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(5) The W.E.R.B. has jurisdiction over organizational and ordinary recognition picketing even though interstate commerce is involved or affected.

WILLIAM A. FIGURE

LIABILITY OF SUCCESSIVE INSURERS UNDER WISCONSIN'S WORKMENS COMPENSATION ACT

The Wisconsin Workmens Compensation Act affixes certain obligations upon the employer and its insurer because of the existence of the employer-employee relationship.¹ The fundamental idea of the statute is to award compensation when the employment causes disability, whether total or partial, permanent or temporary.² The Wisconsin Court has consistently held that disability under the act means physical inability to perform the work in the usual and customary way, *i.e.*, results in a time or wage loss. Accidents which do not produce such disability are not compensable.³ No compensation is provided for what the courts term medical disability such as is found in the case of occupational diseases where, having been exposed to its cause the employee contracts the disease, yet suffers no manifestations which impair his bodily functions so as to cause him to lose time or wages.⁵

The Act was framed with the idea that there would always be a definite date, that of the accident, which would be the basis for determining the liability of the employer and its insurance carriers.⁶ Since, the employer's insurance carrier at the time of injury or accident must pay the award against the employer,⁷ the time of injury as determined by the act becomes important to successive insurers as well as to successive employers because the disability must be sustained at a time when the employer-employee relation exist.

I ACCIDENTAL INJURIES

In the case of accidental injuries, as opposed to occupational diseases, the time of injury or accident and its disability does not present too difficult a problem. An accidental injury is an injury that results from a definite mishap.⁹ As to accidental injuries the Act, from

¹ *South Side Roofing & Material Co. v. Industrial Comm.*, 252 Wis. 403, 31 N.W. 2d 577 (1948).

² *North End Foundry Co. v. Industrial Comm.*, 217 Wis. 363, 258 N.W. 439 (1935).

³ *Ibid.*; *Chain Belt Co. v. Industrial Comm.*, 220 Wis. 116, 264 N.W. 502 (1936).

⁴ *Odanah Iron Co. v. Industrial Comm.*, 235 Wis. 168, 292 N.W. 439 (1940).

⁵ *Supra*, note 2.

⁶ *Employer's Mutual Liab. Ins. Co. v. McCormick*, 195 Wis. 410, 217 N.W. 738 (1928).

⁷ *Maryland Casualty Co. v. Industrial Comm.*, 230 Wis. 363, 284 N.W. 36 (1939).

⁸ *Shaefer & Co. v. Industrial Comm.*, 220 Wis. 289, 265 N.W. 390 (1930).

⁹ *Andrzejczak v. Industrial Comm.*, 248 Wis. 12, 20 N.W. 2d 551 (1945).

its inception, has been substantially the same as it now stands, defining the time of injury as the date of the accident which caused the injury regardless of the time when disability in fact becomes recognizable.¹⁰ Time of injury is easily determined in these cases for the disability is usually immediate in point of time. Establishing the time of injury, the liability is easily placed on the employer and insurer as of that time if the conditions of the act are met *i.e.*, where at time of injury both employer and employee were subject to the Act, employee performed services of his employment, injury arose out of the employment, injury was not intentionally self-inflicted and so forth.¹¹

The difficulty in these accidental injury cases arises when the employee suffers two identical compensable injuries in his employment under successive employers and their insurers, or under one employer with successive insurers. The Court has uniformly held that the clear intent and purpose of the Act is to burden the particular industry in which the injury occurs, with the resulting damage.¹² The relationship of the two injuries and the cause of the later disability then become important in placing the burden. While it is said to be immaterial that the fact that there was a pre-existing physical condition, whether inherent or the result of prior injury, without which no serious injury would have resulted from the subsequent accident,¹³ it is equally true that:

"When the pre-existing condition is so thoroughly established and is of such a serious nature that what happens thereafter, cannot reasonably be held to be the result of a subsequent accident no award would be allowed. . . . no compensation is payable where a pre-existing condition causes the disability independent of any subsequent mishap."¹⁴

Therefore, where the relationship of the two injuries or accidents is of such a nature, no liability for compensation can be placed on a successive insurer subject to the risk at the date of the second accident in the absence of a finding that the second accident was a substantially contributing factor to the disability.¹⁵

Where the second or subsequent accident is claimed to have resulted from physical weakness due to the prior injury or injuries in order to recover compensation from the prior insurer or employer the employee must show that the subsequent injury:

¹⁰ *Ibid.*

¹¹ WIS. STATS. (1951), sec. 102.03.

