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WORKMEN'S COMPENSATION ACTS-AMENDMENTS CHANGING PERIOD FOR ADDITIONAL COMPENSATION DUE TO AGGRAVATION OF INJURY

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WORKMEN'S COMPENSATION ACTS—AMENDMENTS CHANGING PERIOD FOR ADDITIONAL COMPENSATION DUE TO AGGRAVATION OF INJURY—The typical workmen's compensation act provides both for an award to compensate the employee for his original injury and for subsequent awards to compensate him for aggravation of the injury occurring after the original award. The time during which the original award may be opened to allow additional compensation for subsequent aggravation may not be expressly limited, or opening may be limited to a stated time after the original injury or the last payment of the original award. By amendment, the legislature may either lengthen or shorten this period for opening. Whether such amendment applies to a claim for compensation for aggravation when the original injury occurred before the effective date of the amendment is the problem with which the present comment is concerned. If what the courts say is taken to be controlling, the cases seem to be in irreconcilable conflict upon almost every point. However, the decisions themselves fall into a surprisingly uniform pattern.¹

A. Amendments Shortening Period for Opening

1. What the Courts Say

Should an amendment shortening the period for opening an award on the ground of aggravation of the injury be construed to be retroactive when the amendment is silent on that point? One court has said that the amendment should be so construed because "the legislature meant what it said"²—in other words, that the amendment should be construed to be retroactive because the legislature had not expressly stated that it was to be prospective only. Another court has used just the opposite reasoning: "There is nothing in the amendment . . . to suggest that a retroactive effect was intended, and for this reason, if not for the more fundamental reason that the impairing legislation was beyond the power of the legislature, the amendment must be construed as not affecting the parties' rights."³ It may be significant to observe that the prospective construction is a device for avoiding constitutional difficulties. If the court considers a retroactive application of the amendment unconstitu-

¹ For a different treatment of the decisions see 165 A.L.R. 506 (1946).

² *Allen v. Mottley Const. Co.*, 160 Va. 875 at 890, 170 S.E. 412 (1933).

³ *A. P. Smith Mfg. Co. v. Court of Common Pleas of Essex County*, 107 N.J.L. 38 at 41, 150 A. 771 (1930).

tional, then it can avoid the embarrassment of declaring the amendment in part unconstitutional by saying that the legislature intended the amendment to have only prospective application. Before leaving the point of construction, it should be noted that use of the labels "retroactive" and "prospective" is not free from difficulty. For example, is an amendment which cuts off a claim for aggravation occurring after the effective date of the amendment retroactive because the injury occurred before that date?

Assuming that the amendment is construed to bar a claim for aggravation enforceable under the terms of the original statute, the employee may argue that the amendment impairs the obligation of contract or deprives him of property without due process of law. The contract theory has been well stated as follows: "[T]he right of an employee to compensation arises from the contractual relation existing between him and his employer on the date of the injury, and the statute then in force forms a part of the contract of employment and determines the substantive rights and obligations of the parties, and . . . no subsequent amendment which has the effect of increasing or diminishing the amount of compensation recoverable can operate retrospectively to affect in any way the rights and obligations prior thereto fixed."⁴ On the other hand, it can be said that the employee's right to compensation and the employer's liability arise out of status rather than out of any contract, actual or implied in law.⁵

Most courts ignore the contract approach and fight out the issue of constitutionality on the battlefield of substance versus procedure. One court has said that the amendment "fixes the time within which the party must act, if he would enforce a present right. It is a statute of limitations. Such statutes . . . neither create nor destroy rights, but pertain to remedy solely;"⁶ but another court stated that, at the time the employee was injured, "his right attached" and "he was entitled to make application from time to time, and be compensated, if the commissioner

⁴ *Magnolia Petroleum Co. v. Watkins*, 177 Okla. 30 at 31, 57 P. (2d) 622 (1936) (dictum). See also *Kelley v. Prouty*, 54 Idaho 225 at 232, 30 P. (2d) 769 (1934): "In the instant case compensation was being paid pursuant to a contract entered into between the parties, which was approved by the board, and the law in force as of the time when the contract was entered into and approved became a part of the contract as if expressly written into the same."

⁵ "Workmen's Compensation legislation rests on the idea of status, not upon that of implied contract. . . ." *Cudahy Packing Co. v. Paramore*, 263 U.S. 418 at 423, 44 S.Ct. 153 (1923). Cf. "The liability of the employer under the act is not tortious, and is not contractual in the sense that it should be considered a part of the contract; but it is purely statutory." *Anderson v. Miller Scrap Iron Co.*, 169 Wis. 106 at 114, 170 N.W. 275 (1919).

