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Workmen's Compensation--Occupational Disease--Injurious Exposure

William E. Gary III
University of Kentucky

destroyed.[32] For example, if the testator left a heavily indebted estate which, due to financial complexities, required an extended period of administration, the interest and administration expenses borne solely by principal could conceivably deplete the entire corpus. Meantime, the income beneficiary would enjoy the full income from the properties which were subsequently sold to pay the indebtedness and other charges against the estate. Thus an attempt to establish a residuary trust for successive beneficiaries would be converted into a specific bequest of probate income. In dealing with such a problem, the court need only remember that the rule which it has adopted is a rule of construction, not a rule of law. The court should not limit itself to the four corners of the will as suggested in the principal case, but the trustees, executors and court should consider the financial circumstances surrounding the estate before making a conclusive determination of the testator's intent. In some cases the court may find an application under one of the other rules to be more consistent with testator's intent.

The court in the *Whitman* case not only solves the allocation problem by adopting the Massachusetts Rule, it vividly reminds the practitioner and testator to specifically consider the subject of probate income in drafting the testator's will.

K. Sidney Neuman

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASE—INJURIOUS EXPOSURE—Claimant was employed as a mine motor car operator for twenty-three months by the defendant from whom he sought compensation for total permanent disability resulting from silicosis. Medical testimony established that he had some degree of silicosis prior to this employment, but that it had not reached the disabling stage. There was evidence that in this employment claimant was exposed for several hours a day to dust from sand used for wheel traction. Some nine months after beginning work the claimant experienced shortness of breath. Then over a year later a medical examination revealed silicosis which had progressed to the disabling stage.

Claimant thereafter applied to the Workmen's Compensation Board for an award of compensation. The referee's report recommending such an award was set aside by the board, three members of the five-member board sitting, one of the three dissenting. Compensation was denied on the ground that claimant had not sufficiently proved

[32] See examples in Tilghman v. Frazer, 199 Md. 620, 87 A.2d 811 (1952); *In re* Freehely's Estate, 179 Ore. 250, 170 P.2d 757 (1946).

an injurious exposure to the hazard of silicosis during his employment with the defendant. Notwithstanding a subsequent order of the board declaring this opinion a nullity because it did not have a concurrence of a majority of the full Board, claimant appealed to the circuit court on the merits. The circuit court affirmed the original order of the Board, and in addition held that claimant had failed to give timely notice of the disability to his employer. *Held*: Reversed and remanded. In order for a final order of the board to be valid it must have been approved by a majority of all of the members. *Childers v. Hackney's Creek Coal Co.*, 337 S.W.2d 680 (Ky. 1960).

Because of its importance the court then discussed the substantive issue of whether the evidence was sufficient to support a finding that claimant had been *injuriously exposed* while working for the defendant. In concluding that the evidence was sufficient, it was necessary to interpret the following statutory definition of "injurious exposure" found in the Kentucky Workmen's Compensation Act:

> "Injurious exposure" as used in this section shall mean that exposure to occupational hazard which would, independently of any other cause whatsoever, produce or cause the disease for which claim is made.[1]

In its interpretation of this definition the court also took into consideration Ky. Rev. Stat. section 342.316(12), which provides:

> When an employe has an occupational disease that is covered by this chapter, the employer in whose employment he was last injuriously exposed to the hazard of the disease, . . . shall be liable therefor, without right to contribution from any prior employer. . . .

Interpreted literally, these two subsections read together seem to mean that a claimant must prove that his exposure to the occupational hazard during his last employment was such that it would have caused the disabling disease had he been subjected to no previous exposure whatsoever. This interpretation appears to be proper when applied to cases where the claimant seeks compensation for disability resulting from a disease normally caused by a relatively short period of exposure such as carbon monoxide poisoning.[2] It also appears proper when applied to cases where the claimant has not not been exposed to the hazards of his disease in any prior employment. In each instance the claimant's disability has been caused solely by his exposure in one particular employment and his employer at that time is the one from whom he must seek compensation.

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[1] Ky. Rev. Stat. § 342.316(1)(b) (1960).
[2] See, *e.g.*, 2 Gray, Attorneys' Textbook of Medicine § 140.04 (3d ed. 1958).

The defect in this interpretation becomes apparent however when applied to cases where a claimant has contracted an occupational disease which becomes disabling only after long periods of exposure and it is shown that he was exposed to the hazards of the disease in some prior employment. Silicosis cases can provide us with a good example of this. The average silicosis claimant will have been exposed to the hazards of the disease for ten to fifteen years before symptoms of the disease begin to appear.[3] Very rarely, and then only when certain extreme conditions exist, silicosis develops after two to four and one-half years of exposure.[4]

Disability from silicosis is caused by the accumulation of silicon dioxide in crystalline form in the alveoli, or air sacs, at the extreme ends of the bronchioles of the lungs.[5] The minute particles of silica very slowly over the years react with the alkali juices producing a poison which kills those tissue cells close at hand.[6] The body attempts to wall off this poisoned area by building up fibrotic scar tissue around it.[7] After this fibrosis has been occurring for a number of years and the amount of live tissue has been greatly reduced, symptoms of air deficiency begin to appear, shortness of breath occurs upon exertion, resistance to lung infections is decreased, and usually some other lung disease such as tuberculosis or pneumonia eventually sets in, often causing death.[8] It is quite possible for a person to be exposed to harmful quantities of silica dust for several years and still not experience a build-up of fibrotic tissue in his lungs sufficient to cause any disability.[9]

Now assume a situation where the claimant has become disabled after working in the coal mines for twelve years, the first six years under one employer and the remaining six years under his present employer, the hazards of silicosis being about the same in each employment. Had he left the mines after the first six years the accumulation of silica dust in his lungs would probably not have been great enough to cause any disability. Likewise, had it not been for the first six years of exposure, his exposure while working for his present employer would not alone have been sufficient to cause any disability. Under the literal interpretation of these two subsections the claimant

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[3] 2 Gray, *op. cit. supra* note 2, § 147.11.

