Michigan Law Review

Volume 44 | Issue 6

1946

WORKMEN'S COMPENSATION-PREVIOUS IMPAIRED CONDITION AS AFFECTING BASIS OF COMPENSATION-SPECIAL FUND

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WORKMEN'S COMPENSATION—PREVIOUS IMPAIRED CONDITION AS AFFECTING BASIS OF COMPENSATION—SPECIAL FUND—Claimant suffered accidental injury to his left hand, for which he received compensation. Later he sustained additional injuries to head, ears, left and right hands, and thereby became totally disabled. The State Industrial Commission found that claimant was 75 per cent disabled by reason of the later injury alone. *Held*, under Oklahoma Workmen's Compensation Law,[1] employer is liable for the degree of disability which would have resulted had there been no previous injury. The Special Indemnity Fund [2] is liable for payment of the balance of the total disability. *Special Indemnity Fund v. Wood*, 195 Okla. 357, 157 P. (2d) 905 (1945).

Problems concerning the employment of physically impaired workers have been greatly accentuated by the war. Victims of accidents in the accelerated industry of the country during the war as well as the thousands of disabled veterans returning to industry have greatly increased the percentage of impaired workers.[3] It is essential that compensation legislation must not in any way work discrimination against this important element of manpower. The question of the proper basis for compensation when a previously impaired worker suffers a second injury, and, as a result of the combined injuries, becomes totally disabled,[4] is a troublesome one. The prevailing view has been that claimant is entitled to compensation for total disability, to be paid by his current employer.[5] The jurisdictions following this view have interpreted the statute on the theory that the employee, when hired, had that degree of capacity [6] which enabled him to do his

[1] Okla. Laws (1943) tit. 85, § 2, Okla. Stat. (Supp. 1945) tit. 85, § 172, as amended Okla. Laws (1945) p. 418 § 1. "If an employee, who is a 'physical impaired person,' receives an additional personal injury compensable under the Workmen's Compensation Law, which results in additional permanent disability so that the degree of disability caused by the combination of both disabilities is materially greater than that which would have resulted from the subsequent injury alone, the employee shall receive compensation on the basis of such combined disabilities, as is now provided by the laws of this State . . . [but] the employer shall be liable only for the degree or percentum of disability which would have resulted from the latter injury if there had been no pre-existing impairment. After payments by the employer or his insurance carrier, if any, have ceased, the remainder of such compensation shall be paid out of the Special Indemnity Fund provided for. . . ."

[2] See Okla. Laws (1943) tit. 85, § 3, Okla. Stat. (Supp. 1945) tit. 85, § 173.

[3] Scurlock, "Enactment of a 'State-Fund' Amendment," 14 OKLA. B. A. J. 1331 (1943).

[4] See 67 A. L. R. 785 at 794 (1930); 30 A.L.R. 979 (1924). The question of compensation for loss of eyesight, where sight of one eye had been lost previously is dealt with separately in 8 A.L.R. 1324 at 1326 (1920); 24 A.L.R. 1466 at 1467 (1923); 73 A.L.R. 706 at 711 (1931); 99 A.L.R. 1498 at 1505 (1935); 142 A.L.R. 822 at 829 (1943).

[5] 98 A.L.R. 729 at 734 (1935).

[6] ". . . Consequences to the particular workman determine the degree of disability, so that if an injury deprives him of all the capacity he has left after a previous accident, that result might be classed as total disability from the injury." Congoleum Nairn, Inc. v. Brown, 158 Md. 285 at 291, 148 A. 220 (1930).

job, and that his capacity has been transformed by the second injury into total disability.[7] He should, therefore, receive compensation for this loss. The consequences of this view are apparent. If an employer is required to pay for total permanent disability in second injury cases, he may hesitate or refuse to employ handicapped persons.[8] The minority view has avoided this result by granting claimant compensation only for that incapacity resulting from the second injury itself, as if the previous one did not exist. Proponents of this view say that the injury, not the incapacity, controls the award, and that without causal connection the employer cannot be charged for any disability resulting from the previous impairment.[9] In a case involving loss of sight by an employee who had previously lost one eye, the Pennsylvania court said, "If we hold that, by loss of the other arm, leg, or eye, their employer is bound to compensate them for total disability, representing a difference between $5,000 and $2,000, it will surely follow these men will lose their employment."[10] The employer's reluctance to hire handicapped workers is avoided in this manner, but the risk and burden is put on the employee. The Special Indemnity Fund, or second injury fund is the most practical solution found for this problem. It serves the dual purpose of relieving the employer of extra risk involved in the employment of physically handicapped workers, and of compensating these workers in a measure commensurate with the loss of earning capacity.[11] New York first adopted this method in 1915.[12] Since then, more than half the states have enacted similar laws.[13] The value of this legislation is clearly shown in a Minnesota case.[14] Employee lost four fingers and part of the palm of his left hand. Two years later he lost his right arm. Despite this serious handicap, he continued to work for the same employer for thirty odd years, until he lost his left thumb, and was totally disabled. This man, who was able to do work worth $42 a week, probably would not have been employed in a state where the employer was subject to pay compensation for total disability for the loss of a thumb. In some states, when he became totally disabled, he would have received compensation for the loss of a thumb only. Under the second injury fund law he was able to obtain employment and to collect compensation equal to his disability. This appears to be an ideal way to utilize the services of the physically impaired, and to encourage ". . . their employment in every way possible in order that they may take their proper places in society and contribute to the needs of that society. . . ."[15]

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[7] In re Branconnier, 223 Mass. 273, 111 N.E. 792 (1916).

[8] Sharkey, "Legal Situation as to Second-injury Cases," U. S. Bureau of Lab. Stat. Bul. No. 577, 19 INTERNATIONAL ASSN. OF INDUSTRIAL ACCIDENT BDS. AND COMMS. PROC. 146 at 152 (1932).

[9] Weaver v. Maxwell Motor Co., 186 Mich. 588, 152 N.W. 993 (1915).

[10] Lente v. Luci, 275 Pa. 217 at 224, 119 A. 132 (1922).

[11] Sharkey, "Legal Situation as to Second-injury Cases," U.S. Bureau of Lab. Stat. Bul. No. 577. 19 INTERNAT. ASSN. OF INDUSTRIAL ACCIDENT BDS. AND COMMS. PROC. 146 at 152 (1932).

[12] Workman's Compensation Law, 64 N.Y. Consol. Laws (Cahill, 1923) § 15, subd. 8.

[13] See 57 MONTHLY LABOR REV. 729 at 746 (1943) for states with fund in 1943.

[14] Peterson v. Halvorson, 200 Minn. 253, 273 N.W. 812 (1937).

[15] Scurlock, "Enactment of a 'State-Fund' Amendment," 14 OKLA. B. A. J. 1331 at 1335 (1943).