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Workmen's Compensation—Aggravation of Injuries

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The dissent suggested that the legality of decedent's employment status was not unchallengeable: "[W]hen he contracted to do private work for a private individual, in a legal sense he ceased to act as the superintendent of highways . . ."[15] and thus lost his status as an employee.[16]

But the majority found on the authority of *Dann v. Town of Veteran*[17] that the illegality of the work contract did not affect the validity of decedent's employment for purposes of Workmen's Compensation, distinguishing *Clarke v. Town of Russia*[18] on grounds that the employment contract in that case was illegal in its inception.

Aggravation of Injuries

In *Sullivan v. B & A Const., Inc.*,[19] claimant had previously suffered two compensable injuries to his right knee, as a result of which his knee occasionally "locked" so that he was temporarily deprived of use of his right leg. The court unanimously held[20] that injuries suffered in an automobile accident wherein claimant's knee locked so that he was unable to apply the brake, were not compensable.

Claimant admitted that his knee had locked several times previously while he was driving. It was found that although the accident almost certainly would not have occurred but for the original knee injuries, the chain of causation was broken by claimant's own act of driving despite knowledge of his disability and the hazards involved.[21]

There has been some conflict of authority as to whether the prior compensable injury must be the "proximate" cause of the subsequent injury, or merely a "but for" cause. A substantial

15. 307 N. Y. at 432, 121 N. E. 2d at 405.

16. A contract between a municipality and one of its officers is against public policy and is illegal. *Beebe v. Supervisors of Sullivan County*, 64 Hun 377, *aff'd* 142 N. Y. 631, 37 N. E. 566 (1894). Such a contract is wholly void, not merely voidable. *Clarke v. Town of Russia, supra*, note 14; 10 McQUILLAN, MUNICIPAL CORPORATIONS (3d ed. 1949), 196-197. A compensation award was not be based on a void, illegal contract. *Swihura v. Horowitz*, 242 N. Y. 523, 152 N. E. 411 (1926); *Herbold v. Neff*, 200 App. Div. 244, 193 N. Y. Supp. 244 (3d Dep't 1922).

17. *Supra*, note 13. It may be noteworthy that in the *Dann* case coverage was specifically provided for claimant by name in the insurance contract.

18. *Supra*, note 14.

19. 307 N. Y. 161, 120 N. E. 2d 694 (1954).

20. Reversing 282 App. Div. 788, 122 N. Y. S. 2d 571 (3d Dep't 1953), which had unanimously upheld an award by the Workmen's Compensation Board.

21. For the same rule in other jurisdictions, see, 1 LARSON, WORKMEN'S COMPENSATION LAW 183-184 (1952), and Note, 102 A. L. R. 790 (1936).

number of cases support the *Sullivan* finding;[22] but it has been held that it is immaterial that a claimant's negligence contributed to the injury.[23] Other cases have found that the intervention of independent variables such as slipping and stumbling would not bar recovery.[24]

This view has been expressed in terms of the presence of two or more concurrent proximate causes;[25] and it is thought that so long as the original injury contributed materially to the eventual disability, negligence would not necessarily constitute such an intervening variable as to break the chain of causation.[26]

Colvin v. Emmons & Whitehead[27] is the leading case in this jurisdiction holding that negligence of the employee is no bar to recovery for subsequent injuries. That case has been criticized on the ground that it failed to distinguish between the abolition of contributory negligence as a defense against recovery for the initial injury, and the situation where recovery is sought for aggravation of an earlier compensable injury.[28] But the *Colvin* decision may spring from a more basic deviation; it would appear that the court there deliberately chose to extend the effect of the statute to free claimants from the defense of negligence even with reference to such subsequent injuries. The *Sullivan* case refused to so extend this abrogation of the common law, and thus impliedly overruled *Colvin*, though without reference to that case. It should

22. *E. g., Brown v. New York St. Training School,* 285 N. Y. 37, 32 N. E. 2d 783 (1941). Decedent mistakenly swallowed poison tablet instead of pain-relieving tablet prescribed for compensable injury. *Held:* Death not compensable, in absence of showing of pain-induced derangement such as to cause fatal error. See also, *Blackley v. Niagara Roofing Co.,* 225 App. Div. 432, 233 N. Y. Supp. 376 (3d Dep't 1929). *Held:* Original compensable injury, though it aggravated subsequent disability, did not cause claimant to slip or stumble, re-injuring same member; *Fischer v. R. Hoe & Co., Inc.,* 224 App. Div. 335, 230 N. Y. Supp. 755 (3d Dep't 1928): Compensable finger injury was bandaged with alcohol-soaked dressing, which caught fire when claimant lit a cigarette. *Held:* No causal connection established. *Accord: Robbins v. Frohlich,* 303 N. Y. 987, 106 N. E. 2d 65 (1952); Death due to pre-existing condition of delirium tremens while under treatment for infected finger *held* not compensable; Board had granted award on theory that the injury initiated the fatal attack.

