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Workmen's Compensation Act—Immunity of Third Party Employer

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RECENT CASES

Workmen's Compensation Act—Immunity of Third Party Employer. *D*, a foreign corporation engaged in manufacturing chemicals, sold to *X* scrap iron including a coil of pipe which *D* had used in its business. *P*, an employee of a salvage dealer, was ordered by his employer to pick up the scrap iron at *X*'s yard. In order to place the coil of pipe in proper position on his truck, *P* struck the pipe with a maul, the force of the blow causing a corrosive substance to issue from the pipe and injure *P*. Instead of taking compensation under the Workmen's Compensation Act, *P* elected to sue the tortfeasor. Judgment for *P* in Trial Court. Appeal. *Held*: Affirmed. *D* is not within the immunity provision of REM. REV. STAT. § 7675 [P.P.C. § 709-1] since, though *P*'s injury was connected with *D*'s extrahazardous employment, the connection is remote and not "temporal." *Pennsylvania Salt Mfg. Co. of Wash. v. Haynes,* 184 F. 2d 355 (9th Cir., 1950).

The history of workmen's compensation in Washington dates from 1911 when the legislature, realizing that the unfortunate conditions then existing called for remedial action, passed the first act. Wash. Laws, 1911, c. 74, p. 345. It was designed to furnish a remedy which would reach every injury sustained by a workman in any of those industries said to be of an extrahazardous nature. *State* ex. rel. *Davis-Smith Co. v. Clausen,* 65 Wash. 156, 117 Pac. 1101 (1911). The original act provided that each workman injured, whether at the employer's plant, he being in the course of his employment, away from the plant, was entitled to compensation. Also, ". . . if the injury to a workman occurring away from the plant of his employer is due to the negligence of another not in the same employ, the injured workman (or his beneficiaries or dependents) shall elect whether to take under this act or seek a remedy against such other. . . ." Wash. Laws, 1911, c. 74, p. 348. In 1927 that portion reading "occurring away from the plant of his employer" was deleted. Wash. Laws, 1927, c. 310, p. 816. Two years later a proviso was added: "That no action may be brought against any employer or workman under this act . . . if at the time of the accident such employer or such workman was in the course of any extrahazardous employment under this act." REM. REV. STAT. § 7675 [P.P.C. § 709-1].

Thus from 1911 to 1927 an employee injured at his employer's plant did not have a cause of action against a negligent third party. The employee could take only under the act. However, if during this period a workman who was away from the plant of his employer was injured due to the negligence of one not in the same employ, the workman had his choice of taking under the act or suing the tortfeasor. The 1927 deletion made negligent third parties liable at the election of the injured employee regardless of where the accident took place. The 1929 proviso immunized from tort liability those employers and workmen who at the time of the accident were engaged in extrahazardous activity under the act.

This last proviso is the one with which the instant case is concerned. The decision—that though *P*'s injury was connected with *D*'s extrahazardous operations, the connection was remote and not temporal—is perhaps inconsistent with the underlying purpose of the act. The Washington court has repeatedly said that the purpose of workmen's compensation is to place on every hazardous industry the burden arising out of injuries

to its employees, regardless of the cause of injury. The act establishes an industrial insurance program designed to insure both employers and employees engaged in extrahazardous employment. In *Weiffenbach v. Seattle,* 193 Wash. 528, 76 P. 2d 589 (1938), the court said that the 1929 immunity proviso "must have been granted by the 1929 legislature as a reciprocal compensation to industry for the burden it assumes as an aggregate unit in providing, in the language of the statute . . . 'sure and certain relief for workmen, injured in extrahazardous work.' . . ." In the instant case *D* was a contributor to the fund and was engaged in extrahazardous employment. Having assumed the burden, it is submitted that *D,* as a matter of policy, should have received the benefit, namely the protection afforded by the immunity proviso.

In the instant opinion the court relied heavily on *Gephart v. Stout,* 11 Wn. 2d, 184, 118 P. 2d 801 (1941), where it was said that the employer who seeks to bring himself within the immunity proviso must meet two requirements: (1) he must be a contributor to the fund; (2) at the time of the accident he must be engaged in some extrahazardous employment. Admittedly, *D* met the first requirement, but it was denied the protection of the immunity proviso since the connection between *P*'s injury and *D*'s extrahazardous employment was remote and not temporal. It is submitted that the word "temporal," if it means anything in this connotation, is ill-chosen. Substituting Webster's definition, the court is saying the connection is remote and not "pertaining to, or limited by, time." The opinion doesn't define or explain "temporal," but the use of the term suggests that the application of the immunity proviso will be restricted to cases where the negligent act and injury occurred simultaneously. It is probable that the 1929 legislature did not intend to afford such limited protection to third party employers who are bound by the act. If the immunity proviso is not to be restricted in its application to cases where the negligence and injury occurred simultaneously, the point in time where a third party will be protected is still in doubt.

Perhaps a better test, and one which would avoid the disturbing use of the word temporal, is one based on ownership, possession and control. In most cases where third party immunity has been allowed, all of these elements were in the defendant. But the instant case presents a unique factual situation. By selling the scrap iron to X, a third party, and having had it removed from its plant, *D* had divorced itself from ownership, possession, and control. Properly then, it should not be entitled to the protection of the immunity proviso. Thus it is suggested that where there is ownership, possession and control, the defendant will have immunity; where he has none of these, he will not. Future cases falling between these two extremes will determine the exact line of division.

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Corporations—Rights of Preferred Stockholders Upon Dissolution. A corporation's articles of incorporation provided: "In the event of any liquidation, dissolution or winding up of the Corporation the holders of the preferred stock shall be entitled to be paid in full the par value thereof, *and all accrued unpaid dividends thereon* [italics added] before any sum shall be paid to or any assets distributed among the holders of the common stock." During the corporation's existence, it had never declared a dividend. Furthermore, there was no surplus on hand at date of dissolution. In an attempt to determine the rights of the respective stockholders, the liquidating trustees of the corporation obtained a declaratory judgment construing the words "accrued unpaid dividends" to entitle the preferred stockholders to receive, in addition to the par value of their stock, an amount equal to the total amount of dividends which would have been paid on the stock had there been a dividend paid every year since date of