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Unemployment Compensation--Disqualification of "Rank and File" Union Members for Compensation During Strike or Foreman's Union

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634 (1886). It seems, however, that, if the insurer stipulates for subrogation to rights of the mortgagee under the mortgage, payment of the policy will not discharge the debt, even though the mortgagee may have procured the policy by arrangement with the mortgagor. *Foster v. Van Reed*, 70 N. Y. 19 (1887); *Alamo Fire Ins. Co. v. Davis*, 25 Tex. Civ. App. 342, 60 S. W. 802 (1901); cf. *Baker v. Monumental Sav. & Loan Ass'n*, 58 W. Va. 408, 52 S. E. 403 (1906). If treated as insurance by the mortgagee of his interest only, payment by the insurer following loss is not a discharge of the debt, but only a change of creditors, for the insurer is subrogated to the mortgagee's rights on payment. *Dunbrack v. Neal*, 55 W. Va. 565, 47 S. E. 303 (1905). Thus, whichever of these three situations the facts of the instant case are thought to disclose, the debt was not discharged by the insurer's payment of loss to mortgagee. In the *Gillespie* and instant case, the result implies that the court considered the transaction as insurance by the mortgagor for the benefit of the mortgagee. This seems to be the better view as the mortgagee acts for the mortgagor by reason of the express or implied agency. While the result in the instant case seems sound, it is unsatisfactory in not establishing a basis for its conclusion that the mortgagee was authorized to act for the mortgagor and effect an insurance policy binding him by all its terms.

C. H. H., JR.

UNEMPLOYMENT COMPENSATION—DISQUALIFICATION OF "RANK AND FILE" UNION MEMBERS FOR COMPENSATION DURING STRIKE OF FOREMAN'S UNION.—A work stoppage occurred at the mines of Mead Coal Company as a result of a strike by the members of Local 303, a "foreman's" union in District 50 of the United Mine Workers. The claimant, a member of Local 6109, a "rank and file" union affiliated with District 29 of the United Mine Workers, reported for work at an affected mine but was told that it was not operating due to the strike of the supervisory employees. On application for unemployment benefits prescribed by statute, W. Va. CODE (Michie, 1943) c. 21A, the deputy director of employment compensation decided against the claimant but was reversed by the department trial examiner and he in turn by the Board of Review of the Department of Unemployment Compensation which held that the claimant was ineligible under W. VA. CODE (Michie, 1943) c. 21A, art. 6, §4 (4). This decision, affirmed by the circuit court of Kanawha County, rested on an affirmative finding that claimant was "participating, financing, or directly interested in such dispute and [belonged] to a grade or class of workers who were

participating, financing or directly interested in the labor dispute which resulted in the stoppage of work." On *certiorari*, held, that compensation was properly denied not however because there was an affirmative showing of one or more of the disqualifying circumstances but because claimant failed to satisfy the director of his nonparticipation. *Copen v. Hix*, 43 S. E. (2d) 382 (W. Va. 1947).

Although forty-one states, including West Virginia, have enacted a disqualifying section substantially similar to Section 5(d), Draft Bill of the Social Security Board, SOCIAL SECURITY BOARD, DRAFT BILLS FOR STATE UNEMPLOYMENT COMPENSATION OF POOLED FUND AND EMPLOYER RESERVE ACCOUNT TYPES (Rev. ed. Jan. 1937), which is adapted from the English statute, 25 Geo. V, c. 8, §26-(1), Fierst and Spector, *Unemployment Compensation in Labor Disputes* (1940) 49 YALE L. J. 461 n.4, no case has been found in which a parallel situation has been presented to an English or an American court. However, courts have construed the phrase "grade or class" as here used. Some view prospect of benefit as the key to inclusion in a "grade or class," *Iron Workers Union v. Industrial Comm.*, 104 Utah 242, 139 P. (2d) 208 (1943); see *Queener v. Magnet Mills*, 179 Tenn. 416, 423, 167 S. W. (2d) 1, 4 (1942). Others deem the decisive factor to be work classification; thus, a utility man is not a production worker, *Kieckhefer Container Co. v. Unemployment Compensation Comm.*, 125 N.J.L. 52, 55, 13 A. (2d) 646, 648 (1940), while men in the same work are in the same "grade or class." In re *Persons Employed at St. Paul Lumber Co.*, 7 Wash. (2d) 580, 110 P. (2d) 877 (1941). The instant holding suggests union affiliation as a third criterion of class inclusion, and language in the opinion and in Syllabus 3 indicates that a finding of union membership, common on any level to that of the striking group, will necessitate a denial of benefits to the claimant. It would seem however that the case regards common union affiliation as merely indicative of grade or class rather than as irrebuttable evidence of grade or class from the language of the opinion that "to hold that a member of the United Mine Workers is of a different grade or class than the other members of that organization, *in the absence of a distinct plain showing that that is a fact* would be to fly in the teeth of what has been common observation for a decade . . . What has been said concerning the claimant belonging to a grade or class is . . . applicable to them . . . as individuals . . . because if their organization . . . [participates in the work stoppage] . . . the members . . . cannot divorce themselves from direct involvement *without showing a contemporaneous disapproval of the organization's activities.*" (Italics supplied). *Copen v. Hix*, 43 S. E. (2d) 382, 386 (W. Va.

1947). Even the statement of Syllabus 3, that "Claimants . . . become a grade or class . . . when they individually and collectively organize themselves . . . for a common purpose to attain by concerted action a common objective," while broader than the holding of the case, would not necessarily include a claim where, as to the particular dispute, there were facts proving a want of "common purpose," "concerted action" and "common objective." Such a view allows the commissioner to attach the badge of "same grade or class" where the facts indicate a bond of purpose and design between the striking and the non-striking local or the absence of a contrary showing as to the particular labor dispute, while leaving an exit for the members of a local who can show a record of independence notwithstanding their union affiliation. "It is true that under the proper construction of the statute an employee who is prevented from working through no act of his own is entitled to compensation as, for example, where he is barred by force from the premises where he is working." *Brodinson Mfg. Co. v. California Employment Comm.*, 17 Cal. (2d) 321, 327, 109 P. (2d) 935, 940 (1941). The policies of a particular union organization may render this showing an impossibility without impairing the doctrine. The claimant has the burden of removing, by proof of his or his organization's stand in the particular controversy, the presumption, introduced by the showing of common union affiliation, that "'grade or class' is a term coextensive with the . . . organization to which the claimant belongs" and proof of union relationship between the claimant and the striker gives rise only to a presumption of fact of "grade or class," not a presumption of law. Such presumption is an inference of fact and has only the rational potency or probative value of the evidentiary fact. 9 WIGMORE, EVIDENCE (3d ed. 1940) §2941.

An interesting possibility suggested by the instant case is whether it does not reveal a judicial tendency to introduce as or extend to labor unions a doctrine analogous to that developed in another context of "piercing the corporate veil."

T. A. W.