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Amendment to the Workmen's Compensation Law Permitting Benefits for Injuries Not Arising Out of Employment--Disability Benefits Law

James Lysaght

contradictory. On one hand New York denounces wire tapping as a crime, and on the other hand, it accepts as evidence information obtained by means of this very same unlawful tapping. Such an attitude by the courts and by the legislature can only serve to encourage the violations which statutes like Section 552-a were designed to eliminate. The only effective method to stamp out unlawful wire tapping from the New York scene is to exclude wire tapped information from admissibility as evidence, unless such information was obtained pursuant to the procedure prescribed by Section 813-a. It is submitted that until New York favorably inclines toward the federal view of inadmissibility of unauthorized wire tapped evidence, the present view to which it adheres can only serve to hamper and make futile the legislative decrees which condemn and denounce unlawful wire tapping.

HARVEY L. LIPTON.

AMENDMENT TO THE WORKMEN'S COMPENSATION LAW PERMITTING BENEFITS FOR INJURIES NOT ARISING OUT OF EMPLOYMENT—DISABILITY BENEFITS LAW.—"For some years, we have been engaged in modernizing our social welfare programs through various forms of social insurance, ... It is now time to take a complete forward step in this program." [1] The step referred to has been effectuated by the enactment of the Disability Benefits Law in Article 9 of the New York Workmen's Compensation Law,[2] which became effective on April 13, 1949. Benefit payments under the Act will commence on July 1, 1950.

Prior to the enactment of this Act a wage earner, if qualified, could look to two sources of aid in time of need, *i.e.,* workmen's compensation and unemployment insurance.[3] The workmen's compensation fund provides benefits for those employees disabled by occupational disease or by "disability or death from injury arising out of and in the course of employment." [4] The unemployment insurance fund provides benefits for those individuals who are unemployed but are "capable of and available for work." [5] It is to be observed that there existed a gap between these two forms of social insurance. Employees who became disabled from illness or injury incurred outside of and in no way connected with their employment

[1] Governor Dewey's annual message to the legislature, January 5, 1949.
[2] Laws of N. Y. 1949, c. 600.
[3] For an interesting survey of the progress of New York in relation to Workmen's Compensation, Unemployment Insurance and Disability Benefits see Note, 24 ST. JOHN'S L. REV. — (1949).
[4] N. Y. WORKMEN'S COMPENSATION LAW § 10.
[5] N. Y. LABOR LAW § 522.

were ineligible for workmen's compensation payments and claimants for unemployment insurance benefits who became disabled were not capable of and available for work, and consequently could not assert any claim for unemployment insurance.

Employers and Employees Covered

The Disability Benefits Law, enacted to "fill in this gap," brings within its scope covered employers and their employees. A covered employer is one who has in his employment, after July 1, 1949, four or more employees on each of at least thirty days in a calendar year. He becomes subject to the provisions of this Act from and after January 1, 1950 or upon the expiration of four weeks following the thirtieth day of such employment, whichever is later. A covered employer continues to be such until the end of any calendar year in which he has not employed four or more employees on each of thirty days, and shall have duly filed with the Chairman of the Workmen's Compensation Board satisfactory evidence thereof. Should a transfer of the business of a covered employer occur by purchase, operation of law, or otherwise, the transferee immediately becomes a covered employer.[6] Employers not required by this Act to provide for the payment of disability benefits may nevertheless do so voluntarily.[7]

As was indicated, the beneficiaries of the Act are those who are disabled while unemployed and those who are disabled while employed, if the inability to work has been the result of a cause outside of and in no way connected with their employment. To qualify for disability benefit payments while unemployed a claimant must meet the requirements of Section 207. He must have worked for a covered employer and within twenty-six weeks following the termination of such employment have become ineligible for unemployment insurance benefits solely because of his disability. Should an individual under similar circumstances be ineligible for unemployment insurance benefits for lack of qualifying wages, he may receive disability benefits if he was paid wages of at least thirteen dollars a week by one or more covered employers in each of twenty calendar weeks during the thirty weeks immediately preceding the date he last worked for such covered employer, and has evidenced his continued attachment to the labor market during the period of unemployment.

Provision for benefits to those disabled while employed is made under Section 204. In order to qualify under this section an individual must serve a covered employer for four or more consecutive

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[6] N. Y. WORKMEN'S COMPENSATION LAW § 202(2).

[7] *Id.* § 212. ". . . Such election shall be subject to the approval of the chairman, and if the employees are required to contribute to the cost of such benefits the assent . . . of more than one-half of such employees shall be evidenced to the satisfaction of the chairman."

weeks after which he will become eligible for benefits during the course of such employment and will remain eligible for a period of four weeks after its termination. If an employee is discharged after serving four consecutive weeks, there are three possibilities which may occur: (1) He may be reemployed by the same or another covered employer within the four week period immediately following his discharge. In this case he immediately becomes eligible to receive benefits without having to serve an additional four week period. (2) He may be reemployed by a non-covered employer within the four week period immediately following his discharge. In this instance he is no longer eligible for benefits beyond the first day of such employment. (3) He may be reemployed by a covered employer after the four week period immediately following his discharge. In this situation he will immediately become eligible for benefits upon such employment if he had been receiving either unemployment insurance benefits, or disability benefit payments commencing after the first four weeks last following the termination of his employment with a covered employer.