¹² *Murphy Supply Co. v. Fredrickesen*, 206 Wis. 210, 239 N.W. 420 (1931).

¹³ *Kroger Grocery & Baking Co. v. Industrial Comm.* 239 Wis. 455, 1 N.W. 2d 802 (1942).

¹⁴ *Employer's Mutual Liab. Ins. Co. v. Industrial Comm.*, 212 Wis. 669, 250 N.W. 759 (1933).

¹⁵ *Merten Lbr. Co. v. Industrial Comm.*, 260 Wis. 109, 50 N.W. 2d 42 (1951).

"... can be traced back to and have some (substantial) causal connection with the first injury occurring while in the immediate service of the employer."¹⁶

In *South Side Roofing & Material Co. v. Industrial Commission*, an employee sustained three successive injuries to his back over a period of about five years. Each accident occurred while he was employed by a different employer. Compensation was paid by the successive insurers on each accident. Later, when unemployed, he again became disabled due to his back condition and claimed compensation from the three former employers. The Industrial Commission found solely on the basis of its earlier files on the case, that each injury aggravated the other and that the disability was the cumulative effect of all three. The Commission then made an award dividing the liability equally among the three employers. At none of the previous hearings had there been a finding of partial permanent injury or any attempt to determine the degree of partial permanent disability. The Court refused to sustain the award saying:

"No new evidence has been introduced at this time to warrant the conclusion that each injury did in fact contribute to a partial permanent injury or disability a condition which was not apparent at the time of the injuries. To justify assessing either employer here sought to be charged with the one third compensation . . . , the Commission ought to have found upon competent evidence that the only causes of his present disability were those three injuries and that each was equal in casual effect to each of the other."¹⁷

In its discussion the court also said that had there been a finding of partial permanent disability sustained by the first accident the first employer could be burdened with that portion of the award attributable thereto. If it was found that the second accident caused or contributed further to this partial permanent disability the second employer would be liable for that increased disability and the same result would follow as to the last accident.

II OCCUPATIONAL DISEASES

A. Prior to 1933

In 1919 the Wisconsin Legislature created liability under the Compensation Act for disability due to occupational diseases.¹⁸ An occupational disease is a disability acquired over an appreciable period of

¹⁶ *Western Lime & Cement Co. v. Boll*, 194 Wis. 606, 217 N.W. 303 (1928). No reason to believe cause as used here differs from that in *Pfeifer v. Standard Gateway Theater, Inc.*, 262 Wis. 229, 55 N.W. 2d 29 (1952).

¹⁷ *Supra*, note 1.

¹⁸ *Supra*, note 9.

time as the result of exposure in the employment.¹⁹ Compensation therefore was deemed advisable for:

"When an employee gives up his work because he is physically unable to perform it in the usual and customary way, that point of time in the progress of occupational disease is quite comparable to an accident which also prevents him from continuing to perform service."²⁰

In its amendment of the Act to cover occupational diseases, the legislature failed to define what it understood to be time of accident in occupational disease cases and the Court was required to hold that:

". . . the time of accident within the meaning of the statute in occupational disease cases should be the time when disability first occurs. . ."²¹

The Court felt that such interpretation was necessary to prevent difficulties in administration of the Act and in addition to protect the rights of both employer and employee. It felt that if the date the disease had its inception was to be used, the employee would have to give notice of every slight ailment which might be the incipient stage of some occupational disease, requiring employers to investigate all such notices of claims.²² The Legislature recognized that rule.²³

In applying the Act to the cases before it the Court was forced to hold that in the case of occupational disease:

". . . because the statute bases the liability to pay compensation upon the disability and not exposure, the rule is that the employee suffering from an occupational disease is entitled to be compensated if at the time of disability the relation of employer and employee existed."²⁴

Where the employee is exposed to and contracts an occupational disease under one employer, but suffers the disability after further exposure while in the employ of a subsequent employer, only the last employer and its insurer at the time of disability must pay the compensation awarded.²⁵ The same rule applies when one employer has had successive insurers, only the insurer at the time of disability is liable.

