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Workmen's Compensation

Jack Ruegg

indicate that the execution of the will must be satisfactorily proved before the offer of proof of its provisions will be accepted.

GUST A. LEDAKIS

WORKMEN'S COMPENSATION

Destruction of Common Law Remedies—Wife's Loss of Consortium. Plaintiff's husband was injured through the negligence of his employer; he recovered compensation under the state Workmen's Compensation Act.[1] Plaintiff brought an action to recover damages for her loss of consortium. In *Ash v. S. S. Mullen, Inc.*[2] the Court rejected the claim, holding workmen's compensation was an exclusive remedy since the Act provides ". . . relief for workmen, injured in extrahazardous work, and their *families* and dependents . . . and to that end all civil actions . . . for . . . personal injuries . . . are . . . abolished, except as in this title provided."[3] The wife is included in the term "family" by previous Washington decisions.[4] A possibly more emphatic basis of the decision is the provision that compensation ". . . shall be in lieu of any and all rights of action whatsoever against any person whomsoever. . . ."[5] The Act does provide compensation for the wife as follows: She receives compensation in event of her husband's death, and in case of partial or total disability the injured workman receives greater benefits if he is married than if single.[6]

Since the case was of first impression the Court turned to many other jurisdictions to support its conclusions.[7] Plaintiff relied heavily upon *Hitaffer v. Argonne Co.*,[8] which permitted the wife to recover for loss of consortium even though the applicable federal statute provides that the employer's liability under the act is to be ". . . exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such

[1] RCW 51.
[2] 143 Wash. Dec. 319, 261 P.2d 118 (1953), noted 26 ROCKY MT. L. REV. 216 (1954).
[3] RCW 51.04.010 (Italics added).
[4] *E.g.*, Collins v. Northwest Casualty Co., 180 Wash. 347, 39 P.2d 986 (1935).
[5] RCW 51.32.010, a provision ignored in note, 26 ROCKY MT. L. REV. 216 (1954) which disapproves of the principle case.
[6] RCW 51.32.040 *et seq.*
[7] *E.g.*, Napier v. Martin, 194 Tenn. 105, 250 S.W.2d 35 (1952); Holder v. Elms Hotel Co., 338 Mo. 857, 92 S.W.2d. 620 (1936); likewise, the husband cannot sue for his loss of consortium, Swan v. F. W. Woolworth Co., 129 Misc. 500, 222 N. Y. Supp. 111 (1927); GuGse v. A. O. Smith Corp., 260 Wis. 403, 51 N.W.2d 24 (1952).
[8] 87 U.S. App. D.C. 57, 183 F.2d 811; *cert. den.* 340 U.S. 852 (1950); noted 36 CORN. L. Q. 148 (1950).

employer. . . ."[9] The court took the view that an action for loss of consortium was separate and independent of any action covered by workmen's compensation, and hence was not barred by such statutes. However, a contrary result was reached by another federal court interpreting the same statute.[10] The federal statute seems even more explicit than the Washington statute in restricting a suit for loss of consortium.

Duty of the Doctor to Inform Injured Workman of His Rights—Limitation on Time to File Claim. Plaintiff seriously injured his leg on the job. The company physician advised plaintiff he need not file for compensation because the injury was not severe. Plaintiff was kept on the payroll full time after the accident; the physician continued to treat plaintiff after the doctor ostensibly reported him back to full time work, though plaintiff did nothing but make coffee for fellow workers. Defendant employer made no report of the accident to the Department of Labor and Industries as required by RCW 51.28.010. After a year defendant terminated plaintiff's employment. Approximately two months after the injury the company doctor told plaintiff he had varicose veins, and that the disease was not due to the fall, which in fact it was. Before plaintiff attempted to recover compensation the one year period of limitation for filing a claim for compensation under the Workmen's Compensation Act expired.[11] Plaintiff, in *Pate v. General Electric Co.*,[12] brought a personal injury action against the doctor and his employer for failure to inform plaintiff that he could get benefits under the Act for the injury, claiming that as a result he lost forever his right to compensation for his injury. " 'In other words, the gist of plaintiff's claim for redress is not the physical injury which he has suffered, but rather the loss of his statutory remedy to be compensated therefore under the Workmen's Compensation Act.' "[13] Plaintiff claimed the doctor was under a statutory duty to inform him of rights and remedies under the Act. L. 1927, c. 310, § 6 (a) reads in part, "Where a workman is entitled to compensation under this act he shall file with the department, his application for such, together with the certificate of the physician who attended him, and *it shall be the duty of the physician to inform the injured workman of his rights under this*

[9] 44 STAT. 1426, 33 U.S.C.A. § 905.
[10] Johnson v. U.S., 79 F.Supp. 448 (D.C. Ore. 1948), where the Court held the compensation under the statute was an "exclusive" remedy.
[11] RCW 51.28.050.
[12] 143 Wash. Dec. 171, 260 P.2d 901 (1953).
[13] *Id.* at 172, 260 P.2d at 902.

act and to lend all necessary assistance in making this application. . . ."[14] Two issues were presented to the Court: Does a physician have a duty to inform a workman of the procedure to file a claim, and if so, does a workman not so informed have a right of action against a doctor who fails to perform this duty? The Court answered the first question negatively which disposed of the second question, holding the only duties imposed upon the doctor were, on request of the applicant, to supply a certificate for reporting the examination when he filed his claim, and to explain the injury in terms of compensation under the Act. This decision together with the statutory limitation of one year to apply for benefits under the Act left plaintiff without remedy.

