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Workmen's Compensation--Disability Awards--Survival of Right to Accrued Payments

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WORKMEN'S COMPENSATION—DISABILITY AWARDS—SURVIVAL OF RIGHT TO ACCRUED PAYMENTS—After a workmen's compensation disability award for a non-scheduled injury,[1] plaintiff's intestate died from causes unrelated to the injury before any payment had been made on the award.[2] He left no dependents. The administrator recovered a judgment in excess of $5,000 for the portion of the award which had accrued at the date of the intestate's death, and the employer appealed. *Held*: Affirmed. Claims for accrued, unpaid workmen's compensation become, on the death of the claimant, an asset of his estate recoverable by his personal representative, even though claimant leaves no dependents. *Brewer v. Caudill,* 314 S.W. 2d 550 (Ky. 1958).

Most jurisdictions, including Kentucky, have no express statutory provision covering this problem. Consideration of the purpose of workmen's compensation is especially important because there are no Kentucky precedents, and analogous cases in other jurisdictions turn largely upon the variations in workmen's compensation statutes. Two interrelated problems are presented: (1) What part, if any, of a disability award is recoverable after the claimant's death? (2) Who is entitled to recover?

In the absence of express statutory provision, the prevailing view is that unaccrued benefits are not recoverable after the claimant's death.[3] The Kentucky Court, following this view, has reasoned that the remaining, undue and uncollected weekly payments were in no sense allowances to dependents, but were awards to the workman solely "for the impairment of his power to earn for the benefit of himself and his dependents."[4] Although there is authority for the contrary view, the only cases found which have so held are scheduled-injury cases,[5] in which the compensation, unlike a disability

[1] Certain injuries listed in a statutory schedule, e.g., Ky. Rev. Stat. § 342.105 (1959), are compensated irrespective of disability. If the injury is not specified in such a schedule, compensation is allowed for the resulting disability. Ky. Rev. Stat. §§ 342.095, .100, .110 (1959).

[2] The injury occurred in 1951, and the claimant died in 1955, some three months after the final award, which was delayed by litigation of the question whether the deceased was the defendant's employee at the time of the injury. See Brewer v. Millich, 276 S.W. 2d 12 (Ky., 1955).

[3] Cranford v. Farnsworth & Chambers Co., 261 F. 2d 8 (10th Cir. 1958); 2 Larson, Workmen's Compensation § 58.40 (1952).

[4] See Harrison v. Tierney Mining Co., 276 Ky. 637, 642, 124 S.W. 2d 757, 759 (1938). This was a case of a compensable injury resulting in death more than two years after the injury. Unless death occurred within two years of the injury, the statute did not entitle dependents to death benefits. The court failed to stretch the application of the statute to compensate the dependents for a work-connected death. In view of this case, it would seem even more logical to deny recovery of unaccrued benefits in the much weaker case of a death resulting from other than a work-connected injury. A provision was subsequently enacted allowing dependents to recover the remainder of the award in substitution for a claimant whose death resulted from a compensable injury. Ky. Acts 1942, ch. 94, succeeded by Ky. Rev. Stat. § 342.111 (1959).

[5] Parker v. Walgreen Drug Co., 63 Ariz. 374, 162 P. 2d 427 (1945); Mahoney

award, is for the specified injury itself, and not for the loss of wages. It is reasoned that, since the award is for a definite amount, fixed without relation to the employee's ability to earn a living, the right to the compensation vests in him upon the making of an award, even though enjoyment of the benefits is delayed by monthly payment provisions. It should be noted that the latter view is not always adopted even in scheduled-injury cases,[6] but the difference in theory offers a rational basis for differentiating as to the survival of the right to recover accrued or unaccrued benefits.

Recovery of accrued benefits, on the other hand, is commonly allowed,[7] and the cases do not reveal any distinction between scheduled and non-scheduled injury awards.[8] Some cases have held that even accrued portions of an award can not be recovered after the claimant's death.[9] In each of these cases the court was confronted with special statutory provisions, such as non-assignability of benefits, although the true basis was more likely the notion that such compensation was intended as a personal benefit to workmen and their dependents, and that enrichment of persons outside these classes was neither contemplated nor warranted under any circumstances. In a case in which there were apparently accrued disability benefits, the Arizona Court held that although no part of the compensation award could be recovered after the claimant's death, the administrator could recover medical payments to the extent the deceased had paid or become indebted for treatment and thereby depleted his estate.[10] The distinction is necessary to prevent the injury from causing an affirmative hardship where there are dependents, and even if there are none, the result can be reconciled with a denial of the survivability of disability compensation, since medical benefits are in theory close to scheduled-injury awards.

Nevertheless, the question of survival of an award, or portion thereof, should not be resolved without regard to the class of per-

v. City of Payette, 64 Idaho 443, 133 P. 2d 927 (1943). In 2 Larson, Workmen's Compensation § 58.40 n. 65 (1952), four cases are cited to support this proposition, but only the cases here cited are in point.

[6] E.g., George A. Fuller Co. v. Ryan, 69 R. I. 347, 33 A. 2d 188 (1943); Bry-Block Mercantile Co. v. Carson, 154 Tenn. 273, 288 S.W. 726 (1926); Heiselt Constr. Co. v. Industrial Comm'n, 58 Utah 59, 197 Pac. 589 (1921); Ray v. Industrial Ins. Comm'n, 99 Wash. 176, 168 Pac. 1121 (1917).

