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Workmen's Compensation—Evidence—Admissibility of the Supervisor's Record at a Joint Board Rehearing and Before the Superior Court Upon Appeal; Divorce—Interlocutory Decree—Property Settlement—Abatement on Death of One Party

L. T. N.

S. W. P.

RECENT CASES

WORKMEN'S COMPENSATION—EVIDENCE—ADMISSIBILITY OF THE SUPERVISOR'S RECORD AT A JOINT BOARD REHEARING AND BEFORE THE SUPERIOR COURT UPON APPEAL *X*, being dissatisfied with a partial compensation award granted to him on a rehearing of his case by the joint board, appealed to the Superior Court where the jury affirmed the action of the board On appeal, he assigned as error the refusal of the trial judge to admit in evidence a letter written by *X's* physician to the department describing his condition and necessity for treatment The joint board refused to admit the letter, *even though a part of the Supervisor's record,* over an objection by the Department of Labor & Industries that it had no opportunity to cross-examine the doctor concerning the letter The trial judge, after the objection had been reasserted, stated:

> "The letter is clearly inadmissible If your contention were true they never would get through trying the cases; you would have the right to read every paper in the record"

Held: The letter was properly excluded The statute which provided for an informal summary and *de novo* rehearing also provides that:

> " no witness' testimony shall be received unless he shall first have been sworn to testify to the truth, the whole truth and nothing but the truth in the matter being heard, or unless his testimony shall have been taken by deposition " (REM REV STAT § 7696)

The mere fact that the evidence offered is a part of the Supervisor's record will not of itself insure admissibility By way of dictum the court, after stating that it sensed a state of confusion and uncertainty as to the admissibility of the Supervisor's record at the rehearing or as a part of the record certified to the Superior Court if an appeal be taken, announced that either party may identify and submit portions of the record at the rehearing, and if the objections made thereto are renewed upon appeal, the Superior Court will determine the admissibility of the portions offered by the rules of evidence applicable in civil cases *Hutchings v Department of Labor & Industries*, 124 Wn Dec 687 (1946)

The holding of the case cannot be challenged, for clearly the evidence was unsworn and inadmissible under the statute *Sweitzer v Department of Labor & Industries*, 177 Wash 28, 36, 30 P (2d) 980, 34 P (2d) 350 (1934); *Smith v Department of Labor & Industries*, 176 Wash 569, 30 P (2d) 656 (1934) However, the court, in clearing, through dictum, the confusion of which it spoke changed the operation and meaning of the statute in order to protect the jury by shifting the emphasis from maintaining the informal and summary nature of the rehearing and appeals therefrom to the securing of evidence suitable for jury use The statute, while not explicit regarding the admissibility of the record after a rehearing has been granted, is explicit regarding the practice of affirming or summarily denying the application for rehearing It provides:

> "If the Joint Board, in its opinion, considers that the Department has previously considered fully all matters raised by such application, it may without further hearing, deny the same and confirm the previous decision or award, or if the evidence [the rehearing application and the Supervisor's record] on file with the

> Joint Board sustains the applicant's contention, it may without further hearing, allow the relief asked in such application; "

In practice, the Joint Board, when acting upon an application for rehearing, consults the unsworn evidence of the application and the departmental file and then either denies the claim, makes the award requested, or directs a rehearing The admissability of the record at an appeal from either of the first two actions is set forth in the statute:

> " [the applicant] upon such appeal, may raise only such issues of law or fact as were properly included in his application for rehearing, *or in the complete record in the Department* On such appeal the hearing shall be *de novo*, but the appellant shall not be permitted to offer, and the court shall not receive, in support of such appeal, evidence or testimony *other than, or in addition to,* that offered before the Joint Board *or included in the record filed by the Department:*
>
> "The Department of Labor and Industries shall serve upon the appellant and file with the clerk of the court before trial, a certified copy of its complete record on the claim, which shall, upon being so filed, become a part of the record in such case" (Italics supplied)

Thus the court in adopting its ruling on the admissibility of the record *after a rehearing has been granted* has created an anomaly in that the record is admissible before the Joint Board when it considers the rehearing application and it may also use the record to support its action if it confirms or denies the application and an appeal is taken to the Superior Court; but the same record may not be used after the Board has granted a rehearing unless it conforms to the rules of evidence applicable in civil cases While the section authorizing the rehearing has no express provision providing for the admission of the record, the fair import from the statute as a whole and from the intent of the legislature, must have been to admit the record in evidence for consideration in this instance as well That such was the understanding of the court appears in *McKinnie v Department of Labor & Industries*, 179 Wash 245, 37 P (2d) 218 (1934), in which it said when speaking of the Supervisor's record:

> " which reports are, by *statute*, made a part of the record and required to be filed as such and transmitted to court upon appeal" (Italics supplied)

Even stronger language appears in *Devlin v Department of Labor & Industries*, 194 Wash 549, 78 P (2d) 952 (1938):

> "These reports were parts of the departmental file and were considered by the joint board when it rejected respondent's claim They therefore constituted a part of the record before the Superior Court; and, although the sources of information on which they were based and the manner in which they became a part of the departmental file might affect their weight as evidence, they were nevertheless competent and admissible, to be considered for what they were worth *McKinnie v Department of Labor & Industries* "

