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Workmen's Compensation - Injury Not Specifically Provided for Compensable Under Other Provisions of Illinois Acts

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By way of a caveat, Illinois attorneys should pay heed to this extension of the word "interest." If it is the wish of the client that the attorney drafting the instrument be named executor, or the executor's attorney, and such a direction is included in the instrument, it should be witnessed by others not so named. Where there are two competent witnesses in addition to the attorney, and such a direction is made, the attorney should not testify as a witness.

WORKMEN'S COMPENSATION–INJURY NOT SPECIFICALLY PROVIDED FOR COMPENSABLE UNDER OTHER PROVISIONS OF ILLINOIS ACTS

Plaintiff was injured while in the course of his employment for defendant when a safety device on the "man-lift" elevator he was riding failed to operate. The resulting injuries included a ruptured urethra[1] which rendered him impotent. The defendant provided a compensation for medical expenses and for the time of disability in accordance with provisions of the Workmen's Compensation Act. Subsequently, plaintiff initiated an action in common law negligence on the ground that his particular damage did not fit a category of specific injuries and thus was not covered by the Act. The Circuit Court of Peoria County dismissed the action on the basis that it was barred by section 5(a) of the Act.[2] On direct appeal to the Supreme Court of Illinois the judgment to dismiss was affirmed on the grounds that the injury was compensable under a provision providing compensation for the loss of testicles. *Moushon v. National Garages, Inc.*, 9 Ill. 2d. 407, 137 N.E. 2d 842 (1956).

The underlying theory of Workmen's Compensation legislation "is to make the risk of the accident one of the industry itself . . . and hence that compensation on account thereof should be treated as an element in the cost of production added to the cost of the article and borne by the community in general."[3] The mechanics of this theory may be likened to a contract where, in return for an extension of the employer's liability to the coverage of injuries not compensable at common law, the employee

[1] "Urethra, a membranous canal which carries off the urine from the bladder, and in the male it also conveys the seminal fluid. The male urethra extends from the neck of the bladder to the urinary meatus (the opening in the end of the penis)." Maloy, Simplified Medical Dictionary for Lawyers, 438.

[2] Ill. Rev. Stat., (1955) c. 48, § 138.5(a). "No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided shall be available to any employee who is covered by the provisions of this act. . . ."

[3] 1 Schneider Workmen's Compensation Law 2 (2d ed., 1932).

waives his right to bring an action where negligence would lie.[4] Thus, where all parties are subject to the act, the right to bring a common law action against the employer for injuries caused by his negligence is barred.[5]

But should the Compensation Act be extended to cover injuries for which no express provision has been made? Such legislation has generally been given two interpretations: one of strict construction, whereby an injured party's common-law remedy is not extinguished unless expressly provided for by the Act; the other, a broad interpretation in which the injured party's common-law remedy is extinguished, leaving the Compensation Act as his exclusive remedy.

Illinois has always held that, whenever possible, a broad construction should be given the Act so as to effectuate the legislative intent.[6] Thus, where controversy has arisen concerning the applicability of the Act to a particular injury, the courts have sought to place these injuries somehow within the purview of the statute.

In *Kivish v. Industrial Commission*,[7] an employee was sent to a hospital for treatment of an accidental injury arising out of his employment. While there he died of influenza which he contracted while under treatment. The court allowed compensation for the death, ruling that the employer was liable for the consequences of treatment to which the injured employee submits upon demand. In *Lincoln Park Coal and Brick Co. v Industrial Commission*,[8] the claimant received a severe X-ray burn resulting from the treatment of a compensable injury. Although there was no provision for this type of injury within the Compensation Act, the court nevertheless held it to be compensable on the grounds that it was closely connected with the original injury. The court remarked:

> Such an injury is not expressly provided for by the Workmen's Compensation Act (but that Act should be, and is, liberally construed to carry out its manifest purpose and intention, and a few of our decisions . . . have some tendency to support a construction which would authorize an award in this case.[9]

[4] Grasse v. Dealer's Transport Co., 412 Ill. 179, 106 N.E. 2d 124 (1952); Fulton v. Knight, 346 Ill. App. 122, 104 N.E. 2d 554 (1952); Hill-Luthy Co. v. Industrial Commission, 411 Ill. 201, 103 N.E. 2d 605 (1952); Petrazelli v. Propper, 409 Ill. 365, 99 N.E. 2d 140 (1951); Keeran v. Bloomington and Champaign Traction Co., 277 Ill. 413, 115 N.E. 636 (1917).

