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Workmen's Compensation—Subsequent Injury—Duplicating Awards; Manslaughter—Negligence—Statutory Construction

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RECENT CASES

WORKMEN'S COMPENSATION—SUBSEQUENT INJURY—DUPLICATING AWARDS. Plaintiff filed a claim under the Workmen's Compensation Act for permanent partial disability due to an injury to his right middle finger. The supervisor rejected the claim upon the ground that the workman had previously been adjudged totally and permanently disabled by reason of a former back injury and had been awarded a lump sum payment, in lieu of a monthly pension for life. Appeal from a joint board rehearing allowing the claim. *Held:* Claim dismissed, *Harrington v. Dept. of Labor and Industries*, 109 Wash. Dec. 78, 113 P. (2d) 518 (1941), 9 U. OF CHI. L. REV. 184, the court saying: "A subsequent lesser disability cannot be superimposed upon the maximum disability recognized by law." The basis for the decision was REM. REV. STAT. § 7679 (g), which provides in part: "Should a further accident occur to a workman who has been previously the recipient of a lump sum payment under this act, his future compensation shall be adjudged according to other provisions of this section and with regard to the combined effect of his injuries and his past receipt of money under this act."

Does a workman who has received a lump sum for total disability and who subsequently recovers his health undertake further employment at his own risk? Or, since he no longer comes under the Act, may the workman have a common law action for damages against his employer? If the latter is true, the employer has paid his insurance premiums for naught, as he is without protection.

The court cites two cases to support its holding: *Van Tassel v. Basic Refractories Corp.*, 216 App. Div. 774, 214 N. Y. S. 491 (1926) and *Ingram v. W. J. Rainey, Inc.*, 127 Pa. Super. 481, 193 Atl. 335 (1937). In these cases the workman was already receiving the maximum monthly provision allotted under the statute, so an additional monthly payment would give him more than the maximum allowance stated in the act. However, if the workman in the *Harrington* case were to receive compensation for his finger, the amount would not exceed the $15 per month maximum laid down by the act.

It should be noted, also, that in both of these cases the claimant had the same employer when he received his injuries, whereas, in the *Harrington* case, the injuries were received under different employers.

The court cites one other case, *Asplund Construction Co. v. State Ind. Comm.*, 185 Okla. 171, 90 P. (2d) 642 (1939), which held contra on similar facts. The court laid the inconsistency to the wording of the respective state statutes. REM. REV. STAT § 7679 (g), quoted above, was previously interpreted by the court in *Klippert v. Ind. Ins. Dep't*, 114 Wash. 525, 196 Pac. 17 (1921). There, claimant was seeking to recover the stipulated award for loss of an arm, when he had already recovered an award for loss of an eye. The court, holding claimant was entitled to the full amount, said the quoted clause referred to: "injuries to the same member which had been previously compensated within the maximum, and to which a subsequent injury was sustained and still leave the injured workman only permanently partially disabled."

The decision in the instant case expands the application of this clause to include injuries to any member of the body. Will this new view be

limited to cases where the first lump payment was for total permanent disability, or will it overrule the *Klippert* case and include cases where the first payment was for partial disability?

The court pointed out that a duplication of awards would be the result if an opposite decision had been reached. Yet does not the Act itself recognize the validity of such possible duplication? The last clause of § 7679 (g) states: "Should any further accident result in the permanent total disability of such injured workman, he shall receive the pension to which he would be entitled notwithstanding the payment of a lump sum for his prior injury." Thus, although the Act specifically allows a workman to receive an award for partial disability and subsequently an award for total disability, if the workman receives an award for total disability first, he is precluded from further compensation for subsequent injuries. The doctrine of the *Klippert* case also allows duplication. By the loss of both legs at different times, a workman could collect $4,560, yet § 7681 provides that a lump sum payment in case of total disability shall not exceed $4,000. *Accord, Constantin Refining Co. v. Crockett,* 87 Okla. 24, 208 Pac. 788 (1922)

The fact that the workman has been erroneously adjudged permanently disabled, should not bar him from the protection of the Act, if he later recovers and seeks employment. In view of the fact that the Act does not prohibit further compensation after a workman has been adjudged permanently partially disabled, but on the contrary, recognizes a possible duplication of awards, and in view of the policy of the Act to protect both worker and employer, it would seem that a better approach to the problem would be to judge additional awards according to loss of earning power resulting from the injury rather than to apply the technical rule that the "whole includes the less." H. E. K.

