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Workmen's Compensation

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stimulated by decisions such as *Vodrey v. Quigley*[37] to will property to their natural parents and blood relatives if they wish them to share in the adopted person's estate at his death.

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WORKMEN'S COMPENSATION

Workmen's Compensation decisions in 1957 were neither so dynamic nor far-reaching as in 1956.[1] Most decisions involved procedural matters important to the particular case but not of great significance to the general law of workmen's compensation.

Decisions on dependency to determine death benefits involved both children and wives in the past year. In *Miller v. Industrial Commission*[2] an illegitimate posthumous child, which the decedent workman had not acknowledged, was held not to be a dependent child. Two cases involving widows portray workmen's compensation issues with interesting domestic relations undertones. In the first[3] the widow claimant had not been divorced from her first husband. She sought death benefits when her second husband was killed while working. The workman himself had also been married previously. The court held that the widow claimant was not a lawful widow for the purposes of workmen's compensation without proof of both her own divorce from her first spouse and the divorce of her worker husband from his prior spouse.

In the second case the widow claimant offered a common-law marriage relationship as proof of her dependency to the decedent workman. Actually the workman had been married to another woman prior to this relationship, but she had been missing for over seven years before the common-law marriage was consummated. Proof of an attempt to locate this first wife was offered. However, no proof of divorce or death was offered so no legal common-law marriage could be established. This impediment barred the widow claimant's right to death benefits.[4]

Two methods of improper procedure occurred in the former re-hearing procedures. First, in *Firth v. Industrial Commission*[5] after the record had been certified by the Industrial Commission to the common pleas court, the court sought to remand the record to the Commission for further re-hearing procedures. The appellate court held that the Commission had no jurisdiction to hear additional re-hearing testimony under the situation; hence, the common pleas court had no jurisdiction to remand.

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[37] 75 Ohio L. Abs. 65, 143 N.E.2d 162 (Ct. App. 1956) (next of kin of adopted parent inherit property from adopted person and not natural aunt of adopted person).

In a second case, the complex issues of an accidental injury and the causal relation between the accident and the death of the workman required the trial court to re-read medical testimony on possibility and probability to the jury. This was done after the jury had deliberated several hours. Claimant's original objection to this re-reading was subsequently withdrawn. The jury's verdict against claimant was affirmed on the grounds that no prejudicial error had occurred.[6]

The statute of limitations required two interpretations last year. In *State ex rel. Allied Wheel Products v. Industrial Commission*[7] the employer sought a mandamus to set aside an additional award granted to the claimant because of employer's violation of a specific safety requirement. The employee had filed his claim within the statutory period of two years. He based the claim, however, on a regulation not in effect until after the accident. The claimant was allowed to amend his claim to include the prior but almost identical regulation after the expiration of a two-year period from the time of the accident. An abuse of discretion by the Industrial Commission had not occurred; mandamus was denied.

A more important aspect arose in *State ex rel. Koval v. Industrial Commission.*[8] An employee filed a claim two years after the accident. He sought a writ of mandamus to force its acceptance. The employee claimed that the self-insuring employer had paid employee's doctor bill for medical services arising out of the accident. The claimant contended that this was an acknowledgment of the accident by the employer so the two-year statute should run from the date of payment. The claim was filed within this later period. The appellate court dismissed the claim stating that the determination of what was a compensable injury should not be based upon a self-insuring employer's payment of a medical bill but rather on an administrative or judicial decision.

Improper reception of evidence proved to be prejudicial error in two cases last year. The Industrial Commission counsel read letters and entries from the Veterans Administration to the common pleas jury which contradicted claimant's statement of his good health. During the rehear-

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[1] Johnson v. Industrial Comm'n., 164 Ohio St. 297, 130 N.E.2d 807 (1955) and Dripps v. Industrial Comm'n., 165 Ohio St. 407, 135 N.E.2d 873 (1956) were landmark cases discussed in the 1956 Survey, 8 WEST. RES. L. REV. 396 (1957).

[2] 165 Ohio St. 584, 138 N.E.2d 672 (1956).

[3] Evans v. Industrial Comm'n., 166 Ohio St. 413, 143 N.E.2d 705 (1957).

[4] White v. Industrial Comm'n., 102 Ohio App. 236, 142 N.E.2d 549 (1956).

[5] 145 N.E.2d 215 (Ohio Ct. App. 1957).

[6] Ball v. Youngstown Sheet and Tube Co., 142 N.E.2d 874 (Ohio Ct. App. 1955).

[7] 166 Ohio St. 47, 139 N.E.2d 41 (1956).

[8] 141 N.E.2d 306 (Ohio Ct. App. 1956).

ing before the Commission such letters and entries were excluded on claimant's objections. They were not included in the certified record for the jury's consideration in the common pleas trial. A new trial was ordered because of their improper admission during that trial.[9] When the Commission violated its own rule, to receive only such evidence on review as was in the record at the time the award was made, the appellate court by mandamus restored a 40% permanent partial award. To receive a physician's affidavit as new evidence in the review hearing and reduce the original 40% award to 22% was declared illegal.[10]

The employment area received interpretation once again. Claimant was denied an award because he was not working within the employment area in *Lanum v. Beatty*.[11] He was tearing down a barn used in connection with defendant's farm some two miles away. Some evidence existed that defendant owned the barn but not the land. This action was held not to be within the usual course of the farmer's business so the injury incurred was not compensable.

