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Workmen's Compensation—Silicosis—Date of Disability

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mining when evidence reaches the level of "substantial evidence to the contrary," but it is suggested that the majority decision in the instant case is the most cogent resolution of fact and law.⁴⁶

Silicosis—Date of Disability

Workmen's Compensation Law §44-a provides that "the employer in whose employment an employee was last exposed to an injurious dust hazard shall be liable for the payments required by this chapter when disability . . . of the employee shall be due to silicosis or other dust disease."

In *Dunleavy v. Walsh, Connelly, Senior & Palmer*,⁴⁷ claimant was permanently disabled with silicosis from a prior employment without his knowledge and now seeks an award against his latest dust-exposure employer. The Court unanimously reversed the Appellate Division⁴⁸ (which had affirmed a denial of an award by the Workmen's Compensation Board) and held that the policy behind this section was to award disability payments for silicosis only when there was actual inability to work, and then against the latest employer.

The Workmen's Compensation Board found that total disability occurred before claimant entered into the employ of respondent. Disablement from an occupational disease is an accident,⁴⁹ and the date of disability shall be such date as the Board may determine on hearing the claim,⁵⁰ with the only limitation that the Board's decision be based on substantial evidence.⁵¹ The court contends, however, that since partial disability for silicosis is not compensable⁵² and since the carrier of the latest employer against whom an award is given will be reimbursed out of the special disability fund after 260 weeks,⁵³ the Legislature recognized the progressive character of silicosis and intended it should be compensable whenever an employee should become totally unable to work. Protection of employers against fraud may be found in the provision of the act providing that compensation will not be given to an employee who at the time of his employment wilfully and falsely represents in writing that he has not previously suffered from the disease which caused his disability.⁵⁴

46. See *Epstein v. City of New York*, 283 App. Div. 751, 128 N. Y. S. 2d 67 (1954), and *Dubinsky v. Kofsky*, 242 App. Div. 342, 275 N. Y. Supp. 365 (3rd Dep't 1934), where unwitnessed deaths were found to be accidental rather than suicide.

47. 309 N. Y. S. 127 N. E. 2d 727 (1955).

48. 284 App. Div. 1075, 136 N. Y. S. 2d 31 (3rd Dep't 1954).

49. Workmen's Compensation Law §38.

50. Workmen's Compensation Law §42.

51. *Cole v. Saranac Lake General Hospital*, 282 App. Div. 626, 125 N. Y. S. 2d 891 (3rd Dep't 1953).

52. Workmen's Compensation Law §39; *Cifolo v. General Electric Co.*, 305 N. Y. 209, 112 N. E. 2d 197 (1953).

53. Workmen's Compensation Law §15 (8) (ee) and 44-a.

54. Workmen's Compensation Law §43.

The court's rationale in the instant case seems to have been based on the prevalence of silicosis in certain types of industry⁵⁵ and the difficulties of diagnosis as totally disabling.⁵⁶ The decision is commendable in the light of the necessity for most liberal construction of Workmen's Compensation Law in this difficult area of dust diseases,⁵⁷ and the result is merely that the industry which creates this specific hazard will be required to compensate for its injuries.

Reimbursement From Special Fund

In *Mastrodonato v. Pfandler Co.*,⁵⁸ the court was called upon to construe Workmen's Compensation Law §15, subd. 8, par. (d).⁵⁹ Claimant, a veteran, was partially disabled from war injuries, and a subsequent injury in the course of his employment caused a permanent disability. Appellants, the employer and its insurance carrier, filed an application for reimbursement from the special disability fund for medical expenses only, since compensation payments had ceased before the end of the 104 week period and claimant had returned to work.

The court unanimously reversed the Appellate Division⁶⁰ and the Workmen's Compensation Board, holding that medical disability payments unaccompanied by compensation payments can be reimbursed out of the special fund. The intent of the Legislature in enacting this provision was to remove as far as practicable the reluctance of employers to hire partially disabled persons.⁶¹ To accomplish this result, it thus is inconceivable that the Legislature, by using the words "compensation and medical benefits," could mean that both must be present as a condition precedent for reimbursement, since either alone if non-compensable would be a deterrent to employment.

The contention that "disability" as used in this section means a wage earning diminution is likewise rejected by the court. Although generally this is true, it may

55. See Governor Dewey's Message, N. Y. Legis. Ann., p. 211 (1947).

56. See note 51, *supra*.

57. *Nigahosian v. Daub & Co.*, 275 App. Div. 463, 90 N. Y. S. 2d 562, *appeal and reargument denied*, 275 App. Div. 1005, 88 N. Y. S. 2d 672 (3rd Dep't 1949).

58. 307 N. Y. 592, 123 N. E. 2d 83 (1954).

59. "If an employee . . . (having a) physical impairment incurs a subsequent disability by accident arising out of and in the course of employment . . . resulting in a permanent disability caused by both conditions that is substantially worse than that which would have resulted from the subsequent injury . . . alone, . . . such employer or his insurance carrier . . . shall be reimbursed from the special disability fund created by this subdivision for all *compensation and medical benefits* subsequent to those payable for the first one hundred four weeks of disability." [Italics supplied.]

60. 283 App. Div. 752, 128 N. Y. S. 2d 164 (3rd Dep't 1954).

61. Workmen's Compensation Law §15, subd. 8, par. (a).