Written notice of disability must be furnished to the employer unless the claimant is unemployed, in which case he must notify the Chairman of the Workmen's Compensation Board within fifteen days after the disability commences.[8] In like manner, proof of disability, substantiated by an authorized physician, must be furnished not later than twenty days after the disability commences.[9]

Amount and Duration of Benefits Paid

Benefits received will be equal to fifty per centum of the employee's "average weekly wage" but in no case will exceed twenty-six dollars. Provision is made for a minimum weekly benefit of ten dollars. Thus if one-half of the average weekly wage is less than ten dollars the disabled employee is assured of receiving at least ten dollars per week. If, however, the average weekly wage is itself less than ten dollars the employee's benefit payment shall be the amount of his average weekly wage. Benefits may be pro rated in cases where the period of disability is less than a full week. Should a disabled employee be eligible for benefits from more than one employer, his weekly benefits shall be one-half of the total average weekly wage received from all covered employers. Determination of the average weekly wage is made by dividing the wages paid by the employee's last covered employer for the last eight weeks preceding disability, by the number of weeks worked during this period or portion thereof.[10] The duration of benefit payments may not exceed

[8] *Id.* § 217(1). Failure to furnish such notice or proof will not invalidate the claim but benefit payments will be suspended.

[9] *Ibid.*

[10] *Id.* § 204(2).

thirteen weeks during any one year of fifty-two calendar weeks or during any one period of disability.[11] Benefit payments will not be made during the first seven days of disability,[12] unless the disabled employee was receiving unemployment insurance benefits at the time the disability commenced. This conclusion seems warranted from the language employed in Sections 204 and 207. These sections state that benefits shall commence on the eighth consecutive day of disability. Section 207.1, however, provides that a person disabled while unemployed, who is eligible for unemployment insurance, shall be entitled to receive disability benefits for each week of such disability.

Disability benefits are reduced by the amount of any federal old-age or survival insurance benefits or by any annuity or pension received under any employer or governmental program except by those received under a veteran's disability program.[13]

Disabilities Excluded

Benefits will not be paid in the following cases: for disability caused by pregnancy; for disability caused by the wilful intent of the employee; for days on which any employee has performed work for remuneration or is entitled to receive remuneration from his employer; for disability caused by an act of war; for disability commencing before an employee becomes eligible to receive benefits; for disability during any period in which the employee would be subject to suspension for receiving unemployment insurance benefits; or while an employee is not under the care of an authorized physician.[14]

Special Fund for Disability Benefits

Section 214 creates a fund, to be administered by the State, known as the Special Fund for Disability Benefits, from which benefits will be paid to individuals who become disabled while unemployed and to employees whose employers have failed to make the required provisions for benefit payments. Contributions to this fund will come from five sources: (1) The employer and employee shall each contribute an equal amount the sum of which shall be equivalent to two-tenths of one per centum of the wages paid to that employee during a six month period beginning on January 1, 1950 and ending June 30, 1950. The total contribution shall in no event, however, be greater than twelve cents per week for each employee. (2) Penalties recovered from employers for non-compliance with Section 211 and

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[11] *Id.* § 205(1).

[12] *Id.* § 204(1). "Successive periods of disability, caused by the same or related injury or sickness, shall be deemed a single period of disability only if separated by less than three months."

[13] *Id.* § 206(1).

[14] *Id.* § 205.

sums recovered from a carrier which shall fail to make prompt payment of disability benefits without just cause shall also go into this fund.[15] (3) Benefits which have accrued but which are unpaid at the time of the employee's death and which have not been paid to the deceased's surviving spouse, parent, children or to the decedent's estate within six months after his death shall also be contributed. (4) Sums in excess of those required to discharge obligations under this Act, remaining after an employer shall cease to be a covered employer, and not used for the benefit of employees, shall also be deposited in the fund. (5) Assessments on carriers in equal proportions whenever the special fund shall fall below either eleven million dollars or one million dollars less than twice the amount of benefits paid from the special fund in the preceding fiscal year, whichever is greater.

