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Workmen's Compensation--Effect of Transfer of Business Without Notice

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greater than in actions brought by an automobile passenger against his host for injuries caused by his host's negligence. These cases should not be "saddled with a presumption of fraud."[30]

As to the desirability factor, it is submitted that an injury resulting from the tortious act of a spouse should be no less compensable than an act of a stranger. One cannot reasonably assume that a husband is more willing to recompense the general public than his wife, nor is an injured spouse any less injured because she is married. Where an action is denied, she may be without an adequate remedy. It is difficult for courts to continue to argue that denying such an action will contribute to the preservation of domestic happiness in the intentional tort cases where the greatest damage has already occurred and in the automobile negligence cases where the insurance company will indemnify the losing spouse. For those who fear that once the door is opened a volume of trivial suits will arise, it is suggested that the defenses of consent and assumption of risk are applicable to this situation.

The reasons most often advanced for denying a husband or wife such an action are no longer compelling. In addition, denying the right of action may place a heavy burden on the injured spouse. Therefore the decision of the Kentucky court seems a step in the right direction.

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WORKMEN'S COMPENSATION—EFFECT OF TRANSFER OF BUSINESS WITHOUT NOTICE

Transfer of business without notice to the employee as affecting the employee's right to recover against the original employer and his insurer for injuries sustained after the transfer was the subject of an unusual legal determination which was given judicial reaffirmance recently by the Court of Appeals of Kentucky in two similar workmen's compensation cases, *Hamlin* v. *Sammons*,[1] and *Bituminous Gas Corp.* v. *Johnson*.[2] In each case the plaintiff was hired as a mine worker of employer-one who carried workmen's compensation insurance. Employer-one then transferred the mining operations to em-

[30] *Ibid.*
[1] 261 S.W. 2d 440 (Ky. 1953).
[2] 259 S.W. 2d 448 (Ky. 1953).

ployer-two.[3] The employee was not given actual notice of the transfer nor could a change have been inferred since the operations continued in a manner nearly identical to that with which they had theretofore been conducted. The employee who was injured subsequent to the transfer sought a compensation award against employer-one and his insurer. The awards granted in both cases by the Workmen's Compensation Boards and affirmed by the Circuit Courts were sustained by the Court of Appeals. In the *Bituminous* decision it was asserted:

> . . . where there is no actual change in the management of the business, and it is continued in the same general way after the sale by the same servants and employees and the servants are in no way expressly or otherwise informed of the transfer and consequent change of proprietors, the relation is presumed to continue for a reasonable time, and the master remains liable to them to the same extent as though no sale or transfer had taken place. . . .[4]

The Employer. That an employer who transfers his business without giving notice to his employees cannot release himself from liability for their subsequent injuries either at common law or under a workmen's compensation act is the accepted rule.[5] At first glance this would

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[3] It should be noted that employer-two was a sub-lessee rather than a subcontractor. Therefore, statutes and case holdings to the effect that the employees of sub-contractors may collect directly from the insured main employers are inapplicable. See HOROVITZ, WORKMEN'S COMPENSATION 232 (1944).

[4] *Supra* note 2 at 451, quoting from Palmer v. Main, 209 Ky. 226, 272 S.W. 736, 737 (1925). The Bituminous decision was also held to be controlling in Hamlin v. Sammons, *supra* note 1.