While the Court is correct in saying only the injured workman may file a claim for his personal benefits,[15] the basis of plaintiff's claim was a duty on the part of the doctor to inform plaintiff of his "rights" under the Act, including the statutory time limit for application. Plaintiff did not contend that the doctor should file an application for him. Admitting ambiguity concerning what duties the statute does impose, if any, it seems reasonable that filing a claim for compensation is itself a right under the statute with a correlative duty on the Department to consider the application, rather than the claim being a condition precedent to acquiring rights.

Not at issue in this case but suggested by it is the problem of the injured workman who seeks compensation after expiration of the statutory limitation period for filing a claim. The Washington limitation is one year after date of injury,[16] and the Court has applied this limitation literally,[17] but it has also applied equitable principles in extending time limits set by the Workmen's Compensation Act,[18] and has stated the Act should be liberally interpreted.[19] Other courts have

[14] (Italics added.) RCW 21.28.020 omits the word "duty" among other changes. The Court took cognizance of the change and based its decision on the wording of the session law.

[15] RCW 51.28.020.

[16] RCW 51.28.050.

[17] Read v. Dept., 163 Wash. 251, 1 P.2d 234 (1931); Ferguson v. Dept., 168 Wash. 677, 13 P.2d 623 (1932); Sandahl v. Dept., 170 Wash. 380, 16 P.2d 623 (1932); Cunningham v. Dept., 39 Wn.2d 298, 235 P.2d 291 (1951); Wheaton v. Dept., 40 Wn.2d 56, 240 P.2d 567 (1952). *Cf.*, Beels v. Dept., 178 Wash. 301, 34 P.2d 917 (1934); Crabb v. Dept., 186 Wash. 505, 58 P.2d 1025 (1936).

[18] Ames v. Dept., 176 Wash. 509, 30 P.2d 239 (1934). Plaintiff was injured, but before filing his claim was adjudicated emotionally ill; he filed his application from a state mental hospital. The claim was acted upon and closed; plaintiff did not appeal therewith within sixty days as the law required. The Court held that the legislature was aware of equitable principles and did not intend to forbid their application, and that since the general statute of limitation did not run on the insane the special one on workmen's compensation claims ought not to run.

[19] Crabb v. Dept., 186 Wash. 505, 58 P.2d 1025 (1936); Ames v. Dept., 176 Wash. 509, 30 P.2d 239 (1934).

found causes for extending the statutory limitation. A Pennsylvania court stated that ". . . where a person is unintentionally deceived as to his rights by one who has authority to act in the premises, courts will not, if it is possible to prevent it, permit such deception to work an injury to the innocent party . . .," and while plaintiff must conform to the law to secure compensation, still ". . . where a party has been prevented from doing an act through fraud or circumstances that amount to fraud, the court might extend the time within which to do the act."[20] This does not say extension of time to file a claim is a matter of right but is to be determined on the facts in each case. The standard controlling such late claims would be the reasonableness of the delay. However, a survey of most states indicates courts generally hold the legislative limitation period controlling and that filing within this period is a condition precedent to having an application acted upon.[21] Recognizing the applicability of equitable doctrine to late claims could combine a statutory limitation to eliminate claims obviously stale from age together with a flexible rule allowing late claims for reasonable cause. Administrative problems should not be insuperable, especially in light of the fact that several state statutes provide for late claims due to reasonable cause.[22]

Employers without Employees—Right to Subscribe to Benefits—Immunity Provision. In *Latimer v. Western Machinery Exchange*,[23] plaintiff, a member of an informal logging partnership, went with his partners to purchase a donkey engine from the defendant and to help load it onto a truck. In the process a "straddle chain" disengaged from a crane hook and struck plaintiff, who brought an action for personal

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[20] Horn v. Lehigh Valley R.R. Co., 274 Pa. 42, 117 Atl. 409, 410 (1922). Quoted approvingly in Guy v. Stoecklein Baking Co., 133 Pa. Super. 38, 1 A.2d 839 (1943). In the latter case plaintiff, relying upon his employer's statement that he would take care of everything, did not file within the fixed time and according to the statute plaintiff's claim was "forever barred." The court permitted a late application. This principle was reaffirmed in Mackanitz v. Pittsburgh & West Virginia Ry. Co., 157 Pa. Super. 359, 43 A.2d 586 (1945).