⁶ *In re Hogan*, 75 Ind. App. 53 at 57, 129 N.E. 633 (1921).

felt that he was entitled to additional compensation."⁷ Not all courts that treat the compensation for aggravation as a matter of substance hold that the right to such compensation cannot be taken away without violating due process, for some such courts say that "the benefits conferred upon [the employee] by the Legislature are purely statutory and may at any time be taken from him by the Legislature,"⁸ or that the legislature can take away the remedy and leave the right.⁹

Judging from such statements, one might conclude that the courts are in hopeless disagreement. However, there is a surprising degree of uniformity in the holdings, which may emphasize the danger of considering the courts' statements apart from their decisions on the facts.

2. *What the Cases Hold*

An amendment shortening the time during which the original award may be opened to allow compensation for aggravation has generally been held to bar opening at least when the period prescribed in the amendment has run, not only from the date stated in the amendment (the date of the injury or the date of the last payment of compensation), but also from the effective date of the amendment.¹⁰ Several courts, however, reach a contrary result by construing the amendment not to apply when the injury occurs prior to the amendment.¹¹ Assuming, however, that

⁷ *Carbon Fuel Co. v. State Compensation Comm.*, 111 W. Va. 639 at 641, 163 S.E. 62 (1932).

⁸ *Earl W. Baker & Co. v. Morris*, 176 Okla. 68 at 69, 54 P. (2d) 353 (1935).

⁹ "[The amendment] is merely a statute limiting the power of the commission to any act involving the reopening of the award within the period prescribed." *Tischer v. City of Council Bluffs*, 231 Iowa 1134 at 1149, 3 N.W. (2d) 166 (1942).

¹⁰ *Mattson v. Dep't. of Labor*, 293 U.S. 151, 55 S.Ct. 14 (1934) ("a purely statutory right"); *In re Hogan*, 75 Ind. App. 53, 129 N.E. 633 (1921) ("a statute of limitations"); *Vincent v. Allerton House Co.*, 256 N.Y. 522, 177 N.E. 25 (1931) ("remedy"); *Marchuk v. Pittsburgh Terminal Coal Corp.*, 106 Pa. Super. Ct. 249, 161 A. 771 (1932) ("procedure"); *Savidge v. Dime Trust & S.D. Co.*, 108 Pa. Super. Ct. 333, 164 A. 734 (1933) (the court pointed out the employee had had eight months after the effective date of the amendment to make any claim); *Rednock v. Westmoreland Coal Co.*, 132 Pa. Super. Ct. 89, 200 A. 114 (1938) (court intimated there was no aggravation); *Tischer v. City of Council Bluffs*, 231 Iowa 1134, 3 N.W. (2d) 166 (1942) (amendment removed board's jurisdiction); *Ketzel v. Hammermill Paper Co.*, 159 Pa. Super. Ct. 462, 48 A. (2d) 89 (1946) ("procedure"). Cf. *Chicago Board of Underwriters v. Industrial Comm.*, 332 Ill. 611, 164 N.E. 216 (1928).

¹¹ See *Cherry v. State Compensation Comr.*, 115 W. Va. 180, 174 S.E. 889 (1934); *James v. Workmen's Compensation App. Bd.*, 117 W. Va. 493, 185 S.E. 909 (1936); *A. P. Smith Mfg. Co. v. Court of Common Pleas of Essex County*, 107 N.J.L. 38, 150 A. 771 (1930) (constitutional difficulties hinted if amendment were otherwise construed); *Boshers v. Payne*, 58 Idaho 109, 70 P. (2d) 391 (1937) (here employer sought to reopen). Query whether amendment would, as these cases intimate, be retroactive if applied to bar recovery for aggravation occurring after effective date of the amendment.

the amendment has some application, some courts have held that the award can be opened, though the period specified in the amendment has expired, within an equivalent period running, not from the date specified in the amendment, but from the effective date of the amendment.¹² One court, at least, is more strict and has held that, when the opening was barred under the amendment literally applied, and the petition to open was not made until eight months (more than a "reasonable time"?) after the effective date of the amendment, the amendment barred opening, even though this would not have been the result if the period specified in the amendment had been held to run from the effective date of the amendment.¹³ But other courts which do not hold that the period in the amendment runs from the date it becomes effective have seen the way clear to permit the award to be opened months after the effective date of the amendment, even though the amendment, if literally applied, would bar opening.¹⁴

Apparently the courts of only one state have permitted the amendment to destroy a claim for compensation for aggravation in existence at the time the amendment became effective.¹⁵

¹² *Ireland v. Shipley*, 165 Md. 90, 166 A. 593 (1933); *Magnolia Petroleum Co. v. Watkins*, 177 Okla. 30, 57 P. (2d) 622 (1936); *Graner Constr. Co. v. Brandt*, 180 Okla. 221, 68 P. (2d) 788 (1937); *Oklahoma Portland Cement Co. v. Smith*, 181 Okla. 313, 73 P. (2d) 446 (1937); *Ford Motor Co. v. McDonald*, 185 Okla. 130, 90 P. (2d) 404 (1939); *Secrest v. Galloway*, (Iowa, 1948) 30 N.W. (2d) 793.

