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Workmen's Compensation—Computation of Award: Actual Earnings

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Computation of Award: Actual Earnings

Whether earnings which claimant would have received but for a shutdown of his factory occasioned by a strike in another plant should be considered together with earnings actually received in determining claimant's wage-earning capacity was decided in the negative in *Croce v. Ford Motor Co.*[35]

The statute provides that in cases of temporary partial disability ". . . the compensation shall be two-thirds of the difference between the employee's average weekly wages before the accident and his wage-earning capacity after the accident . . ."[36] and further, that the wage-earning capacity "shall be determined by his actual earnings."[37]

It was held that the employee's *capacity* to earn more or less during the disability period was immaterial, the sole criterion being wages *actually received* by him. The court relied on *Matise v. Munro Waterproofing Co.*,[38] wherein an award based on "medical evidence" that claimant's earning capacity had been reduced fifty per cent was set aside on the ground that where actual earnings are present,[39] consideration of other factors is improper.

But whether the *Matise* and *Croce* cases firmly hold that actual earnings are the sole measure of the rate of compensation under all circumstances may be questioned. In *Mikno v. Endicott Johnson Corp.*,[40] where earnings were reduced when a factory closed because of general business conditions, it was said:

> We do not regard . . . *Matise v. Munro Waterproofing Co.* . . . as mandating that actual earnings are the exclusive basis for determining earning capacity under all circumstances and regardless of the cause of reduced earnings.[41]

Also, in *Block v. Ready-Froelich, Inc.*,[42] the court was of the opinion that in case of a general business decline, the disabled worker should not be saved by compensation from bearing the burden shared by his fellow-workers. And other cases have indi-

35. 307 N. Y. 125, 120 N. E. 2d 527 (1954).
36. WORKMEN'S COMPENSATION LAW § 15 (5).
37. *Id.* § 15 (5-a).
38. 293 N. Y. 496, 58 N. E. 2d 511 (1944).
39. In the absence of any actual earnings the Board can hear other evidence and fix a "reasonable" compensation rate. WORKMEN'S COMPENSATION LAW § 15 (5-a); *Sammis v. Queens Borough G. & E. Co.*, 257 App. Div. 58, 12 N. Y. S. 2d 286 (3d Dep't 1939).
40. 278 App. Div. 598, 102 N. Y. S. 2d 45 (3d Dep't 1951)
41. *Id.* at 599, 102 N. Y. S. 2d at 45.
42. 240 App. Div. 9, 269 N. Y. Supp. 284 (3d Dep't 1934), *appeal dismissed*, 264 N. Y. 618, 191 N. E. 595 (1934).

cated that where there is evidence of a claimant's bad faith, *e. g.*, where it appears that claimant rejected jobs at higher pay which he was physically able to perform, "actual earnings" would not be the sole measure of the rate of compensation.[43]

Contribution By Prior Employers

Successive decisions have engrafted to the Workmen's Compensation Law a proviso that where prior compensable injuries have contributed measurably to ultimate disability, the award should be apportioned among the prior employers in proportion to the extent to which the earlier accidents contributed to the final condition.[44] This rule was reaffirmed by the Court of Appeals this term in two cases joined on appeal,[45] despite serious problems of statutory construction.

Claimants *Meszaros* and *Braunstein* had suffered prior compensable injuries, and ultimate disability following their latest injuries was found to have been caused in part by the earlier accidents. The problem appeared in the fact that their earnings after the latest accidents were *greater* than they had been at the time of the earlier contributing accidents. The court held that the award should be charged in part against the earlier employers, despite the fact that their liability might exceed the wages paid to claimants while they were in the earlier employ.

The New York statute provides:

> 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.[46]

The majority observed that the statute referred only to earnings at the time of the latest injury, for which compensation is now being awarded. Any other result, it was argued, would permit

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43. *See, e. g., Santo v. Symington Mach. Co.*, 237 App. Div. 242, 261 N. Y. Supp. 706 (3d Dep't 1932).

44. *Anderson v. Babcock & Wilcox Co.*, 256 N. Y. 146, 175 N. E. 654 (1931); *Chiodo v. Newhall Co.*, 254 N. Y. 534, 173 N. E. 854 (1930); *Zuk v. McGuire Bros.*, 277 App. Div. 956, 99 N. Y. S. 2d 617 (3d Dep't 1950); *Thomas v. Royal Dairy*, 270 App. Div. 688, 63 N. Y. S. 2d 276 (3d Dep't 1946).

45. *Meszaros v. Goldman, Braunstein v. General Marine Repair*, 307 N. Y. 296, 121 N. E. 2d 232 (1954). In the *Braunstein* case the Appellate Division had affirmed an award against the latest employer only, on the ground that WORKMEN'S COMPENSATION LAW § 15 (6) demanded it. 281 App. Div. 1059, 121 N. Y. S. 2d 386 (3d Dep't 1953). In *Meszaros*, an award partly against the prior employer was upheld on the theory that the statute applied only to earnings greater than those obtaining at the time of the latest accident. 281 App. Div. 1063, 121 N. Y. S. 2d 421 (3d Dep't 1953).

46. WORKMEN'S COMPENSATION LAW § 15 (6).