The customary liberal interpretation of the workmen's compensation law was expressed in a conflict of laws case. Two New York employees were temporarily in Ohio on the employer's business. One was killed in an automobile accident while the other was driving. New York death benefits were granted. Under New York law a wrongful death action against the fellow employee was barred. Ohio permits such action under a similar situation for its workmen. The appellate court allowed the New York workman's dependent to follow the Ohio rule and to sue the fellow workman for wrongful death.[12]

Finally, in the procedural area, the Supreme Court upheld the major legislative revisions in workmen's compensation administration adopted in 1955. Since these changes were considered remedial in character, a claimant under the amendments can be deprived of the right of certain statutory attorney's fees in the administrative process.[13]

The customary cases involving accidental injury, proximate cause and the hypothetical question also appeared last year.

Accidental injuries were considered not proved, and claims were rejected in three cases: first, when an employee testified that she felt a "crack in her back" while doing heavy work which she had done before;[14]

[9] Woodard v. Industrial Comm'n., 139 N.E.2d 682 (Ohio Ct. App. 1955).

[10] State *ex rel* Cox v. Industrial Comm'n., 144 N.E.2d 117 (Ohio Ct. App. 1956).

[11] 141 N.E.2d 690 (Ohio Ct. App. 1955).

[12] Ellis v. Garwood, 143 N.E.2d 715 (Ohio Ct. App. 1957).

[13] State *Ex Rel.* Michael v. Morse, 165 Ohio St. 599, 138 N.E.2d 660 (1956).

[14] Jordan v. Ternstedt Division, General Motors Corp., 140 N.E.2d 343 (Ohio Ct. App. 1956).

second, when a decedent who died with lung cancer shortly after a leg amputation allegedly necessitated by a fall but proved only by one witness who testified he saw decedent leaving an elevator in a "falling position";[15] third, when decedent suffered a fatal stroke on alternate theories of either a fall or extreme heat which was not an unusual or unexpected work hazard.[16]

An unusual Supreme Court decision rejected proof of proximate cause where proof of claimant's case alleging glaucoma caused by accidental injury rested on probabilities based upon probabilities in *Brecount v. The Procter and Gamble Co.*[17] The cause of glaucoma is unknown medically. The court majority compared a probability based upon probability to an inference based upon an inference, both of which are inadequate for legal proof. This case was certified from the court of appeals on the issue of whether the trial jury in the common pleas court must be charged on the necessity of determining a 25% eye disability as required by the statute to permit recovery. Once certified, however, the high court can render its decision on other issues. The percentage of disability issue was resolved with the rule that the Commission, not the jury, is responsible for disability determination; hence, the trial court should not charge the jury on the issue.

No proximate causal relation existed according to the appellate courts where a coronary occlusion was suffered while performing the usual work in the usual manner,[18] and where the usual smoke and steam were inhaled after several panes of window pane were broken in the cab of decedent's crane being operated in the usual manner.[19] A jury verdict denying claimant's right to compensation was upheld when the decedent fell at work, then died two years later from chronic myocardial degeneration after three days of exhaustive psychosis.[20] A jury verdict granting claimant the right to participate in the workmen's compensation fund was also upheld when an unskilled worker slipped on an incline in a grain elevator and testified himself, without a medical expert, as to a back injury suffered in the sacroiliac region.[21] The court did intimate that where one segment of the body was accidentally injured resulting in injury to another part or death, a medical expert's testimony would be

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[15] Miller v. Industrial Comm'n., 145 N.E.2d 490 (Ohio Ct. App. 1956).
[16] Grimm v. Industrial Comm'n., 145 N.E.2d 499 (Ohio Ct. App. 1956).
[17] 166 Ohio St. 477, 144 N.E.2d 189 (1957).
[18] Minnick v. Industrial Comm'n., 102 Ohio App. 525, 144 N.E.2d 227 (1956).
[19] Scuetta v. Carnegie-Illinois Steel Corp., 144 N.E.2d 292 (Ohio Ct. App. 1955).
[20] Leeper v. Youngstown Sheet and Tube Co., 144 N.E.2d 549 (Ohio Ct. App. 1955).
[21] Berry v. Industrial Comm'n., 142 N.E.2d 280 (Ohio Ct. App. 1957).

required to support the proximate cause issue. In this respect the court was following *Drakulich v. Industrial Commission.*[22]

In *Zelenka v. Industrial Commission,* [23] a hypothetical question to a medical expert was held improper by the Supreme Court with two judges dissenting. The expert had not attended the decedent. The question was based on assuming as true voluminous hospital records and X-ray photographs with many notations by attending physicians. The decedent had suffered an ankle fracture followed by death from diabetes mellitus with gangrene of the foot.

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[22] 137 Ohio St. 82, 27 N.E.2d 932 (1940). (Accidental injury to the back with death from cancer one year later requires a medical expert's proof.)

[23] 165 Ohio St. 587, 138 N.E.2d 667 (1956).