¹³ *Allen v. Mottley Const. Co.*, 160 Va. 875, 170 S.E. 412 (1933) (construction). Cf. *Consentina v. State Compensation Comr.*, 127 W. Va. 67, 31 S.E. (2d) 499 (1944) (amendment providing that "no further award may be made . . . on account of injuries occurring prior to [a stated date] unless written application for such award . . . be filed with the commissioners" within six months after the effective date of the amendment, held, constitutional). See also *Earl W. Baker & Co. v. Morris*, 176 Okla. 68, 54 P. (2d) 353 (1935), but cf. *Magnolia case*, supra, note 14.

¹⁴ *Strouse v. Quaker Knitting Mills*, 159 Pa. Super. Ct. 39, 46 A. (2d) 526 (1946) (the court permitted reopening four and a half months after the amendment took effect, "since claimant's substantive right of action was in existence at the time the [amendment] became effective, a reasonable time must be allowed to enforce this right. . . ." See also *Kelley v. Prouty*, 54 Idaho 225, 30 P. (2d) 769 (1934) (nine months or less—result reached by construction); *Maryland Casualty Co. v. Posey*, 58 Ga. App. 723, 199 S.E. 543 (1938) (five months—construction); *Daytona Beach Boat Works v. Spencer*, 153 Fla. 540, 15 S. (2d) 256 (1943) (eleven months—dictum). Cf. *Jenkins v. Heaberlin*, 107 W. Va. 287, 148 S.E. 117 (1929); *London Guarantee & Accident Co. v. Pittman*, 69 Ga. App. 146, 25 S.E. (2d) 60 (1943).

¹⁵ *State ex rel. Boswell v. Industrial Comm.*, 125 Ohio St. 341, 181 N.E. 476 (1932) ("a contingent right subject to change or modification by statute"); *State ex rel. Thompson v. Industrial Comm.*, 138 Ohio St. 439, 35 N.E. (2d) 727 (1941) ("express provision" made the amendment apply).

3. Conclusion

At the outset it should be recognized that the courts seem to treat the claim for aggravation as distinct from the claim for the original injury,¹⁶ and that an amendment shortening the time during which a claim for aggravation can be made is not a mere statute of limitations. Such an amendment may limit the time for presenting an existing claim for aggravation, and it may also prevent the accruing of a claim for aggravation occurring after the effective date of the amendment. However, a strong argument can be made that the amendment cannot constitutionally destroy a claim for aggravation occurring before the amendment. At most, it can limit the time for bringing action on such a matured claim to a reasonable time after the effective date of the amendment.¹⁷ In a laudable attempt to create certainty, a few courts have held that the amendment, "in so far as it affects rights of action in existence when [it] is passed," begins to run, "in the absence of a contrary provision. . . when the cause of action was first subjected to its operation."¹⁸ Perhaps the courts are merely borrowing from the legislatures the measure of a reasonable time.

Thus, it would appear that an accrued claim for aggravation arising under an existing statute is a right of sufficient dignity to be considered property within the protection of state and federal due process clauses, but that the right, if it may be called a right, to compensation for future aggravation of an existing injury is not property and may be destroyed by the legislature. Though the legislature may not be able to destroy certain existing rights by repealing the statute which created them, yet a

¹⁶ In *Mattson v. Department of Labor*, 293 U.S. 151 at 154, 55 S.Ct. 14 (1934), the Supreme Court summarized the employee's argument as follows: "The appellant insists that at the date of his injury the statute conferred upon him not only a right to make his original claim and receive compensation, but a further right to file an additional claim, without limit as to time, and to receive readjusted compensation for aggravation of his condition due to his injury. This he says, is a vested right, is property, and its enforcement may not be abolished or limited, consistently with the due process clause of the Fourteenth Amendment of the Federal Constitution." The court rejected this argument and held that the amendment could destroy the employee's "purely statutory right" for compensation for aggravation occurring after the effective date of the amendment. Query whether the amendment could have destroyed a claim for an original injury or for aggravation occurring before the amendment.