23. *Colvin v. Emmons & Whitehead,* 216 App. Div. 577, 215 N. Y. Supp. 562 (3d Dep't 1926): Totally disabled employee received award and later sustained fatal fall from ladder due to attack of vertigo. *Held:* Decedent's indiscretion and negligence in going upon the ladder constituted no defense.

24. *Chiodo v. Newhall Co.,* 254 N. Y. 534, 173 N. E. 854 (1930); *Prentice v. Weeks,* 239 App. Div. 227, 267 N. Y. Supp. 849 (3d Dep't 1933).

25. *Anderson v. Babcock & Wilcox Co.,* 256 N. Y. 146, 175 N. E. 654 (1931); *Murray v. Interborough Rapid Transit Co.,* 253 App. Div. 848, (3d Dep't 1938); *Phillips v. Holmes Express Co.,* 190 App. Div. 336, 179 N. Y. Supp. 400 (3d Dep't 1919), *aff'd,* 229 N. Y. 527, 129 N. E. 902 (1919).

26. *Swanson v. Williams & Co.,* 278 App. Div. 477, 106 N. Y. S. 2d 61 (3d Dep't 1951). *Accord, McCahill v. New York Transp. Co.,* 201 N. Y. 221, 94 N. E. 616 (1911), particularly concurring opinion by Vann, J.

27. *Supra,* note 23.

28. See Note, 38 CORNELL L. Q. 99-104 (1952).

be noted that the *Sullivan* decision is in harmony with the great weight of authority in other jurisdictions.[29]

Intermittent Employment

Workmen's Compensation Law § 203 provides: "Employees in employment of a covered employer for four or more consecutive weeks shall be eligible for disability benefits as provided in section two hundred four."

In *Russomanno v. Leon Decorating Co.*,[30] a painter had worked for several employers for varying periods of time, but in no event did he work for one employer for the statutory minimum of four consecutive weeks. The court held[31] that his injury, sustained in the course of employment, was not compensable, despite evidence that he was ready and willing to work steadily, and that the intermittent nature of his employment was in accordance with the pattern of the trade.

The Appellate Division had affirmed an award on the ground that claimant was "in employment" for the required period in the sense that he was available for work in accordance with trade practice.[32] But the Court of Appeals rejected this reasoning, relying on the "plain meaning" of the statute.

The effect of this decision is to exclude from coverage many workmen whose employment is intermittent.[33] The court found this unobjectionable, in view of the fact that there are several other exclusions found in the statute;[34] but it may be questioned whether the obviously remedial intent of the statute is best served by the strict construction adopted by the court.

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29. *Ibid.*

30. 306 N. Y. 521, 119 N. E. 2d 367 (1954).

31. Conway and Dye, JJ., dissenting, and following the Appellate Division decision, *infra*, note 32.

32. 282 App. Div. 18, 121 N. Y. S. 2d 732 (3d Dep't 1953). The decision relied on Regulation 52(b), promulgated by the Board, which provides for eligibility when "in employment during the work period usual to and available during such four consecutive weeks in any trade or business in which he is regularly employed and in which hiring from day to day of such employees is the usual employment practice." But the Court of Appeals refused to construe the regulation: ". . . Whatever be its full meaning and bearing, it cannot overrule the statute itself and we assume it was not intended to do so." *Supra*, note 30 at 525, 119 N. E. 2d at 369.

33. Such factors as weather, hiring practices, and nature of work could limit the possibility of steady employment in many cases; thus the benefits of the statute might be seriously restricted. This was pointed out in the Appellate Division, *supra*, note 32 at 19, 121 N. Y. S. 2d at 734.

34. See WORKMEN'S COMPENSATION LAW § 201 (6).