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Workmen's Compensation—Res Judicata

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Res Judicata

In *Weiss v. Franklin Square and Munson Fire District,*[20] claimant was a volunteer fireman injured while attending a parade and competitive drill in which his company was engaged. After a denial of relief under the Workmen's Compensation Law, claimant brings this proceeding for compensation under the General Municipal Law. The court unanimously reversing the Appellate Division,[30] *held,* that the prior determination of the Workmen's Compensation Board that claimant's injury did not arise out of and in the course of employment is not res judicata in the instant proceeding.

The two applicable statutes, Workmen's Compensation Law §10[31] and General Municipal Law §205, subd. 3,[32] differ in their scope of coverage; the former applies only where the activity is a form of the employment and attendance is compulsory,[33] while the latter specifically provides for compensation for injuries incurred in performing a voluntary firemanic act which was authorized, permitted or approved by a competent authority within the department.[34] The general rule is that where injuries are not covered by Workmen's Compensation Law but are covered by the broader provisions of another statute, the determination of the Workmen's Compensation Board is not binding in a subsequent proceeding under the other statute.[35] Therefore, the issue at bar was not within the jurisdiction of the Board, and their determination was not res judicata in the instant proceeding.[36]

Although the case is correct on the procedural point in issue, it is to be noted that there is authority contrary to allowing recovery by a volunteer fireman under the General Municipal Law where his attendance at a drill or parade is voluntary.[37] The criterion suggested in the opinion of the comptroller is that attendance must

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29. 309 N. Y. 52, 127 N. E. 2d 804 (1955).
30. 283 App. Div. 1077, 131 N. Y. S. 2d 318 (2d Dep't 1954).
31 "Every employer subject to this chapter shall . . . secure compensation to his employees . . . for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury."
32. "Any such volunteer fireman who shall receive injuries while performing his duties as such . . . or while attending any drill or parade or inspection in which his company or department is engaged . . . shall be reimbursed for such sums . . . for medical . . . treatment. He shall also be compensated for the time he was actually and necessarily prevented from following his vocation."
33. *Niebrehr v. Board of Fire Commissioners,* 279 App. Div. 698, 108 N. Y. S. 2d 246 (3rd Dep't 1951).
34. *Brown v. Towns of Gates and Chili,* 266 App. Div. 640, 44 N. Y. S. 2d 703 (4th Dept. 1943); *affirmed* 292 N. Y. 663, 56 N. E. 2d 94 (1944); see Note 32, *supra.*
35. *Slattery v. Board of Estimate & Apportionment of City of New York,* 271 N. Y. 346, 3 N. E. 2d 505 (1936).
36. *Ogino v. Black,* 304 N. Y. 872, 109 N. E. 2d 884 (1952).
37. 8 Op. State Compt. No. 5607 (1952).

be under order of the Board of Fire Commissioners[38] to qualify for compensation under either Workmen's Compensation Law or General Municipal Law, although case law appears contra.[39]

Suicide

In *Graham v. Nassau & Suffolk Lighting Company*,[40] an employee died by falling into the stack of a superheater, the accident itself being unwitnessed. The court held (4-3), reversing the Appellate Division[41] and reinstating the award of the Workmen's Compensation Board, that the presumption that this was an accidental injury and not suicide was not overcome by substantial evidence to the contrary.

Workmen's Compensation Law §21 provides: "It shall be presumed in the absence of substantial evidence to the contrary . . . (3) that the injury was not occasioned by the wilful intention of the injured employee to bring about the injury or death of himself . . ." While this presumption may not substitute for proof of accident, nevertheless it may be overcome only by substantial evidence to the contrary.[42] Where there is such evidence the presumption fails, and the burden reverts to the claimant.[43]

The dissent,[44] relying on the opinion in the Appellate Division, contends that evidence in the form of a death certificate listing death as suicidal, a recent divorce decree against the deceased, and the physical *difficulties* of falling accidentally into the superheater was such substantial evidence to the contrary. The majority contends that the physical dimensions of the superheater did not make an accident of this type improbable, and evidence of the lack of suicidal tendencies on the part of the deceased, and of his plan to remarry after the divorce, made motivation a question of fact for the Workmen's Compensation Board whose decision was to be final.[45]

The instant case is illustrative of the difficulty the courts have had in deter-

38. Town Law §176 (11) authorizes the Board of Fire Commissioners to provide for public inspections and parades.

39. See note 34, *supra*.

40. 308 N. Y. 140, 123 N. E. 2d 813 (1954).

41. 283 App. Div. 228, 126 N. Y. S. 2d 666 (3rd Dep't 1954).

42. *McCormack v. National City Bank of New York*, 303 N. Y. 5, 94 N. E. 2d 887 (1951).

43. *Magna v. Hagerman Harris Co.*, 258 N. Y. 82, 179 N. E. 266 (1932).

44. Lewis, C. J., and Fuld and Van Voorhis, JJ.

45. Workmen's Compensation Law §20 provides: ". . . the decision of the Board shall be final as to all questions of fact."

mining when evidence reaches the level of "substantial evidence to the contrary,"