a party who dies before a verdict, report or decision is actually rendered against him. . . .

73. N. Y. DECEDENT ESTATE LAW §§116, 119.

to section 478. It would therefore seem inconsistent to invoke a section addressed to an ordinary cause of action in the case at hand. To do so would in effect give the estate a right which the decedent himself did not have at his death.

Creditors Rights—Attorney's Lien

The lien of an attorney is an equitable right to be paid for his services out of the proceeds of the judgment or other proceeding which has been obtained by his labor and skill. The lien exists from the commencement of an action and attaches to a verdict in his client's favor, including the proceeds thereof into whatever hands they may come. This lien cannot be affected by any settlement between the parties before or after the judgment.⁷⁴ In order to supersede an attorney's lien a claim must be a prior charge against the specific fund.⁷⁵

In *Industrial Comm'r. v. W. E. Hedger Transp. Corp.*,⁷⁶ the Court of Appeals dismissed a turnover order⁷⁷ directing the Aluminum Company of Canada to pay the commissioner \$2,100 out of an amount the company had agreed to pay appellant-attorney for his attorney's fee for Hedger in procuring a settlement of an action brought by Hedger against Aluminum. Hedger agreed to settle its claim if Aluminum would pay its attorney's fee to appellant. The commissioner moved for a turnover order directing payment of a part of the sum to satisfy the State's judgments for unpaid unemployment insurance payments from Hedger. The appellant opposed the issuance of such an order on the grounds that the settlement agreement between Hedger and Aluminum invested him with ownership of the sum and, therefore, that the fund was not the property of Hedger and thus could not be the subject of this third party proceeding. The Appellate Division affirmed a determination in favor of the commissioner.⁷⁸

The majority of the Court of Appeals held that the appellant was the *sole* beneficiary of the agreement between Aluminum and Hedger, in consideration of his procuring a release and discontinuance of the Hedger suit, and thus he had title to the whole amount. Alternatively, they held that he possessed his equitable attorney's lien from the time of the commencement of the suit upon the recovery therein, with priority over any later-attaching tax or other lien; further, his actions did not show a waiver nor amount to an estoppel.

The dissenting judges contended that the appellant had waived his lien by not asserting it in the third party proceeding and that he was relying solely upon his claim to title to the fund. They were of the opinion that he was a

74. N. Y. JUDICIARY LAW §475.

75. *Bacon v. Schlesinger*, 171 App. Div. 503, 157 N. Y. Supp. 649 (1st Dep't 1916).

76. 1 N. Y. 2d 503, 136 N. E. 2d 524 (1956).

77. N. Y. CIV. PRAC. ACT §794.

78. *Industrial Comm'r. v. W. E. Hedger Transp. Corp.*, 286 App. Div. 1009, 146 N. Y. S. 2d 662 (1st Dep't 1955).