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Workmen's Compensation--Set-Offs and Deductions for Re-Employment-Abandonment of the "Ditty" Rule

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it can provide services such as mortgage insurance to the consumer at more economical rates than private interests, then if to provide these services at lower prices the Government requires exemption from liability to which the private interests would be subjected, the argument justifying the Government's activity is fallacious. In light of the strong argument which can be presented for interpreting the FTCA as allowing recovery for negligent misrepresentation, it is urged that Government liability be allowed *at least* where the Government activity causing plaintiff's loss has a private counterpart.

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WORKMEN'S COMPENSATION-SET-OFFS AND DEDUCTIONS FOR RE-EMPLOYMENT-ABANDONMENT OF THE "DITTY" RULE—Claimant was employed as a truck driver at an average weekly wage of $96.00. He sustained a compensable injury which disabled him from driving motor vehicles, but was thereafter employed by the same employer as a "gasser" at a wage of $119.00 per week. The Workmen's Compensation Board made an award for total permanent disability and denied the employer's claim of credit for the weeks after the injury in which he employed claimant at wages exceeding those paid prior to the injury. The circuit court affirmed. The employer appealed, alleging several errors[1] including the refusal to allow the credit claimed. *Held:* Affirmed. An employer is not entitled to credit against a workmen's compensation award for total permanent disability for weeks in which he employed claimant at wages exceeding those paid prior to the injury.[2] *E. & L. Transp. Co. v. Hayes,* 341 S.W.2d 240 (Ky. 1960).

The court's reasoning concerning the issue of credit is complex and merits some elaboration; this requires an examination of the history of the *Ditty* rule in order to show the factors that led to its development and the justification of its final abandonment in Kentucky.

The rule was first enunciated in *Consolidation Coal Co. v. Ditty,*[3] where the claimant was totally and permanently disabled from performing his former work. The court held that he was entitled to

[1] Error was alleged in the Board's (1) refusing to require further medical examination, and (2) finding of total permanent disability. E. & L. Transp. Co. v. Hayes, 341 S.W.2d 240, 241 (Ky. 1960).

[2] The court also held that the question of additional examinations under Ky. Rev. Stat. § 342.205 (1960) [hereinafter cited as KRS] was within the discretion of the Board, and that where an employee is totally disabled from performing the work of his former occupation and his capacity to perform other kinds of work is impaired, he is entitled to compensation for the total disability under KRS 342.095.

[3] 286 Ky. 395, 150 S.W.2d 672 (1941).

maximum compensation, subject to a credit for the number of weeks after the accident in which his employer paid him wages *equal to or exceeding the weekly compensation payments.* The court assumed that the Board considered KRS 342.115 which provides:

> If an injured employe refuses employment reasonably suited to his capacity and physical condition procured for him, he shall not be entitled to compensation during the period of such refusal unless, in the opinion of the board, such refusal was justifiable.[4]

The Board's interpretation of this statute was not discussed in the *Ditty* case. However, it is implicit in what the court said, as mentioned in a later opinion, that "it appeared logical to conclude that since an employee was entitled to no compensation if he *refused* re-employment, the wages paid him if he [*accepted*] . . . re-employment would take the place of his compensation."[5] By construing the statute in this manner, the court established a converse principle which was to act as the basis for allowing such credit in many cases. These cases fall into two catagories: (1) partial permanent disability; and (2) total permanent disability.

Partial Permanent Disability

In 1942 the *Ditty* rule was modified to apply only where the employee's subsequent wages equalled or exceeded *those wages paid prior to the injury.*[6] Because the employer was paying wages in excess of those paid the employee prior to the injury, "it hardly [seemed] . . . fair to add to that wage compensation in any amount so long as Plaintiff's earning power is not affected by the injury."[7] Two years later the court refused to apply the credit rule where the injury was one for which the award was automatically fixed by statute.[8] Another limitation was placed on the rule by a 1947 decision which for the first time made it mandatory for the Board to allow credit only where wages equalled or exceeded wages prior to the injury, and not where wages only equalled or exceeded the amount of the compensation award.[9] The allowance of credit was based on the premise that the employee had suffered no present loss. By adopting the measure of prior wages as a minimum requirement, the court indicated that it was attempting

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[4] Then Ky. Stat. § 4900 (Carroll's 1936).
[5] Warner v. Lexington Roller Mills, Inc., 306 Ky. 142, 143, 206 S.W.2d 471, 472 (1947).
[6] Lawson v. Wisconsin Coal Corp., 290 Ky. 375, 161 S.W.2d 600 (1942).
[7] *Id.* at 376, 161 S.W.2d at 600.
[8] Atlas Coal Co. v. Moore, 298 Ky. 767, 184 S.W.2d 76 (1944). KRS 342.105 provides for fixed compensation for enumerated partial permanent disabilities.
[9] Warner v. Lexington Roller Mills, Inc., 306 Ky. 142, 206 S.W.2d 471 (1947).