Regular Fund for Disability Benefits

Benefit payments under Section 204 will come from a fund consisting of employee's donations made through payroll deductions and contributions from the employer. The employee's contribution shall be one-half of one per centum of the wages paid to him on and after July 1, 1950 but not in excess of thirty cents per week. The contribution of the covered employer shall be the excess of the cost of disability payments over the amount of the contributions of his employees.[16] The employer is deemed to act as agent for his employees in collecting the contributions [17] and such amounts are deemed held in trust. A trust status is also imposed on funds held by employers and increments thereto for the purpose of paying benefits and no profit may be derived therefrom.[18]

Approved Methods of Providing for Payments

A covered employer may make provision for disability payments in any of the following ways: [19] He may insure on a premium basis with the State Insurance Fund or with any stock or mutual corporation or reciprocal insurer authorized to transact the business of accident and health insurance in this state.[20] The state fund also presents a solution to the problem of providing insurance for those risks

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[15] *Id.* §§ 213, 220(2), (4).
[16] *Id.* § 210(3).
[17] *Id.* § 209(5).
[18] *Id.* § 210(4).
[19] *Id.* § 211.
[20] "The opinion has been expressed in some quarters that the Disability Benefits Law is an attempt to provide a bonanza for private insurance companies at the expense of the employer and employee. We do not share this view. Whatever source of coverage the employer might select, competition will keep the cost low." Dineen, Social Insurance Through Existing Private Enterprise.

which private carriers may reject. The employer, himself, may make provision for payment of benefits on a self insurance basis by depositing securities or filing a surety bond in an amount approved by the Workmen's Compensation Board. If, however, an employer has a plan which is in existence on the effective date of this article and which remains in effect on July 1, 1950, whereby employees are entitled to receive disability benefits, he will be relieved of the obligation of making provisions for benefit payments "until the earliest date, determined by the chairman . . . upon which the employer shall have the right to discontinue the provisions thereof or to discontinue his contributions towards the cost." [21] Any such plan may be extended with or without modification by agreement or collective bargaining between an employer and employees, and the employer will be relieved of responsibility under the Act during the period of extension. Section 211(4) further provides that "any other plan or agreement in existence on the effective date of this article which the employer may, by his sole act, terminate at any time, or . . . [under] which he is not obligated to continue for any period to make contributions may be accepted by the chairman as satisfying the obligation . . . under this article if such plan or agreement provides benefits at least as favorable as those provided for by this article." By inference it would appear that where an existing plan is not terminable at the employer's will, benefits need not be as favorable as those provided for by Article 9. The employees, however, are compensated by the fact that they are assured of benefits during the term of such agreement which must be in existence by April 13, 1949, whereas other beneficiaries under the Act are either not eligible to receive payments until July 1, 1950 or have no such assurance. Employers, however, are not relieved of the responsibility of making provisions for benefits under Section 207 and are subject to the assessment described in Section 214(2) and for annual assessments to defray the cost of administrating this Act.[22]

A new plan or agreement, entered into after the effective date of this article, will relieve the employer of the statutory responsibility for making provisions for benefits if the plan provides for benefits at least as favorable as those given under the Act.[23]

Where Disability Caused by Act of Third Party

If the disability is the result of an injury inflicted by a third party the employee may nevertheless recover benefits under the Act. The carrier or the Chairman of the Workmen's Compensation Board shall have a lien on the proceeds of any recovery made by a disabled employee in an action against the tortfeasor to the extent of the total

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[21] N. Y. WORKMEN'S COMPENSATION LAW § 211(4).
[22] *Ibid.*
[23] *Id.* § 211(5).

amount of disability benefits paid. Any compromise of a cause of action by the injured employee in an amount less than the benefits provided for in the Act shall be made only with the written consent of either the Chairman of the Board or the carrier. If the injured employee who has received benefits fails to commence an action against the third person within six months prior to the expiration of the statute of limitations, the carrier or the Chairman of the Board may maintain an action against the third party.[24]

Waiver, Release and Exemption of Payments from Claims

Any agreement to waive rights under this Act shall be void. Disability benefits may not be assigned or released and shall be exempt from all claims of creditors and from levy, execution and attachment.[25] However, attorney's fees for services in connection with any contested claim under the Act shall become a lien upon the benefits, if these fees have been approved by the Board. The lien shall be paid from the proceeds only in the manner fixed by the Board.[26]

Conclusion

"What the New York Law provides is analogous to the concept of minimum wage. That is to say the statutory provision for disability benefits is a mandated standard, obligatory for employers and their employees who do not or cannot agree on something better; but where they can and do agree the widest latitude is allowed them to work out the solutions best suited to their own needs." [27] Some of the opposition to the Act in its present form was based on the contentions that the employer pay all the contributions, or that the state insurance fund constitute the sole insuring agent to the exclusion of private companies. Whatever the merit of these criticisms, the bill does offer to industry and labor an opportunity of proving that social betterment can be fostered by joint effort on their part with a minimum of state interference.

JAMES LYSAGHT.

AN ACT TO AMEND THE CIVIL PRACTICE ACT IN RELATION TO ADVERSE POSSESSION BY TENANTS IN COMMON OF REAL PROPERTY. —The one distinctive characteristic of every cotenancy is the right of each tenant in common, with his cotenants, to the possession of

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[24] *Id.* § 227(1), (2), (3).
[25] *Id.* § 218(1), (2).
[26] *Id.* § 225.
[27] Miss M. Donlon's address before the House Ways and Means Committee on H. R. 2893, reported in the Insurance Advocate, April 30, 1949, p. 19, col. 2.