Buffalo Law Review

Volume 11 | Number 1 Article 117

10-1-1961

Workmen's Compensation—"Third-Party" Actions Limited to In-the-Course of Employment Injuries—State Compensation Board's Jurisdiction Over Injuries Occurring in Interstate Commerce Employment Upheld

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out an industrial accident. With all this, the Court relies on cases stating that *physical exertion or climactic incidents* (in the nature of fright) are sufficient to constitute an industrial accident, while saying that they are doing no more than following precent.

It may well be that the headnote reader may feel assured that his client can take his ulcer case to the Workmen's Compensation Board, but he had best be prepared to show that something more than anxiety over business contributed to its causation.

E. H.

"THIRD-PARTY" ACTIONS LIMITED TO IN-THE-COURSE OF EMPLOYMENT INJURIES—STATE COMPENSATION BOARD'S JURISDICTION OVER INJURIES OCCURRING IN INTERSTATE COMMERCE EMPLOYMENT UPHELD

The case of *Meachem v. New York Central R.R. Co.*[6] arose from a disputed workmen's compensation death benefits award. The decedent-employee had been injured in an in-the-course of employment accident in 1945, which left him with an ulcer condition. Later, in 1948, the employee was involved in an automobile collision, and his death from a perforated ulcer followed four months later. The first defense the self-insured employer posed to the compensation claim was that the claimants had settled a third-party action without its consent, contrary to Section 29 of the Workmen's Compensation Law,[7] by their compromise of a wrongful death action based upon the automobile collision. Next, the employer objected to the jurisdiction of the Compensation Board to entertain a claim based upon an accident met with in interstate commerce employment since the federal remedy for such accidents provided by the Federal Employers' Liability Act[8] was exclusive.[9] The Appellate Division decided in favor of the employer, although expressly only upon the Section 29 ground.[10]

The first defense raised a question as to what constitutes a proper third-party action within the meaning of Section 29. That section merely requires that the action be one which lies against a party "not in the same employ" as the "employee" for that party's "wrong or negligence," which has "injured or killed" the "employee," and for which injury the "employee" is "entitled to compensation."[11] This description leaves undertermined whether the wrong committed by the third party is limited to a wrong causing an in-the-course of employment injury only, or extends to any wrong causing a subsequent injury for which the employer is obligated in compensation. In-the-course of employment wrongs have been the almost singular subject of third-party actions, and

6. 8 N.Y.2d 293, 206 N.Y.S.2d 569 (1960).
7. N.Y. Workmen's Comp. Law § 29(1).
8. Federal Employers' Liability Act, 45 U.S.C. § 56 (1958).
9. New York Central R.R. Co. v. Winfield, 244 U.S. 147 (1917).
10. Meachem v. New York Central R.R. Co., 7 A.D.2d 253, 182 N.Y.S.2d 501 (3d Dep't 1959).
11. Supra note 7.

some cases appear to view third-party actions exclusively in terms of this variety of wrongs.[12] However, one subsequent wrong has been held by the Court of Appeals in the case of *Parchefsky v. Kroll Bros.* to be a proper third party wrong.[13] In that case the Court held that the malpractice of a physician, who subsequent to the in-the-course of employment accident negligently treated the industrial injuries suffered by the employee, was a proper basis for a third-party action. The statutory description of third-party actions and the subsequent third-party wrong of malpractice seemingly opened a gap in the law for the introduction of other subsequent wrongs as third-party wrongs.

In *Meacham*, the present case, the Court of Appeals returned to the earlier notion of third-party actions and reasserted the requirement that a third-party action would lie only for a wrong causing an in-the-course of employment injury. Thus the employer's Section 29 defense, based upon a subsequent wrong, was rejected. In reaching its decision, the Court put aside for purposes of argument the Compensation Board's finding that the subsequent wrong, the negligence of the driver who injured the employee in the automobile collision, was not a cause of the employee's death, and, therefore, could not support a third-party action.

The opinion offers only slight explanation of the *Parchefsky* case, saying: "But, Parchefsky simply applies to workmen's compensation law the old rule that one who wrongfully injures another is liable for the malpractice of the physician who treats the injury since it is all part of an unbroken sequence." (Citation omitted.)[14] The dissenting opinion by Judge Froessel, with whom Judge Van Voorhis concurs, is very critical of this distinction. The dissent points out that other rules such as the "single indivisible result"[15] and the "peculiarly susceptible"[16] condition would apply to the present case with equal force to connect the in-the-course of employment injury to the ultimate injury suffered by the employee, his death due to the ulcer condition. Thus the dissent reads the *Parchefsky* case as an indistinguishable precedent for classifying the subsequent wrong in the present case as a proper third-party wrong.