to make the law more certain in regard to credits.[10] The credit rule was again applied in a 1948 case in which the court stated, "the trend has been toward applying the rule more freely."[11] The court referred to the converse interpretation of KRS 342.115 which had been applied in previous cases.[12] The extension of credit in cases involving partial permanent disability came to an end[13] with the amendment of KRS 342.110 which provided: "Compensation payable under this section shall not be affected by the earnings of the employe after the accident, whether they be the same, or greater, or less than prior to the accident."[14] The amendment rendered the *Ditty* rule inapplicable to non-specific, as well as specific injuries.[15]

Total Permanent Disability

Following the *Ditty* case, which itself concerned total permanent disability, came a limitation to the rule: credit was denied where the subsequent wages were paid by a new employer rather than by the original employer.[16] In view of the fact that the claimant had been paid wages by his fellow union members, the court reasoned that KRS 342.115[17] could not be conversely interpreted to allow credit, because the defendant-employer had made no effort to furnish any form of employment.[18] The first substantial step toward the present law of "no-credit" was taken in a decision which denied credit where claimant was found to be totally and permanently disabled to perform *any and all work*.[19] In previous cases allowing credit the claimant was found to be totally and permanently disabled from doing a particular type of work. This was the most outstanding precedent available when the question of credit was raised on appeal in the principal case.

Finally, in 1952, the court denied credit against an award for total disability although the claimant could still perform light work.[20] This

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[10] *Id.* at 146, 206 S.W.2d at 473. *Accord,* American Radiator & Standard Sanitary Corp. v. Crawford, 310 Ky. 711, 221 S.W.2d 684 (1949); Browning v. Moss Williams & Co., 306 Ky. 520, 208 S.W.2d 495 (1948).

[11] Mary Helen Coal Corp. v. Dusina, 308 Ky. 658, 660, 215 S.W.2d 563, 564 (1948).

[12] *Ibid.*

[13] Knott Coal Corp. v. Kelly, 313 Ky. 562, 232 S.W.2d 994 (1949).

[14] This amendment was enacted by the legislature in 1948. The date 1952 in the opinion of the principal case is a typographical error. E. & L. Transp. Co. v. Hayes, 341 S.W.2d 240, 243 (Ky. 1960). See Ky. Acts 1956, ch. 77, §§ 9, 12 for phraseology extending the coverage of KRS 342.110 to occupational diseases.

[15] The latest case in which this added provision of KRS 342.110 was invoked to deny credit to the employer is Doan v. Cornett-Lewis Coal Co., 317 S.W.2d 876 (Ky. 1958).

[16] Columbus Mining Co. v. Sanders, 289 Ky. 438, 159 S.W.2d 14 (1942).

[17] Then Ky. Stat. § 4900 (Carroll's 1936).

[18] *Accord,* Schaab v. Irwin, 298 Ky. 626, 183 S.W.2d 814 (1944).

[19] Hall v. Black Star Coal Co., 296 Ky. 518, 177 S.W.2d 900 (1944).

[20] Anderson v. Whitaker, 247 S.W.2d 980 (Ky. 1952).

result does not detract from the significance of the principal case, as it might appear, because the claimant in the 1952 case was earning less at his new job than he would have earned at the job for which he was being trained when the accident occurred. Because of its unique fact situation, the case itself could not be interpreted as a complete abandonment of the *Ditty* rule.[21]

The *Ditty* rule after its repeal as to partial permanent disability cases by the 1948 amendment[22] and before the decision in the principal case, was applicable only in cases involving total permanent disability to perform *former work* and where the *original* employer supplied wages equal to or exceeding *those wages paid prior to the injury.* The rule was not applicable where the employee was totally and permanently disabled from doing *any and all work.* The principal case overruled these precedents on three grounds: (1) The description of the result reached in the *Ditty* case as "fair and equitable"[23] had no connection with the interpretation and usage of KRS 342.115; (2)KRS 342.115 was not enacted as a means to reduce compensation liability. Logically, a converse interpretation would have no place in the construction of a statute, the purpose of which is to encourage injured workmen to resume employment. The employee contended that this statute was not applicable in the principal case due to a literal interpretation he placed upon it;[24] (3) even conceding that KRS 342.115 could be construed as having been designed to reduce the employer's liability, there is no basis in the language of the statute which could support the two qualifications placed upon the credit rule: (a) wages to be paid by the original employer; and (b) wages at least to equal those paid prior to the accident.

The principal case leaves the law in Kentucky quite clear: "We now declare the complete abolition of the Ditty Rule. The cases which have announced and followed it are overruled."[25]

There are various theories concerning the issue of credit. Those favoring a reduction in employers' liability contend: (1) the result is

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[21] The opinions of the court offer no theory explaining these differing conclusions. In the principal case the court looks beyond the former opinions to the theory that where the Board directed credit in a total disability case, it had not really found the claimant disabled for any and all work, but found him able to perform light work. E. & L. Transp. Co. v. Hayes, 341 S.W.2d 240, 242 (Ky. 1960).

[22] See Ky. Acts 1948, ch. 64, § 11, amending KRS 342.110.

[23] Consolidation Coal Co. v. Ditty, 286 Ky. 395, 396, 150 S.W.2d 672, 673 (1941).