[5] Briggs v. Farnsworth, 336 Ill. App. 417, 84 N.E. 2d 330 (1949); O'Brien v. Chicago City Ry. Co., 305 Ill. 244, 137 N.E. 214 (1922); Wilson Garment Mfg. Co. v. Edmonds, 312 Ill App. 317, 38 N.E. 2d 534 (1921).

[6] Shell Oil Co. v. Industrial Commission, 2 Ill. 2d 590, 119 N.E. 2d 224 (1954); People ex. rel. Radium Dial Co. v. Ryan, 371 Ill. 597, 21 N.E. 2d 749 (1939); Faber v. Industrial Commission, 352 Ill. 115, 185 N.E. 255 (1933).

[7] 312 Ill. 311, 143 N.E. 860 (1924).

[8] 317 Ill. 302, 148 N.E. 79 (1925).

[9] Ibid., at 307 and 80.

In *Lambert v. Industrial Commission*,[10] the claimant, who wore glasses to correct his faulty vision, suffered a permanent injury to his eyes while in the course of his employment. The employer, in denying liability, claimed that since the claimant's vision was defective prior to the accident, he was no worse off because of the injury. The court ruled that although the claimant's eyes were faulty prior to the accident, they were normal with correction at that time, and the corrected, and not the uncorrected, vision should be the determining factor in awarding compensation. In *Hayes v. Marshall Field and Co.*,[11] the plaintiff brought an action of negligence against her employer for the loss of an eye resulting from the treatment by a company physician for an irritation in that area. The plaintiff's action was predicated on the theory that the injury was not caused by a peculiar hazard of employment and thus was not compensable under the Compensation Act. It was held that this particular injury arose out of the course of employment and was covered by the Act, thus extinguishing plaintiff's cause of action.

While there are factual differences in the cases cited and in the problem presented, it is apparent that the Illinois courts have sought to place the injured employee somewhere within the ambit of the Act wherever feasible, holding that this is consonant with the legislative intent. In *Matthiessen and Hegeler Zinc Co. v. Industrial Commission*,[12] the court observed:

> It is, therefore, clear that the words "accident" and "accidental injury" used in the Act were meant to include every injury suffered in the course of employment for which there was an existing right of action at the time the act was passed. . . .[13]

Following this line of reasoning, the court disposed of the instant case by ruling that although plaintiff's specific injury was not covered by the Act, the resulting damage of impotency was covered by Section 8(e), providing for the loss of testicles.

This broad construction was vigorously attacked in the dissenting opinion by Justice Bristow, who claimed that the majority decision was based on nothing more than "medical fiction."[14] He called on the court to apply the strict construction followed in other jurisdictions. This doctrine is predicated upon two fundamental principles. First, while a statute may extinguish a common-law right, such an intention "must be expressed

[10] 411 Ill. 593, 104 N.E. 2d 783 (1952).

[11] 351 Ill. App. 329, 115 N.E. 2d 99 (1953).

[12] 284 Ill. 378, 120 N.E. 249 (1918).

[13] Ibid., at 382 and 251.

[14] This reference was made in showing that no evidence has been introduced to prove that the damaged urethra was the actual cause of plaintiff's impotence, and thus it was argued that the injury was not within the provisions of the Act.

in clear and unequivocal language."[15] This reasoning was advanced in *Billo v. Allegheny Steel Co.*,[16] where the court ruled that the silicosis contracted by the plaintiff was not within the Pennsylvania Compensation Act in that the injury did arise from an "accident" as required by the statute. The court observed:

> It would be a perversion of the humane purpose of the Act to hold . . . an employee was by the Act deprived of a valuable legal right which had theretofore been his. No court will give the Act such an interpretation unless required to do so by the Act's explicit language.[17]