[5] Wilson and Co., Inc. v. Locke, Deputy Commissioner, Employees' compensation Commission, 50 F. 2d 81 (2d Cir. 1931); Ledbetter v. Adams, 217 Ark. 329, 230 S.W. 2d 21 (1950) (not only was the transfer unknown to the public and the employees, but it was also executed without requisite good faith); Donnelly v. San Francisco Bridge Co., 117 Cal. 417, 49 P. 559 (1897); Sechler v. Pastore, 103 Colo. 139, 84 P. 2d 61 (1931) (the transfer itself was invalid, but by way of dicta the court averred that even if the sale had been effective, notice is a prerequisite to employer–one's release from liability); Brenan v. Berlin Iron Co., 74 Conn. 382, 50 A. 1030 (1902); Consolidated Coal Co. v. Seniger, 179 Ill. 370, 53 N.E. 733 (1899); Solomon R. Co. v. Jones, 30 Kan. 601, 2 P. 657 (1883); Hamlin v. Sammons, 261 S.W. 2d 440 (Ky. 1953) (principal case); Bituminous Gas Corp. v. Johnson, 259 S.W. 2d 448 (Ky. 1953) (principal case); Buchanan Mining Co. v. Henson, 228 Ky. 367, 15 S.W. 2d 291 (1929); Palmer v. Main, 209 Ky. 226, 272 S.W. 736 (1925) (leading case); Goodwin v. Smith, 23 Ky. L. R. 1810, 66 S.W. 179 (1902) (the transfer was merely a formal change from a partnership to corporate form); State to use of Hall v. Trimble, 104 Md. 317, 64 A. 1026 (1906); Warren's Case, 272 Mass. 127, 172 N.E. 254 (1930) (the transfer was merely a bill of sale given for security); Beauregard v. Benjamin F. Smith Co., 213 Mass. 259, 100 N.E. 627 (1913); Adams v. McKay, 229 Mich. 670, 202 N.W. 962 (1925); Melhus v. Sam Johnson and Sons Fisheries Co., 188 Minn. 304, 247 N.W. 2 (1933); Benson v. Lehigh Valley Coal Co., 124 Minn. 222, 144 N.W. 774 (1914); Ocean Accident and Guarantee Corporation, Ltd. v. Connell, 93 N. H. 77, 35 A. 2d 385 (1943); Delaware, L. and W. R. Co. v. Hardy, 59 N. J. Law 35, 34 A. 986 (1896); Noel v. Morrison, 260 App. Div. 377, 22 N. Y. S. 2d (1940); Murray v. Union Railway Co. of New York City, 229 N. Y. 110, 127 N.E. 907 (1920); Anderson v. Polleys, 53 R. I. 182, 165 A. 436

be an unusual view since an employer-employee relationship is a prerequisite to compensation,[6] and it would appear that the employment seem to relationship with employer-one ended when the business was transferred, while the employment relationship with employer-two commenced with the work continuance. However, although the employee is actually working for employer-two—technically, no employment relationship could have arisen because an employment contract, like any other, presupposes mutual assent. A new relationship cannot be thrust upon a servant without his knowledge or consent.[7] As stated by Justice Cardozo in *Murray* v. *Union Ry. Co. of New York City*, "There can be no unwitting transfer [of an employee] from one service to another."[8] Thus, no new relationship having arisen, the injured employee must look primarily to the old in seeking compensation.[9]

In holding that the original employment continues for a reasonable time after the transfer if the employee has no knowledge of the change, the courts are limiting the usual rule that the employment terminates upon sale of the business[10] to situations where the exchange is made known to the worker. It is not clear to what specific incidents of employment this limitation is applicable, but certainly there is a positive application in the cases where an injured employee seeks either common law damages or compensation. In his treatise on workmen's compensation Mr. Schneider has said that where there is no notice, the relationship continues "with respect to the right to compensation. . . ."[11] This conclusion is not based merely on the broad policy of the compensation acts. The primary reason for holding employer-one is that "rights and remedies are not lost by stumbling unawares into a new contractual relation."[12] Thus, employer-one should be held liable not only in compensation and common law damage suits, but also in other situations where litigation arises out of employment.

(1933); Holloway v. G. O. Cooley and Sons, 206 S. C. 234, 37 S.E. 2d 666 (1946); Traders and General Insurance Co. v. Jaques, 131 S.W. 2d 133 (Tex. 1939); Federal Surety Co. v. Shigley, 7 S.W. 2d 607 (Tex. 1928) (the transfer was not completed until after the injury); Missouri K. and T. R. Co. of Texas v. Ferch, 36 S.W. 487 (Tex. 1896); Gulf, C. and S. F. R. Co. v. Shearer, 21 S.W. 133 (Tex. 1892). Also see note 50 A. L. R. 1166 (1944); 71 C. J. 397 (1935).