¹⁷ Cf. *Jackson ex dem. Hart v. Lamphire*, 3 Pet. (28 U.S.) 280 (1830); *Jenkins v. Heaberlin*, 107 W. Va. 287, 148 S.E. 117 (1929). Logically the amendment could be treated both as limiting the time for making a claim for aggravation occurring prior to the amendment to a reasonable time after the effective date of the amendment, and as preventing any claims for aggravation arising after the effective date of the amendment. However, a court which does not distinguish between the two aspects of the amendment might hold that the claim for aggravation could accrue within a reasonable time after the effective date. Such a view would avoid the uncertain fact question as to when the aggravation occurred.

¹⁸ *Magnolia Petroleum Co. v. Watkins*, 177 Okla. 30 at 33, 57 P. (2d) 622 (1936).

property right cannot arise under a non-existent statute.¹⁹ Perhaps this is a situation where the nebulous phrase, "vested right,"²⁰ borrowed from feudal real property law, has some usefulness today. The claim for aggravation becomes vested when the aggravation occurs, and a subsequent statute cannot destroy it; but, before the aggravation occurs, the claim is merely contingent upon the occurrence of the aggravation while the statute is in effect. If the test of property in the constitutional sense is the substantiality of the right or interest concerned, then the accrued, but not the inchoate, claim for aggravation is substantial, judging from the deference the courts have shown it.

The above summary is drawn more from the decisions of the pertinent cases than from what the courts have said. It is believed that it will explain the results reached in most of the cases. The issue of retroactive versus prospective construction has been passed over for two reasons: if the amendment were to apply to accrued claims for aggravation, it is believed to be unconstitutional, so that speculation over retroactive construction of the amendment is idle; and, when the amendment is applied to aggravation arising after its enactment, there is no question of retroactivity if the claim for aggravation is treated as separate from the claim for the original injury.

The contract theory is ignored both because it is largely ignored by the courts and because it is a fiction. A fiction might be justifiable if it were necessary to reach a just result; but it is believed that the property theory reaches such a result without resort to the realm of legal fantasy.

Finally, a caveat is in order. Some statutory choses in action may be destroyed by the legislature.²¹ What the touchstone is that reveals which statutory choses may be destroyed and which may not is not the problem of this comment.²² It is submitted, however, that the accrued claim for

¹⁹ "[A] right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws. . . ." 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 749 (1927).

²⁰ Cf. *Reynolds v. E. Clemens Horst Co.*, 35 Cal. App. 711, 170 P. 1082 (1918).

²¹ See, for example, the decisions sustaining retroactive application of the portal-to-portal act. *Battaglia v. General Motors Corp.*, (C.C.A. 2d, 1948) 169 F. (2d) 254, cert. denied, (U.S. 1948) 69 S.Ct. 236; *Darr v. Mutual Life Ins. Co.*, (C.C.A. 2d, 1948) 169 F. (2d) 262, cert. denied, (U.S. 1948) 69 S.Ct. 166. Cf. *Ettor v. City of Tacoma*, 228 U.S. 148, 33 S.Ct. 428 (1913) (legislature had no power to destroy statutory chose in action); *Cusick v. Feldpausch*, 259 Mich. 349 at 353, 243 N.W. 226 (1932) ("A common-law right of action is property and entitled to protection. . . . [A] statutory right of action for damage to person or property, which has accrued, is a vested right, and likewise to be protected").

²² See *Brown*, "Vested Rights and the Portal-to-Portal Act," 46 MICH. L. REV. 723 (1948); *Cotter*, "The Constitutionality of Retroactive Legislation—The Portal-to-Portal Act of 1947," 34 VA. L. REV. 26 (1948).

aggravation is a claim of the sort that the legislature cannot destroy, judging from the decisions of the courts of all states but one that have passed upon the matter. It should be noted that the courts of the one dissenting state seem never to have squarely considered the problem.²³ It is extremely difficult to find any overwhelming public interest in favor of allowing the legislature to destroy an employee's claim for aggravation which has arisen under the plain terms of an existing statute.

B. Amendments Lengthening Period for Opening

Some amendments to workmen's compensation acts have increased, rather than shortened, the period during which an award can be opened for aggravation. When the injury occurs but the award has not become final prior to the amendment, there should be no particular difficulty in holding the employer liable for aggravation occurring during the extended period and after the effective date of the amendment.²⁴ But when the employer has made full compensation for an injury under the existing statute, can a subsequent amendment impose additional liability upon him? A prospective construction of the amendment avoids such a problem.²⁵ But if the amendment is construed to apply retroactively, the issue of constitutionality is squarely presented. Arguably there is an impairment of obligation of contract;²⁶ but again it is submitted that the contract argument is artificial. A more forceful argument is that the amendment, so applied, deprives the employer of property without due process.²⁷ By retroactive legislation the employer who had completely discharged his liability for an injury and aggravation thereof under existing statutes is made to pay additional compensation for the same injury.