Secondly, it is argued that too broad an interpretation would be tantamount to judicial legislation.[18]

> Courts are not permitted by construction to carry a statute, particularly one in derogation of the common law, beyond its clearly defined scope. It is for the legislature to limit or extend the operation of its enactments, and even though there are no self-contained limitations, it would be judicial legislation to extend a statute beyond its subject matter.[19]

Upon this theory many jurisdictions have denied statutory compensation unless the specific injuries have been expressly provided for in the Acts.[20] A prime example of this may be seen in *Boyer v. Crescent Paper Box Co.*[21] There, the plaintiff sued in common law negligence for injury to her scalp when she was literally scalped by a machine used in her employment. This injury was not covered by the Compensation Act at the time of the accident, although it was provided for in the revised statute at the time the case was before the Supreme court. The plaintiff's common law action was allowed on the grounds that the injury was not covered at the time of the accident, and it was immaterial that it subsequently was provided for.

[15] Triff v. National Bronze and Aluminum Foundry Co., 135 Ohio St. 191, 20 N.E. 2d 232 (1939); Boal v. Electric Storage Battery Co., 98 F. 2d 815 (C.A. 3rd, 1938); Covington v. Berkeley Granite Corp., 182 Ga. 235, 184 S.E. 871 (1936); Downing v. Oxweld Acetylene Co., 112 N.J.L. 25, 169 Atl. 709 (1933); Jones v. Rinehart, 113 W. Va. 414, 168 S.E. 482 (1933); Szalkowski v. C. S. Osborne & Co., 9 N.J. Misc. 538, 154 Atl. 611 (1931).

[16] 328 Pa. 97, 195 Atl. 110 (1937).

[17] Ibid., at 115.

[18] Whitmore v. Industrial Commission of Ohio, 105 Ohio St. 295, 136 N.W. 910 (1922); Western Indemnity Co. v. Milam, 230 S.W. 825 (Tex. Civ. App., 1921); Page v. N.Y. Realty Co., 59 Mont. 305, 196 Pac. 871 (1921); Frey's Guardian v. Gamble Bros., 188 Ky. 283, 221 S.W. 870 (1920).

[19] Rosenfield v. Matthews, 201 Minn. 113, 275 N.W. 698, 699 (1937).

[20] Manning v. Gosset Mills, 192 S.C. 262, 6 S.E. 2d 256 (1939); Dixon v. Gaso Pump and Burner Mfg. Co., 183 Okla. 249, 80 P. 2d 678 (1938); Donnelly v. Minneapolis Mfg. Co., 161 Minn. 240, 201 N.W. 305 (1924); Shinnick v. Clover Farms Co., 169 App. Div. 236, 154 N.Y.S. 423 (1915).

[21] 143 La. 368, 78 So. 596 (1917).

While it can be seen that many jurisdictions are prone to construe the Workmen's Compensation Acts strictly, the Illinois courts have generally followed a practice of broad construction. However wide the difference in these two views may be, there is one factor common to both—each doctrine is predicated upon legislative intent.

In concluding this discussion, one point in the instant case should be noted. The court stated:

> Yet, even if it be assumed that the injury is not under section 8(e), it does not follow that the plaintiff should prevail. He still is covered by the Act and sustained an actual injury for which he received compensation benefits. Therefore, by its clear import section 5(a) bars his suit.[22]

Can this be taken to mean that so long as the parties are subject to the Act, every injury, whether expressly mentioned or not, will be covered by the statute? The courts may very well so rule, using reasoning similar to that found in the dissenting opinion in *Boyer v. Crescent Paper Box Co.*:[23]

> In adopting a [Compensation] Act, . . . it is impossible to forsee every kind of injury that may occur. The most that can be done is to make provisions applying indiscriminately to injuries in general, and to classify as far as possible injuries in general.[24]

[22] Moushon v. National Garages, Inc., 9 Ill. 2d 407, 410, 137 N.E. 2d 842, 844 (1956).

[23] 143 La. 368, 78 So. 596 (1917).

[24] Ibid., at 600.