[6] See Cody v. Combs, 302 Ky. 596, 194 S.W. 2d 525 (1946).

[7] Standard Oil Co. v. Anderson, 212 U. S. 215, 225 (1909); Hull v. Phila. and Reading Co., 252 U. S. 475 (1920).

[8] 229 N. Y. 110, 127 N.E. 907 (1920).

[9] It has been said, however, that employer-two is an undisclosed principle and therefore liable as master. McClure v. Detroit Southern R. Co., 146 Mich. 457, 109 N.W. 847 (1906).

[10] 3 SCHNEIDER, WORKMEN'S COMPENSATION LAW 44-45 (1943).

[11] *Ibid.*

[12] *Supra* note 8.

Only three injury cases[13] have been found wherein an employee was denied recovery against employer-one despite lack of notice. In these cases it was said that since the employee was actually doing work for employer-two, that relationship should control—notice being immaterial. However, none of these cases discussed or distinguished the principle that there can be no employment relationship until the consent of the employee is procured. The only additional reasoning discerned was found in *Smith* v. *Belshaw*,[14] an action against an employer for common law damages, wherein it was asserted that employer-one should not be held liable for the negligence of employer-two. This argument has merit even in the compensation cases despite the fact that negligence is not a prerequisite to a recovery of workmen's compensation, as the negligence of employer-two may, in many instances, have caused or contributed to the injury, and it may be that a previous employer should not be held liable for the consequences of an act committed by another person. Yet, it should be remembered that the estoppel placed on employer-one is based on his own failure to make known his change in circumstances, thereby leaving the employee in an alien situation involving possible risks of which he had not been forewarned.

The rule under consideration places on the employer the duty of notifying the employee not that he is no longer covered by workmen's compensation, but merely that there has been a "transfer"[15] or "change in ownership."[16] This notice may be express or even implied from the circumstances. Ancillary to the "no express notice" factor upon which this rule depends, is the essential requirement that the working conditions remain the same so that the employee has no sufficient cause for suspicion and inquiry. But as stated by a South Carolina court:

> There are no circumstances to make this inference [of implied understanding] inevitable. Whether the circumstances were such as to necessarily put claimant on inquiry a question of fact to be determined by the Industrial Commission.[17]

The Insurer. Having determined that the original employer is liable, the succeeding question is whether his insurer should also be held. If the insurer had notice of the transfer and did not take im-

[13] Smith v. Belshaw, 89 Cal. 427, 26 P. 834 (1891) (Donelly v. The San Francisco Bridge Co. which is cited with the majority in footnote five was decided by the California Court only six years after the Smith Case, supra. Although an opposite stand was taken, the Smith Case was not mentioned); Crusselle v. Pugh, 67 Ga. 430, 44 Am. Rep. 724 (1881); Putnam v. Ind. Comm., 80 Utah 187, 14 P. 2d 973 (1932).

[14] 89 Cal. 427, 26 P. 834, 835 (1891).

[15] *Supra* note 2.

[16] *Supra* note 10.

[17] Holloway v. G. O. Cooley & Sons, 208 S. C. 234, 37 S.E. 2d 666 (1946).

mediate action, the company should be estopped from denying liability, having acquiesced in the change. But in the event the insurance company had no knowledge of the change, it might be argued that the company should not be held to have insured someone unknown to them—that insurers have a right to select their risks, having a full understanding of the facts.

The issue of the insurer's liability was considered in only one of the two Kentucky cases under consideration, *Bituminous Gas Corp.* v. *Johnson.* Therein the court pointed out that there was ample evidence to sustain a finding that the insurer had notice of the transfer. However, it further asserted:

> That is not to say that, in the absence of such notice, the non-assignment provision in the policy would have worked its discharge in this case. The insurer will not be relieved from its liability to a workman injured at work covered by the policy at the location named in the policy merely because of an inconsequential change in the operations.[18]

Thus, the actual operation of the business being the same, the risk originally insured had not been changed or increased.

