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Workmen's Compensation

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was unable to convince the court that the homestead claim previously filed by the deceased wife was invalid. The decision was affirmed by the supreme court.

B's chances in this litigation might have been better if he had based his claim on RCW 11.52.020 rather than RCW 11.52.010, even though some factual and statutory construction problems might have existed under the RCW 11.52.020 approach. Under RCW 11.52.020, the court may, if a homestead *has been selected* during the life time of the deceased spouse, award such homestead to the surviving spouse. By proceeding under RCW 11.52.010, appellant faced the necessity of showing that no valid homestead had been selected by his wife.

WORKMEN'S COMPENSATION

Horseplay—Course of Employment. The question of a workman's right to compensation for an injury sustained during a "horseplay" or "skylarking" incident was presentd to the Washington Court for the first time in *Tilly v. Department of Labor and Indus.*[1] Tilly, en route to the men's lavatory, "did some act or made some remark" to a female co-employee, and escaped into the lavatory when she began chasing him, armed with a wet paper towel. When he later emerged to return to his work station, she renewed the pursuit. Tilly's efforts to regain the sanctity of the men's room were frustrated by the intervention of a male employee, who held him while his face was washed by his pursuer. After a brief friendly scuffle, Tilly was released, and the two men laughingly returned to the lavatory. While attempting to drink, Tilly lost consciousness and died the following morning from a dissecting aneurysm.[2] In affirming a judgment awarding Mrs. Tilly a widow's pension, the court held that Tilly was, as a matter of law, in the course of his employment at the time of his injury.

Although the *Tilly* case is one of first impression in Washington, so-called "horseplay" incidents in workmen's compensation cases have frequently been analyzed by courts in other states and by many text writers.[3] The non-participating victim of horseplay is generally permitted recovery,[4] whereas the treatment to be given the participating

[1] 152 Wash. Dec. 111, 324 P.2d 432 (1958).

[2] This condition apparently resulted from a reduction of the normal amount of oxygen in the blood. The appellants, in their brief, conceded that the medical testimony was in conflict as to the causal relation between the face washing incident and the death. The court held this to be a concession that the jury was enttiled to find Tilly's death to be caused by a compensable injury as defined in RCW 51.08.100. See Porter v. Department of Labor and Indus., 51 Wn.2d 634, 320 P.2d 1099 (1958). For a discussion of what constitutes an injury under the act, see Windust v. Department of Labor and Indus., 152 Wash. Dec. 1, 323 P.2d 241 (1958); Comment, 33 CALIF. L. REV. 458 (1945).

[3] 1 LARSON, WORKMEN'S COMPENSATION § 23 (1952); 6 SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 1614 (Perm. ed.); Horovitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 ILL. L. REV. 311 (1946).

[4] Leonbruno v. Champlain Silk Mills, 229 N.Y. 170, 128 N.E. 711 (1920); Swift & Co. v. Forbus, 201 Okla. 516, 207 P.2d 251 (1949); Hollingsworth v. Auto Specialties Mfg. Co., 352 Mich. 255, 89 N.W. 2d 431 (1958).

victim and instigator is still highly controversial. In his treatise on workmen's compensation law, Larson has reduced the actual or suggested approaches of the courts in such cases to four:[5] (1) The present majority rule, the "aggressor defense," resulting in denial of compensation in all such cases;[6] (2) the New York rule, holding that even the initiator or participant may recover if the horseplay was a regular incident of the employment as distinguished from an isolated act;[7] (3) that the instigator should be treated the same as the non-participant, since it is the conditions of the employment that induce the horseplay; and (4) that the participant should recover if, by ordinary course-of-employment standards, his indulgence in horseplay does not amount to a substantial deviation from the employment.[8]

In the present case, the Washington court appears to have adopted the fourth approach, predicating recovery "solely upon the conduct of Mr. Tilly in relation to his employment"[9] and confining itself to the question of whether or not Tilly was in the course of his employment at the time of his injury, as required by RCW 51.32.010.[10] Unfettered by the requirement which exists in most American jurisdictions that a compensable injury be one "arising out of" as well as "in the course of" employment,[11] the court avoided the hazards of placing horseplay cases in a separate category calling for the application of a special set of rules. It is to be noted that the court refrained from expressly classifying Tilly as a participant or non-participant in the face-washing incident. The case indicates that one sustaining injury through acts of horseplay in workmen's compensation cases will be judged by ordinary course-of-employment standards.