[4] "These cases are only possible with inhalation of free silica mixed with a strong alkali, as with washing powder containing finely ground sand and soap." 2 Gray, *op. cit. supra* note 2, § 147.08.

[5] 2 Gray, *op. cit. supra* note 2, § 147.02.

[6] 2 Gray, *op. cit. supra* note 2, § 147.07.

[7] 2 Gray, *op. cit. supra* note 2, § 147.07.

[8] 2 Gray, *op. cit. supra* note 2, § 147.08.

[9] 2 Gray, *op cit. supra* note 2, § 147.08.

would be unable to say that he had been injuriously exposed during either period of employment and would therefore be denied compensation.

Hypothetically this same result would follow had the claimant been exposed to silica dust for twelve years in his first employment and only a few days in his present employment. Had the court accepted this interpretation in the principal case it would have established a rule clearly contrary to the intent and purpose of the Workmen's Compensation Act: to award compensation to industrial employees for disabilities caused by traumatic personal injuries and occupational diseases arising out of and in the course of employment.[10]

The court, however, recognized the inherent defect in the literal interpretation and construed the meaning of the statutory definition of injurious exposure so that the intent and purpose of the Act may be carried out in future cases. It said:

> All that is required under KRS 342.316(1)(b) is that the exposure be such as could cause the disease independently of any other cause. It will be noted that under neither of the cited subsections is there any minimum *time* requirement for the period of exposure. Accordingly, it is not required that the employe prove that he *did* contract silicosis in his last employment, but only that the conditions were such that they could cause the disease over some indefinite period of time.[11]

This interpretation of injurious exposure, while giving effect to the intent of the Act, will lead to some rather undesirable results if applied literally to all cases. By returning to the hypothetical case it is quite readily seen that the last employer of a silicosis claimant, although he received the services of the claimant for only a short period of time, will be liable for all compensation granted to the claimant without right to contribution from a previous employer who may have received by far the greatest benefit from the claimant's services.[12] It is even conceivable that an employer might be tempted to

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[10] See Benito Mining Co. v. Girdner, 271 Ky. 87, 111 S.W.2d 571 (1938).

[11] Childers v. Hackney's Creek Coal Co., 337 S.W.2d 680, 683 (Ky. 1960). This interpretation was held to be controlling in Blue Diamond Coal Co. v. Napier, 337 S.W.2d 879 (Ky. 1960).

[12] See Osborne Mining Co. v. Davidson, 339 S.W.2d 626 (Ky. 1960), decided after the principal case. In January, 1955, claimant, after 30 years of work in the same mine, experienced shortness of breath and chest pains. He submitted to an examination which revealed silicosis in the second stage. Five months thereafter the defendant purchased the mine. Claimant continued working in the mine for the defendant until filing his claim for compensation some three years and three months later. The court ruled that the evidence clearly established that claimant was injuriously exposed to the hazards of silica dust during his employment by the defendant and that under Ky. Rev. Stat. § 342.316(12) the defendant alone was liable for his compensation. This illustrates the inequitable consequence which may result from the court's interpretation of the two subsections under consideration being applied to all cases.

discharge an employee whom he believes to be on the verge of becoming disabled, with the hope that some other mine operator will employ him and thereby become liable for any subsequent disability.

The most logical way to prevent such results would seem to be by revision of the statute. This could best be done by drafting a new and separate section to cover silicosis and other similar diseases which cause disability only after a prolonged exposure. The section should make the last employer primarily liable for compensation, but should give him the right to contribution from previous employers in whose employment the claimant was exposed to the hazards of the disease causing disability.[13] The share of the total compensation to be borne by each employer should be proportional to the duration of the exposure which the claimant suffered while working for that particular employer.[14] In order to place some limitation upon the extent of litigation brought about by such suits, the last employer might well be limited to actions against those employers in whose employ the claimant was exposed during a prescribed number of years before the disability occurred.[15] Such a statute would spread the burden of compensating for such occupational diseases more evenly among employers directly concerned with some portion of claimant's hazardous exposure, thereby relieving the inequitable burden presently placed upon the last employer.

William E. Gary, III

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[13] 2 Gray, *op. cit. supra* note 2, § 147.14.

[14] Mich. Comp. Laws § 417.9 (1948), provides:

The total compensation due shall be recoverable from the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted. If, however, such disease was contracted while such employe was in the employment of a prior employer, the employer who is made liable for the total compensation as provided by this section may appeal to said board for an apportionment of such compensation among the several employers who since the contraction of such disease shall have employed such employe in the employment to the nature of which the disease was due. Such apportionment shall be proportioned to the time such employe was employed in the service of such employers, and shall be determined only after a hearing, notice of the time and place of which shall have been given to every employer alleged to be liable for any portion of such compensation. If the board finds that any portion of such compensation is payable by an employer prior to the employer who is made liable for the total compensation as provided by this section, it shall make an award accordingly in favor of the last employer, and such award may be enforced in the same manner as an award for compensation.

[15] Such a statute might well impose a twelve year limitation on actions for contribution, this being a fair average of the period of exposure usually experienced before symptoms of silicosis begin to appear. See 2 Gray, *op. cit. supra* note 2, § 147.11.