The issue underlying this argument over the precedential value of the *Parchefsky* case is whether the claimants, by obtaining both the compensation death benefits award and the wrongful death settlement, would be allowed a double recovery. The majority examines the recoveries and finds that only the "minor item of funeral expenses" is specifically provided for in both the settlement and the award.[17] The dissent disagrees, stating that the same single injury, the employee's death, is being redressed under the same theory of damages to

12. Obrien v. Lordi, 246 N.Y. 46, 157 N.E. 925 (1927); Zirpola v. T. & E. Casselamn, Inc., 237 N.Y. 367, 143 N.E. 308 (1924).
13. 267 N.Y. 410, 196 N.E. 308 (1935).
14. Meachem v. New York Central R. Co., supra note 6 at 298, 206 N.Y.S.2d at 574.
15. Prosser, Torts 226 (2d ed. 1955).
16. Restatement, Torts § 495 (1934).
17. Meachem v. New York Central R.R. Co., supra note 6 at 298, 206 N.Y.S.2d at 574.

make restitution for the extinguishment of the claimants' means of support. The majority's next point is that the payments would not constitute an unconscionable double recovery in view of the modest total amount that would be received by the claimants. The majority further observes that there is no positive prohibition in compensation law against the "collection of additional amounts from other sources."[18] The dissent, in reply to this, interprets Section 29 as intending to allow the employer to minimize his compensation burden by placing, whenever possible, the ultimate responsibility for the damages on the third-party wrongdoer.

Some criticism of the majority's explanation of the *Parchefsky* case might be warranted. If the malpractice rule can be legitimately applied in compensation law, other rules of causality, which Professor Prosser in his discussion of intervening causes puts on a similar or identical footing with the malpractice rule,[19] can hardly be misapplied to compensation law. The first rule suggested by the dissent, the doctrine of the "single indivisible result," might be weak in its application because the rule itself is open to criticism since it obtains due to a difficulty in apportioning damages rather than resting upon any causal connection. The second rule, the "peculiarly susceptible" condition suggested by the dissent, comes very close to the malpractice rule. Both rules concern subsequent aggravation of the initial injury, which result is occasioned by, or causally connected to, the initial injury, so that responsibility for the initial injury carries over to the ultimate injury. Applying these rules to the facts here, it appears that the risk of the subsequent aggravation of Meachem's ulcer condition due to a negligent collision is no less forseeable than the subsequent aggravation of Parchefsky's injured arm due to the negligence of a physician. At one point the majority does make a reference to the remoteness in time and space between the industrial accident and the later automobile collision, as if a ruling on proximate causality were about to follow. However, remoteness in time and space standing alone would not destroy any proximate causality that might exist between the industrial injury suffered by Meachem and his eventual death due to a perforated ulcer. The parallelism of the *Parchefsky* case and the present case seems to negative the majority's effort to explain away the *Parchefsky* case.

The majority position might, however, be justified on other grounds. The basis of employer responsibility in general for industrial accidents is contractual, growing out of the contractual relationship imposed on the employer and employee by compensation law. The employer's obligation is to pay compensation regardless of his fault in causing the employee's injury, but the employee in turn takes a lesser satisfaction for that injury. It is not an obligation to pay compensation because of any fault on the employer's part in causing the accident. Both the dissenting and majority opinions seem in agreement to this

18. Ibid.
19. Prosser, supra note 15 at 272-273.

extent. The dissent, however, would connect the employer to both liability and *excuse* because the employee's ultimate injury, here his death, can be traced back to the in-the-course of employment accident for which the employer in the first instance bears responsibility. The problem is whether Section 29 can be interpreted to mean *any accident caused by another*, even where that causality is at best partial as in the case of subsequent injury. From these premises two conclusions may be drawn. First, the employer should generally be held liable for employee injuries, for immediate or in-the-course of employment injuries as well as ultimate or subsequent injuries, since his contractual obligation is paramount in compensation law to any excuse ambiguously or inexplicitly provided in Section 29.[20] Second, since the employer is only given an excuse in view of the culpable nature of third party's act in producing the ultimate injury, where the third party's act is only a partial cause of the ultimate injury, the employer's excuse should not be lightly acknowledged. Aside from these considerations, further arguments can be made for the criterion laid down by the majority; that is, that only in-the-course of employment wrongs give rise to third-party actions. This criterion is a much more definite guide by which to determine third-party actions. Wrong is either committed in the course of employment or it is not. The criterion suggested by the dissent, that any wrong which does not break the causal connection between the industrial accident and the ultimate injury is a third party wrong, would bring with it problems unsuited to the relaxed forum of the Compensation Board. Altogether these various considerations would seem to recommend the adoption of an "industrial wrongs only" criterion for third-party action, producing a result favorable to both the compensation claimant and to the administration of compensation claims.

