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Workmen's Compensation--Average Weekly Wages

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courts to shape a workable pattern of taxation which will provide the needed revenue for the states and yet not unduly burden interstate commerce.

Raymond Albert Hinerman

Workmen's Compensation—Average Weekly Wages

P had been employed by the National Cash Register Company as a machine-maintenance man at an average weekly wage of sixty-eight dollars. Three nights a week he drove a taxicab for D at an average weekly wage of twenty-eight dollars. After P had worked five weeks for D, a passenger shot P rendering him totally and permanently disabled. The issue presented was whether an employee who holds two separate jobs and who is injured in one of them may have his workmen's compensation based on his average weekly wages from both employments, or whether it must relate only to the wages earned in the job on which the employee was injured. The commissioners and lower court found it would be manifestly unfair to the employee to take only the earnings from the part-time job to establish the average weekly wage. To do so would establish his average weekly wage at approximately one-third of his actual earnings at the time. Held, error and remanded. The North Carolina Workmen's Compensation Act stated that average weekly wages shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury. The employer for whom he was working must pay the weekly compensation benefit. It would be unfair to D to have P's average weekly wage computed by combining his earnings from two employments. To do so would require D to pay more in compensation than he ever paid P in wages. Barnhardt v. Yellow Cab Co., 146 S.E. 2d 479 (N.C. 1966).

Whether an employee, who holds two separate jobs and is injured in one of them, may have his compensation based on his average weekly wages from both of the jobs is controlled by statutes in the several states. A few states have very liberal statutes allowing earnings from all concurrent employments to be combined in forming the wage basis of an injured employee. On the other hand, many states have conservative statutes which allow only the earnings from the employment in which the employee was injured to be used as the basis for computing his average weekly wage.
Where state statutes have made no express provision concerning the computation of the wage basis of an employee, it is generally held that the earnings from all concurrent related employments should be used in computing the wage basis. Larson, Workmen's Compensation Law § 60.31 (Supp. 1961). However, a few recent well-reasoned decisions have reached a different conclusion. See, e.g., De Asis v. Fram Corp., 78 R.I. 249, 81 A.2d 280 (1951). In Quinn v. Pate, 142 Vt. 121, 197 A.2d 795 (1964), the Supreme Court of Vermont construed the Vermont statute which has no express provision for aggregation of earnings from concurrent employments. The court noted that the Workmen's Compensation Act must be construed liberally. However, the purpose of the act was not only to benefit the injured employee but also to give the employer a liability which is limited and determinate. In reaching its conclusion the court, in effect, balanced the equities between the employer and the employee. To make an employer, in the absence of an express statutory provision, responsible for compensation in lieu of the wages earned in another employment is unfair to the employer. In the principal case the court stated that, "Whether an employer pays this benefit directly from accumulated reserves, or indirectly in the form of higher premiums, to combine plaintiff's wages from his two employments would not be fair to the employer."

The conclusion reached in the above cases has been attacked vigorously by some legal commentators. They feel this position defeats the whole purpose of the Workmen's Compensation Acts because it gives the injured employee an award which has no relationship to his true earnings. Larson suggests that the courts should allow accumulation of earnings in forming the wage basis of an injured employee, but it should bear some reasonable relation between the concurrent employments. Larson, supra.

The legislature of Pennsylvania adopted a liberal view by expressly stating that wages from all employments be combined in fixing the wage basis of an injured employee. The Pennsylvania statute provides, "Where the employee is working under concurrent contracts with two or more employers and the defendant employer has knowledge of such employment prior to the accident, his wages from all employers shall be considered as if earned from the employer liable for compensation." Pa. Stat. Ann. tit. 77, § 582 (1952); Brown v. Saltillo Borough Council, 137 Pa. Super. 599, 10 A.2d 93 (1939).
New York has adopted a statute that provides for aggregation of earnings from concurrent similar employments. N. Y. WORKMEN'S COMPENSATION LAW § 14; *Drew v. City of Troy*, 14 A.D.2d 954, 221 N.Y.S.2d 105 (1961). However, this type of statute has been subject to criticism. In the principal case Mr. Justice Sharp found it difficult to perceive any valid reason why wages from similar employments should be aggregated when those from dissimilar jobs are not. "A disabled employee accustomed to full earnings, is no less destitute because he happened to be earning his living in unrelated employments." Perhaps the reason for adopting this "similar employment" type statute was that a particular industry would have to bear the burden; whereas, under the Pennsylvania method, a completely different industry may have to compensate an employee for an injury in another type occupation.

Most states have adopted a more conservative statute which provides that the wage basis of an injured employee is restricted to the employment in which he was working at the time of the injury. The North Carolina statute which the court construed in the principal case stated that, "Average weekly wages shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury..." N. C. STAT. § 97-2 (5) (Michie 1963). This clause is clear enough, but *P* contended that a subsequent sentence within this section modified this clause. This sentence stated that where the previously stated method would be unfair, either to the employer or employee, then, in computing average weekly wages, other methods could be used as will most nearly approximate the amount which the injured employee would be earning if he had not been injured.

The court in refusing *P*'s contention used reasoning similar to that used by the Vermont Court in *Quinn v. Pate*, supra. The court held that this subsection was inserted to do justice to both the employee and the employer and that it would be unfair for the defendant to pay more in compensation benefits than he ever paid in wages. If the legislature intended that the wages from concurrent employment be combined, it would have been more specific.

The West Virginia statute concerning the computation of the basis of an injured employee's recovery provides that, "The average weekly earnings, wherever earned, of the injured person at the time of the injury, shall be taken as the basis upon which to compute the benefits." W. VA. CODE ch. 23, art. 4, § 14 (Michie 1961) (Emphasis
added). No cases have been found construing this statute. However, the words "wherever earned" make a strong case for the proposition that the legislature intended to aggregate the earnings from all employments, similar or dissimilar, in computing the employee's average weekly wage.

Menis Elbert Ketchum, II

ABSTRACTS

Attorney and Client—Disciplinary Action for Negligence and Inattention by an Attorney

Respondent practiced law while engaged in full-time employment in an unrelated field. He was charged with misrepresenting to his client the reason for an extensive delay in the disposition of a divorce case. The delay was caused by his failure to obtain an entry of default. Held, suspended. The attorney should be suspended until he can devote himself fully to the practice of law. In the Matter of Klaiber, 46 N.J. 133, 215 A.2d 29 (1965).

Several courts have held that negligence, inattention or professional incompetence in handling a client's affairs constitutes a violation of the cannons of professional ethics, attorney's oath or court rule. In re Greer, 52 Ariz. 385, 81 P.2d 96 (1938); State ex rel. The Florida Bar v. Fishkind, 107 So. 2d 131 (Fla. 1958).

In some instances negligence and inattention with respect to a client's affairs have resulted in disbarment. In re Hall, 58 Ariz. 67, 118 P.2d 67 (1941); In re Hermann, 165 Ore. 59, 105 P.2d 512 (1940). On the other hand, some courts regard negligence and inattention as grounds for suspension or censure. People ex rel. Chicago Bar v. Anderson, 273 Ill. 37, 112 N.E. 273 (1916); Attorney Gen. v. Lane, 259 Mich. 283, 243 N.W. 6 (1932).

An investigation of the cases reveals that the courts have called particular attention to factors other than mere inattention. Some courts have considered the fact the fees were received in advance for services never rendered or rendered only after formal charges were brought. In re Hall, supra; In re Hermann, supra. In other instances courts have considered the prior history of misconduct