[24] Brief for Appellee, p. 6, E. & L. Transp. Co. v. Hayes, 341 S.W.2d 240 (Ky. 1960).

[25] E. & L. Transp. Co. v. Hayes, 341 S.W.2d 240, 244 (Ky. 1960).

"fair and equitable;[26] and (2) KRS 342.115 should be interpreted conversely. However, the history of the *Ditty* rule is an example of how unfounded precedent, based on nothing more than a sense of "fairness" and an unwarranted interpretation of a statute, can create confusion on a point of law. Prior to the principal case, the allowance of credit in Kentucky depended on several unrelated factors: the amount of wages,[27] who paid the wages,[28] and whether the disability was total or partial.[29] The employer in the instant case was supported by these precedents; but, because of the indefinite and confused reasoning in previous opinions, his position was untenable. He argued that because there was re-employment at higher wages, the employee lost no earning power, and consequently did not deserve both compensation and wages.[30] This was an incorrect conception of the relationship between re-employment and earning power. Re-employment at the same or even higher wages does not necessarily preclude the existence of reduced earning power. Earning power is neither absolute nor limited to the present. A loss may not appear immediately; however, the likelihood of its occurrence at some future date does not justify a reduction in compensation payments merely because of a present ability to earn wages.

The general purpose of workmen's compensation legislation is "the giving of compensation, not . . . denial thereof."[31] The legislation was enacted to check employers' freedom from liability and to direct the cost of industrial injury to the consumer. The use of the *Ditty* rule to reduce the amount of compensation was contrary to this legislative intent.

One further argument in favor of the result is, "[wages] are remuneration for work done, . . . [compensation] is indemnification for injury sustained."[32] Wages and compensation are separate concepts in the law and should not be confused by an attempt to interrelate them. The *Ditty* rule failed because it did not distinguish between these concepts in its interpretation of KRS 342.115. Certainly if wages were actually earned, they could not later be rationally claimed by the employer as credit. Clearly the wages were paid as a purchase price of the employee's service, and it is untenable that they

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[26] Consolidation Coal Co. v. Ditty, 286 Ky. 395, 150 S.W.2d 672 (1941).
[27] Lawson v. Wisconsin Coal Corp., 290 Ky. 375, 161 S.W.2d 600 (1942).
[28] Columbus Mining Co. v. Sanders, 289 Ky. 438, 159 S.W.2d 14 (1942).
[29] Atlas Coal Co. v. Moore, 298 Ky. 767, 184 S.W.2d 76 (1944).
[30] Brief for Appellant, pp. 21-22, E. & L. Transp. Co. v. Hayes, 341 S.W.2d 240 (Ky. 1960).
[31] Horovitz, Current Trends in Workmen's Compensation 476-77 (1947).
[32] 11 Schneider, Workmen's Compensation § 2319(b), at 525 (1960).

were a substitution for disability compensation. Where the employee performed regular work under stress of pain and physical inconvenience the argument against credit is even stronger.[33] The employee should not be penalized for his desire and attempt to work under such physical disability.[34]

For these reasons the result of the principal case was justified as another step in the expanding theory of compensation for work-connected disabilities. The history of the *Ditty* rule indicates that the *Hayes* rule should have been adopted earlier. The disappearance of the credit rule will create an added incentive for the compensated employee to return to work.[35] The *Hayes* case will complement the 1948 amendment to KRS 342.110[36] in the law of set-offs and deductions against workmen's compensation awards.

Marshall P. Eldred, Jr.

TORTS—NUISANCE—INTERFERENCE WITH THE FLOW OF SURFACE WATER —Plaintiff and defendant own land on opposite sides of a highway. The natural surface drainage is northwesterly across plaintiff's land, under an abandoned fill, under the highway, and onto defendant's land. Defendant constructed a fill across a creek on his land six hundred feet northwest of the highway and installed several large drainpipes. During an unprecedented rainfall, water backed up behind defendant's fill and onto plaintiff's land, damaging a tenant house and other property. The issue was submitted to the jury under instructions based on negligence in the construction of the fill.[1] Judgment for defendant. *Held:* Affirmed. The civil law rule of absolute liability for obstruction of surface waters was applicable under the

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[33] *Id.* at § 2319(c).

[34] If the courts feel that credit should be allowed in some instances the test should be that of intention. If the employer intends that wages be in lieu of compensation and the employee is aware of this intention, credit might be allowed. 2 Larson, Workmen's Compensation § 57.41 (1960). Two such examples are: an employee not working but receiving full wages as a gratuity; and the creation of a position in which claimant does no work.

[35] The effect, if any, of the abolition of the *Ditty* rule on the employer will be insignificant. The employer who re-employes a successful claimant is protected by KRS 342.120(5), which provides that any part of an award not paid at the time the claimant is re-employed by the original employer shall be paid out of the Subsequent Claim Fund.

[36] Ky. Acts 1948, ch.64, § 11.

[1] The basis of the decision is not clear. The court first states that the case was given to the jury on instructions based on negligence, and later states that admitting the proof of the inadequacy of the pipes, the vital issue in the case was whether or not defendant's fill caused plaintiff's flooding.