The issue of double recovery is fully discussed by the Court. Again, it seems that the majority is correct in holding that there is no double recovery for reasons similar to those supporting the criterion they suggest for third-party wrongs. The principle that no one shall have a double satisfaction for a single injury is based upon considerations of justice. Its application in compensation law is only by analogy, and by virtue of the Section 29 provisions against complete recovery of both a true third-party settlement or judgment and a compensation award. In view of the distinct character of the two recoveries, one obtained in the face of proving fault, and the other without encountering any difficult problem of proof, it would seem permissible to look beyond the formal nature of the recoveries to the dollar amounts they represent and consider first the interests of the injured party before those of the party responsible to make such satisfaction.

The second defense raised by the employer in the present case, concerning

20. One Minnesota case uses the contractual basis of employer responsibility to reject malpractice as giving rise to a third party action. McGough v. McCarthy Improvement Co., 206 Minn. 1, 287 N.W. 857 (1939).

the compensation board's jurisdiction to entertain a claim founded upon an interstate commerce employment accident, required the Court to reexamine Section 113 of the Workmen's Compensation Law.[21] Section 113 provides that the parties to a compensation proceeding may waive their rights to assert a federally provided remedy, here the FELA. In *Ahern v. South Buffalo R. Co.*,[22] this section of the Compensation Law was tested and found constitutionally valid in so far as it was not an encroachment upon the preeminence of the federal remedy in the field of interstate commerce employment accidents. The United States Supreme Court approached Section 113 as a mere permissive provision allowing the parties to a compensation proceeding an additional state remedy, if those concerned had abandoned by waiver the federally provided remedy. The precise point at issue upon the facts of the present case is, however, whether the employer by his conduct in the compensation proceeding could and did implicitly waive its rights to have the accident claim adjudicated under the provisions of the FELA. Prior to the *Ahern* decision the Court of Appeals, in the case of *Fitzgerald v. Harbor Lighterage Co.*, had purportedly established a requirement against implied waiver, stating that the compensation parties must "announce" their intention to abandon their federal remedy.[23]

The majority opinion of the Court of Appeals on this issue was that the employer had by his conduct implicitly waived its federal rights and remedy as provided it by the FELA. The following facts were considered as determinative in the finding of a waiver: ". . . representation of the employer by experienced counsel; utilization by the parties of the Board's machinery at a series of hearings resulting in a series of awards; and payment and acceptance of those awards."[24] (The Court here refers to payments made under a prior award to Meachem for the ulcer condition originally suffered as a result of the interstate commerce employment accident.) Thus the employer's second defense was refused.

In arriving at this conclusion, the majority considered the *Ahern* case, in which there were similar facts from which a waiver could be inferred, as a relaxation of the earlier "announcement" requirement purportedly set by the *Fitzgerald* case. The dissent opposed this interpretation of the *Ahern* case stating that the *Ahern* case rested not upon a finding of implied waiver, but rather upon a finding of estoppel, since the employer in that case had waited until the period of limitation governing actions brought under the FELA to run before it asserted any objection to the Compensation Board's jurisdiction. The dissent admonishes against allowance of a liberal waiver requirement, because such a requirement might lead to the inadvertent claimant's loss of the more lucrative federal remedy available to him. Beyond this the dissent points out,

21. N.Y. Workmen's Comp. Law § 113.
22. 344 U.S. 367 (1953), affirming 303 N.Y. 545, 140 N.E.2d 898 (1952).
23. 244 N.Y. 132, 155 N.E. 74 (1926).
24. Meachem v. New York Central R.R. Co., supra note 6 at 300, 206 N.Y.S.2d at 576.

as the employer had argued, that the case of *Baird v. New York Central R. Co.*,[25] which held that back shop employees (Baird and Meachem were engaged to maintain and repair locomotives and other equipment not in use) were included under the federal remedy, had not been decided at the time the employer became a party to the present claim.