²³ See note 17, *supra*.

²⁴ *J. W. Ferguson Co. v. Seamen*, 119 N.J.L. 575, 197 A. 245 (1938); *Bordick v. John Conlon Coal Co.*, 144 Pa. Super. Ct. 522, 19 A. (2d) 536 (1941); *Brusco v. Philadelphia Rapid Transit Co.*, 148 Pa. Super. Ct. 97, 24 A. (2d) 710 (1942); *Gange Lumber Co. v. Rowley*, 326 U.S. 295, 66 S.Ct. 125 (1945). See also, re Illinois amendment increasing the period during which the employer may reopen the award: *Superior Coal Co. v. Industrial Comm.*, 321 Ill. 240, 151 N.E. 890 (1926); *Smolen v. Industrial Comm.*, 324 Ill. 32, 154 N.E. 441 (1926); *Snowden McSweeney Co. v. Industrial Comm.*, 324 Ill. 423, 155 N.E. 277 (1927); *Perry Coal Co. v. Industrial Comm.*, 343 Ill. 525, 175 N.E. 801 (1931).

²⁵ *Mustanen v. Diamond Coal & Coke Co.*, 50 Wyo. 462, 62 P. (2d) 287 (1936). Cf. *Dashiell v. Holland Maide Candy Shops*, 171 Md. 72, 188 A. 29 (1936).

²⁶ Cf. *Preveslin v. Derby & Ansonia Developing Co.*, 112 Conn. 129, 151 A. 518 (1930); *Hardware Mut. Casualty Co. v. Carlton*, 151 Fla. 238, 9 S. (2d) 359 (1942).

²⁷ *United Iron Works v. Smethers*, 159 Okla. 105, 14 P. (2d) 380 (1932). Cf. *Arnold & Murdock Co. v. Industrial Comm.*, 314 Ill. 251, 145 N.E. 342 (1924); *Preveslin v. Derby & Ansonia Developing Co.*, 112 Conn. 129, 151 A. 518 (1930).

If, however, the aggravation occurs after the amendment, and the claim for aggravation is considered as separate from the claim for the original injury, the amendment might escape the stigma of being retroactive.²⁸ But it is still possible to argue that an amendment which imposes liability upon a former employer even for future aggravation of the injury of a former employee is unreasonable and arbitrary in cases where the injury occurred, and the liability therefor under existing law was fully discharged, prior to the effective date of the amendment. The success of such an argument is another matter, for some courts, at least, strongly favor such amendments. At least, it would seem that only a court which strongly favored such an amendment would be willing to resort to the argument that "[t]here is no constitutional inhibition against the revival of a barred remedy."²⁹ Though the idea of a right without a remedy is in itself somewhat transcendental, the idea of a "barred remedy" for a non-existent right is astounding. The amendment does not merely revive a barred remedy but attempts to give a new right and a remedy for it. If a sympathetic court desires to give effect to the amendment, it might avoid doing violence to legal theory by a finding that under the provisions of the workmen's compensation act, the employer is in no position to raise the due process issue.³⁰

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²⁸ Cf. *Independent Pier Co. v. Norton*, (D.C. Pa. 1935) 12 F. Supp. 974; *Bethlehem Shipbuilding Corp. v. Cardillo*, (C.C.A. 1st, 1939) 102 F. (2d) 299; *Luckenbach S.S. Co. v. Norton*, (C.C.A. 3d, 1939) 106 F. (2d) 137; *Amsterdam Casualty Co. v. Cardillo*, (Ct. App. D.C., 1939) 108 F. (2d) 492.

²⁹ *Lane v. Department of Labor & Industries*, 21 Wash. (2d) 420 at 426, 151 P. (2d) 440 (1944). "We are not here dealing with the revival of a right or claim which has been extinguished, but simply with a power of the board to afford a specific remedy within three years of the date of accident because one year was found by the Legislature to be inadequate for the just determination of a disability classification." *Montgomery v. Seneca Iron & Steel Co.*, 236 App. Div. 19 at 21, 257 N.Y.S. 556 (1932). For other questionable reasoning see *J. W. Ferguson Co. v. Seaman*, 119 N.J.L. 575, 197 A. 245 (1938).

³⁰ *Gange Lumber Co. v. Rowley*, 326 U.S. 295, 66 S.Ct. 125 (1945) (increased award paid from state insurance fund; increase in employer's premium speculative and trifling).