Although the transfer in the type of case under consideration made merely an inconsequential change in the practical operations of the business, it is submitted that a substantial change was effected in the legal relationships between the parties. Employer-one was no longer actually operating the business, nor was he, in actuality, an employer. Thus, failing to give notice was taking an inequitable advantage of his insurer. Nevertheless, since the employer is liable, the insurer should also be held. Any other decision would violate the purpose and spirit of the workmen's compensation legislation. Note, for example, the wording of the Kentucky Compensation Act:

> All policies insuring the payment of compensation under this chapter shall contain a clause to the effect that . . . the insurer shall in all things be bound by and subject to the awards, judgments or decrees rendered against the insured.[19]

To leave the employee an avenue of redress against the employer alone would oftentimes give him a technical recovery without practical effect, should the employer be judgment proof. This result is contrary to one of the humanitarian purposes of workmen's compensation—taking the burden of the economic loss from the shoulders of the employee who is, after all, in the poorest position to bear it.[20]

Little has been written on the liability of the insurance company in this particular situation. In most compensation cases of this type,

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[18] *Supra* note 2 at 451.
[19] KY. REV. STAT. 342.360 (1953).
[20] See generally 58 AM. JUR. 576 (1948).

the employer is held liable without mention of the insurer's responsibility.[21] There are, however, two cases in which the insurance company has been specifically mentioned as being answerable along with the insured,[22] and in yet another instance, where the owner-employer had executed a bill of sale for the purpose of security, the court said "The evidence falls far short of compelling a finding that the policy of insurance issued to the subscribers was rendered invalid because of these written instruments without the consent of the insurer."[23]

A second line of reasoning upon which the insurer's liability is sometimes based is the theory of a direct obligation between the insurer and the employee. Returning to the Kentucky Compensation Act, we find this provision:

> No policy of insurance against liability for compensation arising under this chapter shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to it all benefits conferred by this chapter and all installments of the compensation that may be awarded or agreed upon, and that the obligation shall not be affected by any default in the giving of any notice required by such policy, or otherwise. *This agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation, enforceable in his name.* (Italics writer's)[24]

This type of provision was construed in a South Carolina case wherein the court asserted:

> It is suggested that the policy in question contains a provision that no assignment of any interest under the policy shall bind the Company unless its consent is endorsed thereon. But this is not a contest between the insurer and the insured. Under the terms of the act and paragraph D of the policy, a direct obligation arose from the carrier to the claimant and this obligation would not be affected by the failure of the sellers or purchasers to give notice to the carrier of a sale or a transfer of possession of the business.[25]

It would, therefore, appear that in addition to the "spirit of the act" argument for holding the insurer liable, in those jurisdictions where the compensation act provides for a direct obligation between the insurer and the employee, the insurer would be answerable for claims against the employer despite the contemplated wrongful actions by the employer.

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[21] Wilson and Co. Inc. v. Locke, Deputy Commissioner, Employees Compensation Commission, 50 F. 2d 81 (2nd Cir. 1931); Ledbetter v. Adams, 217 Ark. 329, 230 S.W. 2d 21 (1950); Sechler v. Pastore, 103 Colo. 139, 84 P. 2d 61 (1938); Buchanan Mining Co. v. Henson, 228 Ky. 367, 15 S.W. 2d 291 (1929); Palmer v. Main, 209 Ky. 226, 272 S.W. 736 (1925); Neal v. Morrison, 260 App. Div. 377, 22 N. Y. S. 2d 649 (1940).

[22] Adams v. McKay, 229 Mich. 670, 202 N.W. 962 (1925); Melhus v. Sam Johnson and Sons Fisheries Co., 188 Minn. 304, 247 N.W. 2 (1933).

[23] Warren's Case, 272 Mass. 127, 172 N.E. 254, 255 (1930).

[24] KY. REV. STAT. 342.365 (1953).

[25] Holloway v. G. O. Cooley and Sons, 206 S. C. 234, 37 S.E. 2d 666, 671 (1946). Also see 7 APPLEMAN, INSURANCE LAW AND PRACTICE 471-472 (1943).