The court in the *McKinnie* case was not only of the opinion that the record containing hearsay was admissible at the rehearing, but after conceding that the hearsay offered at the rehearing was technically

inadmissible, adopted a rule manifesting its willingness to relax the common law rules of evidence in an administrative hearing, as is the modern trend The court upheld the admissibility of hearsay in the form of statements of the deceased where a witness was presently sworn and testifying, justifying it on the basis that the same or similar statements could come into the hearing through the record

When the precise question, whether the record is automatically admissible at the rehearing, arose again in the instant case, the court, in overruling the portion of the *McKinnie* and *Devlin* cases, inconsistent with the *Sweitzer* case, declared that the fact that the evidence offered was a part of the Supervisor's record was no longer controlling, citing REM. REV STAT § 7697 (P P C 704-1) In proceeding beyond the facts of the instant case and stating that the admissibility of the Supervisor's record must be tested by the common law rules of evidence applicable in civil cases, the court appears to have reversed the former trend relaxing the common law rules of evidence at an administrative rehearing and upon appeal therefrom and to have returned to the position stated in *Park v Department of Labor & Industries*, 184 Wash 472, 51 P (2d) 620 (1934):

> " departmental investigations and trials before the superior court should be conducted subject to all applicable laws and rules of evidence "

In adopting the present position, the court has expanded the only specific statutory restriction on the use of the record at the rehearing namely, the requirement that the witness' testimony be sworn, to the general requirement that it meet all rules of evidence before being admitted Hence, little if any of the record will actually be admissible in practice The court, in adopting the rule perhaps had its eye on the protection of the jury from incompetent evidence, and since the record certified from the rehearing is the only evidence available in the trial in the Superior Court, the rules must also be applied at the rehearing But in adopting this position the court has ignored the fact that the record should be admissible for what it is worth in that large percentage of cases which are never appealed to the Superior Court

L T N

DIVORCE—INTERLOCUTORY DECREE—PROPERTY SETTLEMENT—ABATEMENT ON DEATH OF ONE PARTY *W* sued for divorce asking that certain property be awarded to her alleging it to be her separate property *H* cross-complained asking for a divorce and alleging the property was community The trial court gave judgment for *W* found the property to be her separate property and awarded it to her *H* appealed Pending the appeal *W* died Appellant moved to dismiss the appeal *Held:* The interlocutory order became a nullity in its entirety on the death of *W*, and as the status of the property involved was fixed in the interlocutory order the award to *W* would not stand *Dougherty v Dougherty* 124 Wash Dec 777, 167 P (2d) 467 (1946)

In Washington an interlocutory decree of divorce abates and becomes a nullity for all purposes on the death of one of the parties prior to the entry of the final decree *McPherson v McPherson*, 200 Wash 365 93 P (2d) 428 (1939); *State* ex rel *Atkins v Superior Court* 1 Wn (2d) 677 97 P (2d) 139 (1939) The subject matter of a divorce is the marital status of the parties and the settlement of property rights is merely incidental In re *Martin's Estate* 127 Wash 44 219 Pac 838 (1923); *Wilkinson v Wilkinson*

63 Wash 126, 114 Pac 915 (1911); *Ambrose v Moore*, 46 Wash 463, 90 Pac 588, 11 L R A. (N S) 103 (1907) An exception to this abatement rule was made where the rights of third persons (parties to the action) were affected by the decree adjusting property rights of the husband and wife *Materson v Ogden*, 78 Wash 644, 139 Pac 654 (1914)

In the instant case the court held the case of *McPherson v McPherson*, 200 Wash 365, 93 P (2d) 428 (1939) controlling Its facts were essentially the same The court made no distinction between cases where the court divided community property in the interlocutory decree and where the court declared certain property to be the separate property of the wife and merely awarded it to her The court specifically held In re *Garrity's Estate*, 22 Wn (2d) 391, 156 P (2d) 217 (1945) not to be controlling That case may be distinguished on facts from the instant case in that the proceedings were on a petition of the surviving wife to be appointed administratrix of the husband's estate, and the separate character of the property in that case had become fixed by mutual deeds of the parties to make it separate The court held the separate status of the property would stand regardless of the outcome of the divorce The case of In re *Martin's Estate, supra*, is very similar to the *Garrity* case except that no written agreement to convey was made The parties merely executed mutual deeds as to the realty and took possession and held the personalty as separate The court held the disposition of the property by mutual agreement to be controlling Here also the proceedings were on a petition of the surviving wife to be appointed administratrix of the husband's estate

In Washington an interlocutory decree of divorce, voided by the death of one of the parties, is not the proper vehicle to determine the status of the property New York is apparently in accord with the Washington position, In re *Crandall's Estate*, 196 N Y 127, 89 N E 578 (1909), while California is contra, *Klebora v Klebora*, 118 Cal. App 613, 5 P (2d) 965 (1931) *See* also 104 A. L R 654, 158 A. L R 1205

S W P