There does seem to be some lower court authority for holding an implied waiver under Section 113 of the compensation parties' federal remedy.[26] Waiver was implied from the extremely long period of time in which the employer had made compensation payments. Even in the *Fitzgerald* case, the "announcement" doctrine case, Chief Judge Cardozo did not foreclose the possibility of implied waiver. His words are: "We put aside the question of whether waiver by the claimant within the meaning of this section is sufficiently established by the election to file a claim, unaccompanied by express disclaimer of admiralty remedies."[27] The *Ahern* case may correctly be added to this list, since as the majority observes:

> In Ahern the employer had not raised the question of Federal jurisdiction until after the workmen's time to bring a Federal Employers' Liability Act suit had passed. But there was no intention by either court [the majority here refers to the fact that both the Court of Appeals and the United States Supreme Court had rendered decisions upon the case] that this time element was an essential basis for a valid finding of waiver by Ahern's employer. Ahern and his employer waived. Meachem and his employer waived in exactly the same way. That there was in Ahern's case the added feature of estoppel is a factual difference, but not such a distinction as to produce a different result.[28]

In effect the majority is admitting the dissent's contention that there was an estoppel present in the *Ahern* case, but it also emphasizes the waiver that was present in that case, since the case seemingly had two grounds for decision. The majority rebuts the dissent's further point, regarding the state of the law as it applied to back shop workers at the time the employer became a party to the present claim, by saying that the employer here was the same party who raised the jurisdiction question in the *Baird* case more than three years before raising it in the present case. In conclusion, it may be said that no insurmountable obstacle stood in the way of the majority's holding in favor of a liberal waiver requirement under Section 113. A strict reading of the *Ahern* case would lean toward the dissent's interpretation of the case on the basis of estoppel. However, no compelling reason for holding to a strict waiver requirement, in the face of the more lenient concept of waiver now found in the law generally, can be seen in the dissent's position. The effect of a liberal waiver provision under Section

25. 299 N.Y. 213, 86 N.E.2d 567 (1949).
26. See Kane v. Morse Dry Dock and Repair Co., 250 App. Div. 888, 7 N.Y.S.2d 465 (3d Dep't 1938).
27. Fitzgerald v. Harbor Lighterage Co., supra note 23 at 136, 155 N.E. at 76.
28. Meachem v. New York Central R.R. Co., supra note 6 at 300, 206 N.Y.S.2d at 576.

113 is for the time being merely to refuse the right to bring a FELA action to the more punctilious employer or claimant who by his conduct clearly shows that he has knowingly given up his federal remedy but who orally insists on having what advantage it might later present to him. As yet, a liberal waiver requirement will not refuse the ignorant or unsuspecting their right to bring an action under the FELA.

D. P. S.

UNEMPLOYMENT INSURANCE LAW LIBERALLY CONSTRUED TO FURTHER LEGISLATIVE INTENT

Four cases decided by the Court of Appeals on the same day present the judicial interpretation of certain important words in the New York Unemployment Insurance Law. Section 592, subdivision 1, provides for the suspension of benefits for a period of seven weeks after loss of employment due to strike, lockout or other "industrial controversy" in the "establishment" in which claimant has been employed. *Matter of Ferrara*[29] held that a controversy caused by an unauthorized walkout by National Airlines clerks at the Idlewild Airport office would not preclude payments to National clerks in Manhattan, although belonging to the same union. Payments were allowed to mechanics and cleaners of a different union employed at a hangar 2½ miles from the Idlewild office.

Three possible interpretations were presented for the Court's consideration. The Industrial Commissioner desired a construction of the word "establishment" broad enough to encompass employees "whose continuance at their jobs has become useless, or economically wasteful while the strike lasts, and 'because of' it." National Airlines argued that each metropolitan area constitutes a single establishment of necessity integrated to sell and provide air transportation. Claimants sought a narrow construction of the word to make each geographic location a separate "establishment." It was the claimants' view which prevailed.

The Court reasoned that since the Unemployment Insurance Law was remedial in nature, to protect workers unemployed through no fault of their own, it must be given a liberal interpretation. While benefits are suspended to those directly involved in a strike, to avoid state financing of such strike, this suspension must be narrowly construed "to effectuate the broad humanitarian objectives sought to be achieved. . . ." To relate the word to the broad functions or scattered locations commonplace in our industrial society would to a great extent defeat the statute's *raison d'être.* Also considered was the legislative resistance to attempts to broaden the meaning of "establishment" following the Appellate Division decision in *Matter of Machincki.*[30] There, a strike at Ford Motor Company's Michigan plant did not preclude immediate benefits to claimants in New York plants laid-off because of it. "Establishment" was determined from the standpoint of "place where the employee was last

29. 10 N.Y.2d 1, 217 N.Y.S.2d 11 (1961).
30. 277 App. Div. 634, 102 N.Y.S.2d 208 (3d Dep't 1951).