[21] *E.g.*, Burke v. Industrial Commission, 368 Ill. 554, 15 N.E.2d 305 (1938); Gavigan v. Visiting Nurses Association, 125 Conn. 290, 4 A.2d 923 (1939); Williams v. Campbell Construction Co., 63 Ga. App. 381, 11 S.E.2d 233 (1940); Riccioni v. American Cyanamid Co., 23 N. J. Super. 465, 93 A.2d 60 (1952); Gilbert v. Metropolitan Utilities District of Omaha, 156 Neb. 750, 57 N.W.2d 770 (1953).

[22] 4 ANN. LAWS OF MASS., c. 152, § 49 (1949); 2 ANN. CODE OF MD., p. 3687, art. 101 (1939). *Cf.*, DEERING'S GEN. LAWS 1923, Act 4749, § 11 (c) (Cal.), and England, 6 Edw. VII, c. 58, § 2 (1).

[23] 40 Wn.2d 155, 241 P.2d 923 (1952), reversed on rehearing *en banc*, 42 Wn.2d 756, 259 P.2d 623 (1953). A similar case arising in the same industry and reaching the same result was Pink v. Rayonier, Inc., 40 Wn.2d 188, 242 P.2d 174 (1952), reversed on rehearing *en banc*, 42 Wn.2d 768, 259 P.2d 629 (1953).

injuries against defendant. Defendant, an employer in extrahazardous activity, pleaded the immunity proviso in the Workmen's Compensation Act which provides ". . . that no action may be brought against any employer or any workman under this title as a third person if, at the time of the accident, such employer or such workman was in the course of extrahazardous employment under this title. . . ."[24] In the departmental hearing the Court assumed, as had the parties, that if plaintiff *could* qualify for benefits under the Act his action was barred. The only issue raised, therefore, was whether plaintiff could qualify for coverage under the Act as a self-employed person with no employees. RCW 51.32.030 gives any employer in extrahazardous activity the option to qualify for personal benefits. The Court held the definition of "employer" in the Act includes a self-employed employer without employees; therefore his action is barred, despite the fact that he had not made himself eligible for compensation.

On rehearing *en banc* the Court reversed, saying that an option to qualify for compensation is insufficient to bar a personal injury action. The Court pointed out that its earlier assumption that the action of anyone who could qualify for benefits was barred resulted from a misinterpretation of *Koreski v. Seattle Hardware Co.*[25] In the *Koreski* case, a corporate official, who could have qualified to receive compensation, but had not done so, was injured while installing an electric motor. The tort action against a third party employer was held barred by the immunity proviso. In the *Latimer* decision the Court stated that the plaintiff in the *Koreski* case was a *workman* whose action was barred for that reason.[26] Since Latimer was not a workman, that rule was inapplicable; and since he had not elected to qualify for personal benefits under RCW 51.32.030 the immunity proviso left his personal injury action unimpaired.

Since plaintiff, though without employees, was an employer and since he was engaged in extrahazardous activity he was automatically within the scope of the Act,[27] and arguably is *protected* by the immunity provision from suits by any workman or employer in extrahazardous activity based on his own negligence whether he pays premiums or not. But by the decision in this case a self-employer who

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[24] RCW 51.24.010.
[25] 17 Wn.2d 421, 135 P.2d 860 (1943).
[26] A literal reading of the Act indicates a *wòrkman* is to have an *absolute* right to compensation contrary to the indication in the *Koreski* case.
[27] RCW 51.12.010 *et seq.*

does not qualify for the benefits of the Act still has a cause of action against third party tort-feasor workmen and employers, even though they are covered by the Act.

The Court apparently confused two different parts of the Act and overlooked others. The Court overlooked the fact that the Washington Workmen's Compensation Act provides no option for any employer engaged in extrahazardous employment to be or not to be within the scope of the act; the employment is covered by compulsion.[28] This has been recognized by the Court in the past when it said, "Our workmen's compensation act, let us be reminded, is one under which neither the employer nor the employee has any right of election as to whether he will come under and be governed by its provisions, so far as extrahazardous employment is concerned."[29] In rejecting the rule that the tort action of anyone who *could* qualify for compensation is barred by the immunity provision, the court made no distinction between RCW 51.12.110 and RCW 51.32.030. RCW 51.12.110 is designed to enable *non-extrahazardous* employers to come within the scope of the Act to the extent of covering their workmen and preventing suit by the employer's workmen against the employer, but does not prevent suits by third party employers or employees.[30] RCW 51.32.030 is designed to give employers already within the scope of the Act personal coverage for injuries to their person if they so elect; it has no relation to immunity from suit. The Court has recognized this distinction as applied to employers with employees. When an injured third party employee attempted to sue an employer in extrahazardous activity with employees the Court held that the immunity proviso is a defense regardless of whether the employer has qualified to receive compensation as an individual.[31]

The primary source of confusion is the inclusion of the employer without employees in the employer classification. The Court cannot be criticized for this as the statute defining employer is so confusingly drawn as to preclude a logical, rationally consistent construction.[32] It

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[28] *Ibid.*

[29] Shaughnessy v. Northland Steamship Co., 94 Wash. 325, 329, 162 Pac. 546, 547 (1917).