[7] 2 Larson, op. cit. supra note 3, at 52 n. 64.

[8] *Compare* Greenwood v. Luby, 105 Conn. 398, 135 Atl. 578 (1926), *with* Bry-Block Mercantile Co. v. Carson, 154 Tenn. 273, 288 S.W. 726 (1926).

[9] E.g., Paramount Pictures, Inc. v. Industrial Comm'n, 106 P. 2d 1024 (Ariz., 1940); State ex rel. Rowland v. Industrial Comm'n, 126 Ohio St. 23, 183 N.E. 787 (1932); Bozzelli v. Industrial Comm'n, 122 Ohio St. 201, 171 N.E. 108 (1930); Ray v. Industrial Ins. Comm'n, 99 Wash. 176, 168 Pac. 1121 (1917). In the first two cases it does not appear whether there were depedents; there were none in the latter two.

[10] Paramount Pictures, Inc. v. Industrial Comm'n, supra note 9.

sons to be benefited, and this appears to be reflected in the cases.[11] There were no dependents in the principal case, and the brief for the appellant states that the deceased had nó known relatives in the United States, so that the balance of the recovery not expended on administration expenses, attorney fees, and claims of creditors, will probably escheat to the state.[12] If there were dependents, a denial of recovery of accrued benefits would be contrary to the spirit of the statute, since there are express provisions for dependents in two instances, both of which relate to death as a result of a compensable injury.[13] In these sections, the only ones dealing with payment after a claimant's death, recovery is limited to dependents,[14] and the reason and equity in allowing recovery of benefits by a personal representative where an injury has resulted in death appear to be greater than in the case of disability awards.

The appellant relied on the section of the statute making compensation and claims therefor non-assignable and exempt from claims of creditors.[15] Assignability is not a proper test for survivability since this kind of statutory provision would appear to be for the special purpose of protecting a class of persons against their own improvidence.[16] Moreover, the statutory exemption does not show an intention that creditors should not be paid when, as here, the welfare of a workman or his dependents is not involved. On the contrary, the fact that the deceased may have been extended credit during the unfortunately prolonged litigation is the strongest argument in support of the court's decision, as the legislative purpose to benefit workmen may be achieved indirectly insofar as the decision might tend to encourage the extension of such credit. This is not a proper way to insure prompt payment of compensation, however. A litigant should not be penalized for pursuing his legal remedies to the limits allowed by law, and the legislature could enforce prompt

[11] The opinion of the court in the principal case cites 58 Am. Jur. Workmen's Compensation § 578 (1948), as authority for the proposition that accrued benefits are recoverable. However, four of the six cases there cited clearly show dependents, one case is not clear on this point, and the sixth is distinguishable on the law and facts.

[12] Ky. Rev. Stat. § 393.020 (1959).

[13] Ky. Rev. Stat. § 342.070 (1950), provides for death benefits to be paid dependents of a workman whose death results from a compensable injury within two years; Ky. Rev. Stat. § 342.111 (1959), provides for payment to dependents of all allowed and unpaid awards, not to exceed the amount payable for death.

[14] At the time of the injury in the principal case, Ky. Rev. Stat. § 342.070 (1948), provided that where death resulted from a compensable injury within two years and there were no dependents, burial expenses not to exceed $300, medical expenses, and the sum of $200 were to be paid the personal representative. This latter sum does not approach the $5,000 (approximate) recovery in the principal case, and even this nominal payment was eliminated by Ky. Acts 1956, ch. 77, § 5.

[15] Ky. Rev. Stat. § 342.180 (1959).

[16] Monson v. Battelle, 102 Kan. 208, 170 Pac. 801 (1918).

payment after a final award by imposing a fine or penalty for delay.

Workmen's compensation statutes normally are not construed to create an asset for the estate of a deceased claimant, and the right to recover, which is purely statutory, ought not be extended by the courts unless the purposes of this non-fault legislation are being furthered.

> The ultimate 'social philosophy,' then, behind non-fault compensation liability is the desirability of providing, in the most efficient, most dignified and most certain form, financial and medical benefits which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment.[17]
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> So the making of an award for disability, far from being an adversary recovery of damages by an injured plaintiff from a defendant guilty of some kind of constructive responsibility for the accident, is rather the signal for the setting in motion of a scheme of social protection which goes no further in nature, amount or duration than the necessities of that protection require.[18]

This expresses the idea that no more burden should be passed on to the consumer of the product than is necessary to carry out the purposes of workmen's compensation. An award which will escheat to the state or even one which will go to creditors or heirs does not meet this test. Though the public has an interest in prompt payment of such claims and the discouragement of frivolous litigation, good faith claims and defenses should not be discouraged.

Unless the statute clearly provides otherwise, the following rules are suggested as being consonant with these considerations and with the purposes of workmen's compensation legislation: (1) in case of scheduled injuries the right to compensation should be held to vest in the employee at the time of the injury and to pass to the personal representative whether or not there are dependents; (2) in case of non-scheduled injuries the right to compensation should be held to vest in the employee only as payments accrue during his lifetime, and after his death recovery should be allowed only by dependents and only to the extent of accrued benefits.

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[17] 1 Larson, Workmen's Compensation § 2.20, at 6 (1952).
[18] Id. § 2.60, at 12.