The situation often arose where the employee suffered a number of disabilities due to occupational disease each under a different employer or while different insurers were on the risk for one employer. There

¹⁹ *Supra*, note 9.

²⁰ *Supra*, note 2.

²¹ *Zurich General Accident & Liab. Ins. Co. v. Industrial Comm.*, 203 Wis. 135, 233 N.W. 772 (1930).

²² *Supra*, note 6.

²³ *Chain Belt Co. v. Industrial Comm.*, 220 Wis. 116, 264 N.W. 502 (1936).

²⁴ *Kimlark Rug Corp. v. Stansfield*, 210 Wis. 319, 246 N.W. 424 (1933).

²⁵ *Supra*, note 6, *Kennerberg Granite Co. v. Industrial Comm.*, 212 Wis. 651, 250 N.W. 821 (1933).

the question of recurrence or new attack of disease became important for the purpose of ascertaining which insurance carrier or which employer and its carrier would be liable.

"Recovery from the disease which had caused disability before entering the employment of the last employer, and a new onset of disease causing disability after he enters such last employment must occur in order to render such last employer liable for compensation. . ." ²⁶

There must be this causal relationship between the disease and the work performed in the employment, in order to burden the last employer or insurers, because the purpose of the Act is to place the burden of disability on the employer and industry which caused or contributed to it. ²⁷

As the Act stood prior to 1933 many employees found themselves in a situation in which they had been exposed to and contacted an occupational disease in the service of an employer, but became disabled while employed by a subsequent employer who did not contribute to the disability, or while they were unemployed. The employer who exposed him was not liable because the employee was not in his employment at the time of the disability. ²⁸ The employer in whose service he was at the time of the disability and who did not contribute to the disability was not liable because the occupational disease was not an incident of and did not grow out of that employment. ²⁹ Such a result under the Act saw the employer taking this opening in the Act to escape liability as they took the opportunity to discharge the employees who had medical disabilities before the compensable disability occurred. ³⁰ In these cases, where the Court was required to hold that the employer and insurer were not liable for compensation, it often called the attention of the Legislature to this particular shortcoming in the Act concerning occupational diseases. ³¹ It was not until 1933 that the Legislature responded.

B. Subsequent to the 1933 Amendment

By the 1933 amendment the Legislature defined the time of accident or injury in the case of occupational disease as "the last day

²⁶ *Outboard Motor Co. v. Industrial Comm.*, 206 Wis. 131, 239 N.W. 141 (1931). Also, *Zurich General Accident and Liability Ins. Co. Ltd. v. Industrial Comm.*, 203 Wis. 135, 233 N.W. 772 (1930).

²⁷ *Hayes v. Ajax Rubber Co. Inc.*, 202 Wis. 218, 231 N.W. 584 (1930).

²⁸ *Supra*, note 24; *Sivyer Steel Casting Co. v. Industrial Comm.*, 220 Wis. 252, 263 N.W. 565 (1935).

²⁹ *Supra*, note 27.

³⁰ *Supra*, note 23; *Motor Casting Co. v. Industrial Comm.*, 219 Wis. 204, 262 N.W. 577 (1935); *Sivyer Steel Casting Co. v. Industrial Comm.*, 220 Wis. 252, 263 N.W. 565 (1935).

³¹ *Supra*, note 23.

of work for the last employer, whose employment caused disability.”³² Before the injury complained of can be fixed at any definite time the employment must cause disability, which remains defined as a time or wage loss.³³ In referring to the “employer whose employment caused disability” the statute intends reference to the last employer whose employment contributed substantially to furthering the progress of the disabilities.³⁴

The amendment was intended to supplement the law as it stood prior to 1933 not to change it.³⁵ It was designed to cover those specific situations in which disability occurred after the relation of employer-employee terminated.³⁶

The Wisconsin Court has held that the disability must be sustained at a time when employer-employee relation exists.³⁷ The Act now declares that the time of injury in case of occupational disease shall be the last day of work for last employer whose employment caused the disability.