The import of the instant case is twofold: not only does it suggest the approach to be taken by the Washington court in cases involving

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[5] 1 LARSON, *op. cit. supra* note 3, § 23.20.

[6] See Horovitz, 15 NACCA L. J. 29 (1955), to the effect that the trend is away from this rule.

[7] Announced in the case of Industrial Comm'r v. McCarthy, 295 N.Y. 443, 68 N.E.2d 434 (1946); Note, 34 CORN. L. Q. 460 (1949).

[8] This is the approach recommended by Mr. Larson.

[9] Tilly v. Department of Labor and Indus., 152 Wash. Dec. 111, 117, 324 P.2d 432, 436 (1958).

[10] "Each workman injured in the course of his employment, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with this chapter. . . ." "Workman," as defined in RCW 51.08.180, means: "every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his employment. . . ."

[11] For a distinction between "arising out of" and "in the course of" as employed in workmen's compensation statutes, see Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents*, 42 CALIF. L. REV. 531, 547 (1954); Note, 33 CALIF. L. REV. 458 (1945).

horseplay, but it sheds some light on what standards the court is going to invoke in determining whether an injury was sustained "in the course of employment" for the purposes of the act. The *Tilly* case manifests a return by the court to a more liberal construction of the term "course of employment" and is thus a retreat from a literal application of the frequently cited rule of *D'Amico v. Conguista*,[12] to the effect that a workman is not within the course of employment if he is not engaged in the performance of the duties required by his contract of employment or specifically directed by his employer.[13] This standard has been invoked by the court to deny recovery in several workmen's compensation cases[14] and was given weight in *Tipsword v. Department of Labor and Indus.*,[15] just preceding the *Tilly* case. In the *Tipsword* case a truck driver, who normally ate lunch wherever his duties required him to be, was held not to be within the course of his employment when he came in contact with a high voltage cable while walking to a shady spot to eat lunch. The court denied his widow a pension because of her failure to show "that her deceased husband was engaged in the actual performance of his duties under his contract of employment, the law as previously announced by this court and acquiesced in by the legislature. . . ."[16] In the *Tilly* case, although giving lip service to the above rule, the court cited an early Washington case,[17] decided under the original provisions of the act,[18] in holding that Tilly, in leaving his work station for the proper use of

[12] 24 Wn.2d 674, 167 P.2d 157 (1946).

[13] Under our workmen's compensation act, definite conditions *must* exist at the time of an injury in order to entitle one to the benefits of the act. First, the relationship of employer and employee must exist between the injured person and his employer . . . ; second, the injured person must be in the course of his employment; third, *that the employee must be in the actual performance of the duties required by the contract of employment;* and, fourth, the work being done must be such as to require payment of industrial insurance premiums or assessments.

D'Amico v. Conguista, *supra* note 12, at 679. (Emphasis added.) See Bridges v. Department of Labor and Indus., 46 Wn.2d 398, 281 P.2d 992 (1955); Scobba v. Seattle, 31 Wn.2d 685, 198 P.2d 805 (1948); Cugini v. Department of Labor and Indus., 31 Wn.2d 852, 199 P.2d 593 (1948); Purinton v. Department of Labor and Indus., 25 Wn.2d 364, 170 P.2d 656 (1946).

[14] See note 13. For a strict application of the D'Amico rule, see Muck v. Snohomish County Pub. Util. Dist., 41 Wn.2d 81, 247 P.2d 233 (1952), in which an employee was denied compensation for injuries sustained when he turned aside from his prescribed duties to aid a fellow workman. See Comment, 29 WASH. L. REV. 42, 48 (1954).

[15] 152 Wash. Dec. 44, 323 P.2d 9 (1958).

[16] 152 Wash. Dec. 44, 47; 323 P.2d 9, 11 (1958).

[17] Welden v. Skinner & Eddy Corp., 103 Wash. 243, 174 Pac. 452 (1918). The statute in effect at that time permitted recovery for injuries sustained on the business premises of the employer, regardless of th actions of the employee. Therefore, the statement in the opinion that an employee en route to a toilet on the employer's premises was within the course of employment was dictum.

