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Workmen's Compensation—Hearsay Evidence

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THE COURT OF APPEALS, 1954 TERM

men's Compensation Law. Although this opinion accurately reflects the traditional rule for tolling a statute of limitations, the analogy is inaccurate when it is attempted to be applied to Workmen's Compensation Law, where the public policy is to construe the provisions liberally in favor of injured employees.⁷

The instant situation is unusual in that there is no question that the general employer could have been held liable for an award,⁸ but the claimant chose to hold the special employer alone liable. The policy towards liberal construction will sustain this decision, but it is suggested that in the ordinary case where both employers would be joined, this result need not follow, since relief can be given the employee against the employer making advance payments of compensation, thereby making application of the public policy unnecessary.

Hearsay Evidence

In *Doca v. Federal Stevedoring Company*,⁹ claimant was injured by a crane owned by his employer after finishing work for the day and starting home. The employee never filed a claim, although the employer filed a report of the accident, and upon an award for the employee by the Workmen's Compensation Board, the employee took the unusual position of appealing, thereby hoping to gain a reversal so as to commence an action for negligence.

The court, affirming the Appellate Division,¹⁰ held, that the Board had jurisdiction, and that the finding that the accident arose *out of and in the course of employment* had support on the record.

Judge Desmond writing for the majority disposes of the jurisdictional question by pointing out that in a previous common-law action brought by this employee,¹¹ it was held that the filing of the report by the employer conferred an initial jurisdiction on the Board, and this is *res judicata*. It was further held that since the employer's carrier paid compensation before an award to the employee, the Board had jurisdiction without a claim ever being filed by the injured employee.¹²

The evidence upon which the award was based was the reports filed by the employer and attending doctor. This was hearsay evidence which is admissible in

7. *Kiriloff v. A. G. W. Wet Wash Laundry*, 257 App. Div. 37, 12 N. Y. S. 2d 109 (3rd Dep't 1939); *reargument denied*, 258 App. Div. 818, 15 N. Y. S. 2d 815 (3rd Dep't 1939); *appeal dismissed* 282 N. Y. 466, 27 N. E. 2d 11 (1940).

8. Notes 2 and 3 *supra*.

9. 308 N. Y. 44, 123 N. E. 2d 632 (1954).

10. 284 App. Div. 46, 130 N. Y. S. 2d 172 (3rd Dep't 1954) [unanimous opinion written by Imrie, J].

11. *Doca v. Federal Stevedoring Co.*, 305 N. Y. 648, 112 N. E. 2d 424 (1953).

12. *Meaney v. Keating*, 305 N. Y. 660, 112 N. E. 2d 763 (1953).

Workmen's Compensation proceedings if there is a residuum of common-law evidence,¹³ but the majority contends that the residuum requirement is unnecessary where the other party does not question the sufficiency of the proof. The general rule that acquiescence of an employer in an award without contesting jurisdiction binds the employer¹⁴ likewise applies to an employee, estopping him from contesting the award. Also, since reports by an employer are probative evidence that an accident arose out of and in the course of employment as to the employer,¹⁵ they should have the same effect on an employee.

The majority also suggested, but refused to decide, that it may be that the presumption of Workmen's Compensation Law § 21¹⁶ applies, since *claim* as used in the statute seems to denote any proceeding before the Board whether initiated by the employer or employee.

Judge Froessel wrote a vigorous dissenting opinion, denying that the requirement of a residuum of legal evidence has no application here. He contended that the rule that an employer's reports act as probative evidence against himself is well recognized as an exception to the hearsay rule, because they are his admissions,¹⁷ but as against an employee no such exception is found. Therefore, regardless of the acquiescence of the employee in the award, there is no legal evidence that the accident arose out of and in the course of employment, and the Board thus has no jurisdiction.

The holding of the majority in the instant case would seem to be a logical extension of the general policy of Workmen's Compensation to allow hearsay evidence to the greatest extent possible.¹⁸ This exception to the residuum requirement works no hardship on an employee, since he has ample opportunity to contest the sufficiency of proof in the first instance. There is no statutory prohibition against this decision,¹⁹ the residuum rule being merely a creation of the courts which illus-

13. *Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507 (1916); *Ostrowski v. Mohawk Carpet Mills*, 275 App. Div. 874, 88 N. Y. S. 2d 865 (3rd Dep't 1949).

14. *Ahern v. South Buffalo Ry. Co.*, 344 U. S. 367 (1953); *affirming* 303 N. Y. 545, 104 N. E. 2d 898 (1952).

15. *Campana v. Prudential Ins. Co. of America*, 267 App. Div. 1007, 47 N. Y. S. 2d 848 (3rd Dep't 1944); *appeal denied* 268 App. Div. 834, 50 N. Y. S. 2d 463 (3rd Dep't 1944).

16. "In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary (1) that the claim comes within the provisions of this chapter."

17. Note 15, *supra*.

18. *Ziegler v. Cassidy*, 220 N. Y. 98, 115 N. E. 471 (1917).

19. Workmen's Compensation Law §118 provides that the Chairman or Board, in making an investigation or inquiry or conducting a hearing, shall not be bound by common law or statutory rules of evidence.

trates their reluctance to depart from the traditional prohibition against hearsay evidence.²⁰

Medical Opinion Evidence

A general rule of negligence law applicable to Workmen's Compensation proceedings is that where death from one cause is accelerated, however slightly, by another compensable cause, the death is compensable.²¹ In *Riehl v. Town of Amherst—Department of Highways*,²² decedent died of cancer, and his estate claims death benefits because the death certificate stated heart disease, a compensable injury for which benefits were being paid, was a contributing factor in the death. The court reversing the Appellate Division,²³ held, that the award was not supported by substantial evidence, because the attending physician during his testimony stated he could not prove any causal connection between cancer and heart disease.²⁴

A death certificate can have no greater probative force than the grounds upon which the testimony of the certifying doctor shows it to be based.²⁵ The majority applies this rule to the instant case and concludes that since the doctor admits he cannot prove a causal connection between cancer and heart disease, the evidence is speculative and not substantial.²⁶ The dissent disagrees as to the implication arising from the doctor's testimony and contends that there is substantial evidence to support an award.

The decision appears to be correct on the evidentiary point decided,²⁷ but it is suggested that on the substantive point of whether a causal connection may be found between cancer and heart disease, more adequate evidence could sustain an award.²⁸

20. 2 LARSEN, WORKMEN'S COMPENSATION LAW, §79.30.

21. 2 *Restatement of Torts* 431, 432; *McCahill v. New York Transportation Company*, 201 N. Y. 221, 94 N. E. 616 (1911).

22. 308 N. Y. 212, 124 N. E. 2d 287 (1954).

23. 283 App. Div. 196, 126 N. Y. S. 2d 594 (3rd Dep't 1953).

24. Conway and Dye, JJ. dissent and vote to affirm on the opinion of Halpern, J. in the Appellate Division.

25. *McCormack v. National City Bank of New York*, 303 N. Y. 5, 99 N. E. 2d 887 (1951).

26. See *Bye v. State Ins. Fund*, 279 App. Div. 1105, 112 N. Y. S. 2d 114 (3rd Dep't 1952), where medical testimony was held to be speculative that an industrial accident aggravated a preexisting cancerous condition, but cf. *Murphy's Case*, *infra*, Note 28.

27. *McCormack v. National City Bank of New York*, *supra*, Note 25.

28. *Murphy's Case*, 328 Mass. 301, 103 N. E. 2d 267 (1952), where heart disease was found to be a contributing cause of death by cancer.