MANSLAUGHTER—NEGLIGENCE—STATUTORY CONSTRUCTION. Defendant went hunting with his friends, *A* and *B*. They separated according to a plan which was to make their hunt more effective. While still daylight, about five o'clock in the afternoon, the defendant saw "the head and shoulders of a deer" among the brush. He fired, and the bullet struck *A* in the head, killing him. Defendant was charged with manslaughter, allegedly having acted "wilfully, unlawfully and feloniously, without using ordinary caution in that he knew or should have known other human beings were in his close vicinity, and without keeping a proper lookout for other human beings. " The jury brought in a verdict of guilty as charged, whereupon the defendant made motion in arrest of judgment and for a new trial. The motion in arrest of judgment was granted, but no action was taken on the motion for a new trial. The State appealed. The order was reversed and cause remanded with instructions to the trial court to vacate that order and rule on the defendant's motion for a new trial. *State v. Hedges,* 8 Wn. (2d) 652, 113 P (2d) 530 (1941)

In the opinion of this case, the Court takes occasion to make a definitive statement of the measure of negligence necessary to convict, under our manslaughter statute, for a homicide resulting from the commission of a lawful act. In arriving at its conclusion, the Court starts with REM. REV. STAT. § 2395, defining manslaughter thus: "In any case other than those specified in §§ 2392, 2393, and 2394, homicide, not being excusable or justifiable, is manslaughter." REM. REV. STAT. §§ 2392, 2393, and 2394, re-

spectively, define murder in the first and second degrees, and a killing in the course of fighting a duel. Admittedly, this cannot be justifiable homicide, so the court considers Rem. § 2404, defining excusable homicide which is " . . . committed by accident or misfortune in doing any lawful act by lawful means, *with ordinary caution* and without unlawful intent (italics supplied). All four of these elements must be present, says the Court, in order for the homicide to come within this section.

The defendant argued that the phrase "with ordinary caution" should be construed to mean *with slight caution,* that failure to use ordinary caution is ordinary negligence, while failure to use slight caution would constitute "gross negligence," or that degree of negligence which must be proved before the death amounts to manslaughter. But the Court said, " . . . giving the words their ordinary meaning, the exercise of ordinary caution and the presence of the other elements of the statute, with the absence of the unlawul intent equal excusable homicide; while the absence of ordinary caution, or affirmatively speaking, the presence of *ordinary negligence* plus death, equal manslaughter."

Various cases in this jurisdiction in which language apparently to the contrary is found, cited by the Court in its opinion, *State v. Hopkins,* 147 Wash. 198, 265 Pac. 481, 59 A. L. R. 688 (1928); *State v. Sandvig,* 141 Wash. 542, 251 Pac. 887 (1927); *State v. Hoyer,* 105 Wash. 160, 177 Pac. 683 (1919); *State v. Palmer,* 104 Wash. 396, 176 Pac. 547 (1918), were either distinguishable on their facts from the instant case, or did not consider the specific question, hence the language in those opinions did not govern the instant case. In *State v. Turpin,* 158 Wash. 103, 290 Pac. 824 (1930), the Court intimated that grossly negligent conduct is necessary to convict under REM. REV. STAT. § 2404. But the Court in the instant case said that since the issue in the *Turpin* case was whether the homicide was justifiable, the language with regard to the degree of negligence did not amount to a holding.

The Court was influenced by the decision of the Wisconsin court in *Clements v. State,* 176 Wis. 289, 185 N. W. 209, 21 A. L. R. 1490 (1921), where under a statute similar to REM. REV. STAT. § 2404 the holding was that " . . . the elements of usual and ordinary caution in the performance of an act are essential constituents involved in the definition of the ordinary care, and under such definition the failure to perform such lawful act with usual and ordinary care as the mass of mankind exercises under the same or similar circumstances constitutes negligence." The Wisconsin court suggested, however, that the legislature might well amend the statute to require a finding of gross negligence before an accused could be convicted, and the Wisconsin legislature did so amend in accordance with the suggestion. *State v. Whatley,* 210 Wis. 157, 245 N. W. 93, 99 A. L. R. 749 (1932).

The Washington Court makes the same suggestion: that if it be desirable to require a finding of gross negligence to convict, a statutory change must be made; that under the statute as it stands no other measure of negligence can be made to apply. As our Court says, statutes like that of this State are rare in other jurisdictions. Most of them require a finding of gross negligence. *People v. Searle,* 33 Cal. App. 228, 164 Pac. 819 (1917); *State v. Cope,* 204 N. C. 28, 167 S. E. 456 (1933); *Copeland v. State,* 154 Tenn. 7, 285 S. W. 565, 49 A. L. R. 605 (1926); *State v. Gutheil,* 98 Utah 205, 98 P. (2d) 943 (1940). In most of these jurisdictions manslaughter is

in two degrees—voluntary and involuntary—and the test of the involuntary manslaughter is that the negligence resulting in death must be gross negligence or conduct "which imports a thoughtless disregard of consequences or heedless indifference to the safety and rights of others." *Copeland v State, supra.* This is essentially the definition of negligence under the common law concept of involuntary manslaughter, and this seems to be the majority view.

But in our jurisdiction there are no degree of manslaughter; we have abandoned the common law view. Any killing which is not murder in either the first or second degrees, or justifiable or excusable, is manslaughter. And our statutes do seem to mean that ordinary negligence in the performance of a lawful act which results in death will constitute manslaughter. If there are any changes to be made in this interpretation of the law in our State, such change must come from the legislature.

J. B. K.