[18] Laws 1911, ch. 74, § 5.

the lavatory facilities provided by his employer, was in the course of his employment unless he unreasonably deviated from such purpose to such an extent that the deviation could be said to constitute an abandonment of his employment. The undisputed facts indicating no unreasonable deviation, Tilly was found, as a matter of law, to be within the course of his employment at the time of the horseplay incident.

The *Tilly* case lent support to the court's subsequent decision in *Gordon v. Arden Farms Co.*[19] In the latter case, an employee, having donned the uniform provided by her employer, left the ladies' lounge and was on her way downstairs to commence work when she tripped and fell, sustaining injuries. In holding that she was in the course of employment at the time of her fall, the court cited the *Tilly* case in repudiating a literal application of the *D'Amico* rule and went on to state:

> [I]f by any standard recognized by this court an injured person meets the statutory test of being "in the course of his employment," this court cannot by sheer repetition add a further condition that requires the worker to be not only in the course of his employment, but also to be engaged in the performance of duties required of him by his contract of employment.[20]

The decisions in the *Tilly* and *Arden Farms* cases indicate a return by the Washington court to its earlier standard for construing course of employment, which permitted recovery for an employe (1) engaged in acts incidental to the proper performance of his work or (2) furthering the purpose of his employer when injured.[21] This doctrine is in tune with the weight of authority in other jurisdictions and with the true spirit of the act of providing "sure and certain relief for workmen, injured in extrahazardous work . . . regardless of questions of fault and to the exclusion of every other remedy."[22]

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[19] 153 Wash. Dec. 31, 330 P.2d 561 (1958).

[20] *Id.* at 37, 330 P.2d at 565. The court adopted the same basic approach to "course of employment" used in the Tilly case, requiring "some independent act of the employee, which has no relation to the employer's interest, and is solely for the employee's benefit, . . . to break the so-called nexus and to put the employee without the course of his employment."

[21] See White v. Shafer Bros. Lumber & Door Co., 165 Wash. 298, 5 P.2d 520 (1931); McKay v. Department of Labor and Indus., 181 Wash. 702, 44 P.2d 793 (1935).

[22] RCW 51.04.010.

Award of Additional Compensation—Expert Testimony. The case of *Dowell v. Department of Labor and Industries,* 51 Wn.2d 428, 319 P.2d 843 (1957), involved additional compensation awarded by a jury in an industrial insurance appeal. An injured employee placed his claim for compensation with the workmen's compensation board and received a twenty per cent permanent partial disability award. Upon reopening the claim, the original compensation was affirmed by the board of industrial appeals. The employee appealed to the superior court, and his doctor testified that he was "permanently and totally" disabled. Witnesses for the board testified that he was only twenty per cent disabled. The jury awarded sixty per cent additional compensation.

On appeal, the supreme court *HELD:* A jury in an industrial insurance appeal case may arrive at a verdict that lies between the opinions of the expert witnesses who have testified. The court did not agree with appellant's contention that, since respondent's doctor did not testify in terms of a percentage, the jury could not compromise between the experts.

The difficulty lies in the definitions of permanent partial disability and permanent total disability (RCW 51.08.150 and RCW 51.08.160). It is stated that although the concepts of partial and total disability are different, both are alike in that they both involve loss of working ability. The court defined permanent partial disability as a partial incapacity to work, as measured by loss of bodily function (RCW 51.08.150). Permanent total disability, said the court, is inability to work at *any* gainful occupation (RCW 51.08.160). On cross examination the respondent's doctor contradicted his previous statement on direct examination—that the respondent was totally disabled—by saying there were jobs the employee could do. He added that there were certain bodily functions he could not perform. By describing them to the jury, said the court, there was then substantial medical testimony, even though not given as a percentage of disability, that supported a jury finding of an additional sixty per cent disability award, and the jury did not need to disregard the doctor's testimony completely.

RCW 51.32.080 provides in part that the medical witness should testify by comparing a disability not specified in the statute to the statutory schedule of disability which it most closely resembles. The *Dowell* case holds that the expert testimony may have probative value even though not expressed in terms of percentage and not given in the exact terms of comparison to a schedule of injuries. The question of the extent of partial disability is one of fact, and since the jury is the ultimate trier of fact, nothing compels it to accept the exact opinion of any one of the experts.