“This obviously refers the ‘time of injury’ back to a point of time when the employer and employee relationship existed.”³⁸

The amendment does not contemplate that the compensation awarded in those cases shall, as a matter of course, be paid from the last day of work.³⁹

Where the employee sustains disability while in the service of the employer whose employment caused or contributed to disability, the date of liability of the employer and insurer is thereby fixed and the amendment has no application.⁴⁰

SUMMARY

Under the present state of the law the liability of successive employers and successive insurers may be said to rest on these principles;

Accidental Injuries:

Time of injury is the date of the accident which caused the injury.⁴¹ The employer at the “time of injury” and the insurance carrier at the “time of injury” are liable. Where there are two or more accidental injuries, then there must be a determination whether the

³² *Milwaukee Malleable & Gray Iron Works v. Industrial Comm.*, 220 Wis. 244, 263 N.W. 662 (1933).

³³ *Ibid.* See also *Shaefer & Co. v. Industrial Comm.*, *supra*, note 8.

³⁴ *Montello Granite Co. v. Industrial Comm.*, 227 Wis. 170, 278 N.W. 391 (1938).

³⁵ *General Accident Fire & Life Assur. Co. v. Industrial Comm.*, 221 Wis. 540, 266 N.W. 224 (1936).

³⁶ *Ibid.*; see also citation in note 32, *supra*.

³⁷ *Supra*, note 8.

³⁸ *Supra*, note 8.

³⁹ *Supra*, note 34.

⁴⁰ *Supra*, note 35.

⁴¹ *Supra*, note 10.

subsequent injury is merely a recurrence without aggravation of the prior injury or injuries, or whether the subsequent injury is either (a) a new and independent injury or (b) an aggravation of the continuing early injury. If it is merely a recurrence of the old injury without aggravation the employer and the insurer as of the time the recurrence takes place are not liable.⁴² If the subsequent injury is a new and independent injury or an aggravation (in substantially increased degree of the early injury) the employer and the insurer at that "time of injury" are liable for the additional disability which the second accident inflicted.⁴³

Occupational Diseases:

Time of injury is the last day of work for the last employer whose employment caused disability.⁴⁴ The employer and the insurer as of that time are liable for the consequences of such disability.⁴⁵ If the disability is sustained while the employee is still in the employ of the employer who exposed him, liability is fixed as of that date of disability.⁴⁶ Where there has been an apparent recovery from a former disability causing disease and there is a subsequent exposure and disability occurs, there must be a determination whether this subsequent disability arose from a recurrence, or whether it is due to a new onset induced by subsequent exposure, or whether it is due in part to both such causes operating together. If the Commissioner's findings from the evidence do not support recurrence in any degree, the employer and the carrier at the time the disability manifests itself are liable.⁴⁷ If the later liability is due entirely or in part to the recurrence, the employer and the insurer at the time of original disability must bear their assigned share of the compensation for the subsequent disability.⁴⁸

In regard to occupational disease," . . . the 1933 amendment imposes upon the trier of fact, in cases involving claims of disability made after the relation of employer and employee has ceased, a much greater responsibility than that which inheres in the determination of ordinary claims arising out of accidental injuries. . . . However, it is a responsibility which can be met and in which sound and impartial conclusions can be reached, upon which just awards may be based."⁴⁹

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Marquette L.L.B., 1953

⁴² *Supra*, notes 14 and 15.

⁴³ *Supra*, note 1.

⁴⁴ *Supra*, note 10.

⁴⁵ *Supra*, note 7.

⁴⁶ *Supra*, note 35.

⁴⁷ *Supra*, note 6; *Kennenberg Granite Co. v. Industrial Comm.*, 212 Wis. 551, 250 N.W. 821 (1933).

⁴⁸ *Supra*, note 26.

⁴⁹ *Supra*, note 34.