[30] Pryor v. Safeway Stores Inc., 196 Wash. 382, 83 P.2d 241 (1938).

[31] Jewett v. Kerwood, 143 Wash. Dec. 639, 263 P.2d 830 (1953).

[32] RCW 51.08.070 defines employer; "'Employer' means *any person*, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any extrahazardous work, by way of trade or business, *or* who contracts with one or more workmen, the essence of which is the personal labor of such workmen, in extrahazardous work." (Italics added.) The court has not

seems clear that an employer without employees comes within the literal definition of employer.

The *Latimer* case held that an action by an employer without employees against a third party employer engaged in extrahazardous activity is not barred unless plaintiff has elected personal coverage. Does it follow that an employer with employees has an action unless he elects personal coverage?[33] Certainly the common understanding is that nothing of this sort should occur,[34] but since the *statute* equates employers with employees with employers without employees the Court can hardly escape from extending the effects of the *Latimer* decision to this situation. This decision would apparently bar an action by an employer with employees only if the employer had elected personal coverage under RCW 51.32.030. If this happens the immunity provision is made less effective because an employer with employees in extrahazardous activity may sue another for injuries but may not be sued for injuries inflicted by himself or his employees provided the employer has paid his premiums and the injuries occur in the scope of the employment. A literal reading of the Act would indicate that the employer in extrahazardous activity gains immunity from suit by third party employers and employees by reason of his employment alone. The Court, however, has by way of dictum, attached a condition to immunity; the employer must be paying premiums.[35] But it should be noted that this condition is read into the Act.[36]

always followed a literal interpretation of this section. See Comment, 29 WASH. L. REV. 42, 43 (1954).

[33] It is conceivable that an employer with employees could have actions it might wish prosecuted, *i.e.*, compensation for loss of services of a key employee injured by third parties. *E.g.*, Johnson v. Harris, 187 Okl. 239, 102 P.2d 940 (1940) is illustrative; the employee recovered in his action and the employer recovered in a separate action. Jones v. Waterman S.S. Corp., 155 F.2d 992 (C.A. 3d 1946) based the employer's right to recovery on common law. Many states do not permit the employer to sue for loss of services of the employee unless a statute gives the right. *E.g.*, Noblin v. Randolph Corp., 180 Va. 345, 23 S.E.2d 209 (1943) (complicated by wording of state workmen's compensation act); some states limit recovery by the employer to losses resulting from intentional harm to the employee; *e.g.*, Crab Orchard Improvement Co. v. Chesapeake & O. Ry. Co., 115 F.2d 277 (C.A. 4th 1940) (dictum indicates that negligence causing injury and loss is "too remote").

[34] 2 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.40 (1952), "Three states have drawn a boundary-line not around the same employ . . . but around the entire membership of the state's compensation family. The consequences vary somewhat . . . but they have in common the thought that the immunities . . . should be conceived of on a system-wide basis . . . Washington goes the farthest of all. Neither the employer nor the employee may sue any other employer or employee subject to the compensation act."

[35] Jewett v. Kerwood, *supra* note 31. Larson, *supra* note 34, states, ". . . Washington, starting with the broadest statute, has been assiduously cutting it down by interpretation until it is difficult to recognize the original."

[36] The statute once provided employers in default could not interpose the immunity provision. L. 1927, c. 74, § 3. *See*, Reeder v. Crewes, 199 Wash. 40, 90 P.2d 267 (1939).

The employer without employees creates a serious problem under the Washington statute; the fundamental error appears to be the definition of employer contained in the Act which permits employers without employees to be classified as employers. Recognition of the problem by the legislature will be the major step towards its solution.[37]

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The provision has been omitted. L. 1947, c. 247, § 4 (d). Further, since an employer with no employees is not obligated to pay premiums, he seemingly cannot be in default.

[37] Solutions to this problem are difficult. A possible answer is to limit the immunity provision to employers with employees, but this would require overruling another part of the *Latimer* case as the Court clearly found the Washington statute to apply to employers without employees. 40 Wn.2d 155, 159-162, 241 P.2d 923, 926-927 (1952). Furthermore, the Court would be disregarding the statutory definition of employer. But should the Court do this the employer without employees could not be covered by the Act even by election and payment of premiums.