Workmen's Compensation Act—Award as Pro Tanto Satisfaction in Employee's Subsequent Action Against Concurring Tort-Feasors

N. E. R.

West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol54/iss2/11

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
509, 35 S.E. 820 (1900), the lessor attempted to hold the lessee under an unless clause for delay rentals but the court said there was no promise by the lessee and the action could not be maintained.

In West Virginia a special problem is created by the Statute of Conveyances. W. VA. CODE c. 36, art. 1, § 1 (Michie, 1949). By this statute, no interest in land whereby any part of the corpus is to be taken can be created unless by deed or will. For the lease in the instant case to continue beyond the thirty-day work stoppage, there would have to be a deed. Under this statute "no oral agreement, practical construction, or other theory (except hindrance or prevention by the lessor) can bring life to an estate which has ceased to exist; a deed is necessary." DONLEY, supra, 88.

C. M. H.

**Workmen’s Compensation Act—Award as Pro Tanto Satisfaction in Employee’s Subsequent Action Against Concurring Tort-feasors.**—A was a subscriber to the Workmen’s Compensation Fund. W. VA. CODE c. 23, art. 2, § 5 et seq. (Michie, 1949). Plaintiff, A’s employee, was injured while employed in A’s machine shop. Contending that the wilful negligence of A’s agent concurred with that of the agents of B and C, plaintiff brought a joint action against A, B, C and their agents. Held, that the agents’ acts were each concurrent contributing causes of plaintiff’s injury but because the conduct of A’s agent was not wilful within the meaning of W. VA. CODE c. 23, art. 4, § 2 (Michie, 1949), A and his agent came within the purview of W. VA. CODE c. 23, art. 2, § 6 (Michie, 1949) and were not subject to an action at law; however, since all parties were joint tort-feasors the compensation award would be pro tanto satisfaction as to B, C and their agents. Brewer v. Appalachian Construction Co., 65 S.E.2d 87 (W. Va. 1951).

In the absence of specific statutory provisions to the contrary, the weight of authority asserts that the provisions of compensation acts abolishing an employee’s right of action for injuries arising from his employment do not apply to an employee’s right of action against third persons who are not themselves within the ambit of the act. Baugh v. Rogers, 24 Cal.2d 200, 148 P.2d 633 (1944); Fidelity & Casualty Co. v. Huse & Carleton, 272 Mass. 448, 172 N.E. 590 (1930). But even though the employee’s right is generally preserved, it is usually held that to the extent that he recovers from the
fund, he is precluded from recovery against third persons. *O'Brien v. Chicago City Ry.*, 305 Ill. 244, 137 N.E. 214 (1922); *Williams v. Dale*, 189 Ore. 105, 8 P.2d 578 (1932). However, in some jurisdictions where the statute contains industrial insurance features, even double recovery is permissible. *Foster v. Congress Hotel Co.*, 128 Me. 50, 145 Atl. 400 (1929).

Although the instant case is in accord with the weight of authority, it cites for its support only *New River & Pocahontas Consolidated Coal Co. v. Eary*, 115 W. Va. 46, 174 S.E. 573 (1934), a decision adhering to the general rule of *pro tanto* satisfaction between joint tort-feasors, and fails to take cognizance of prior West Virginia cases adjudicating similar rights of an employee whose employer has complied with the Workmen's Compensation Act. In *Mercer v. Ott*, 78 W. Va. 629, 89 S.E. 952 (1916), an employee was unloading a railroad car for his employer when an engineer of X Railway pushed other cars against it, fatally injuring him. An administrator for the deceased's estate released X. The court held that payment to the administrator by the railroad did not operate to prevent the mother from receiving compensation from the fund. To the defendant's contention that the act should not be so construed as to permit a double recovery, the court said:

"It is claimed by the compensation commissioner that the employer was liable for damages for not having given the deceased a safe place in which to work, and that therefore the recovery and payment of damages by one tort-feasor released the other. But does it follow that because the ... [employer] would be released at common law under these circumstances that no resort may be made under our statute for further compensation out of this fund by one who is a dependent? We think not. The money recovered from the ... [other tort-feasor] or from the ... [employer] would be distributed to the parties in the proportions provided by law in relation to the distribution of personal estate left by a person dying intestate, while sums received from the compensation fund would be paid to one or more dependents of the deceased. The amount which may be received for wrongful act causing death of another is fixed by law at such sum as the jury may deem fair and just, not exceeding $10,000.00. The amount of the average weekly earnings of the injured person at the time is made the basis upon which to compute the benefits. ... [The fund] partakes largely of the nature of pension. These considerations show conclusively that the right to compensation out of this fund under the statute and the right to recover damages of a tort-feasor are of such radical [sic] different
character that the rules of law invoked by the Honorable Commis-

sioner are not applicable."

At 637-638, 89 S.E. 954-955. In Merrill v. Marietta Torpedo Co.,
79 W. Va. 669, 92 S.E. 112 (1917) an employer within the act hired
plaintiff's services to defendant. Injured by an agent of defendant,
plaintiff received his compensation award and then proceeded
against the defendant. Noting that the question presented was
"identical" with that answered by the Mercer case, the court asserted
that an employee may recover compensation whether his injury is
occasioned by the negligence of his master or not; and if the injury
was occasioned by the negligence of a third party, the employee's
right to compensation out of the fund is not thereby affected nor
is his right to an action against the third party causing the injury
impaired.

These two cases show that an employee may recover the usual
compensation award subsequent to recovery from a concurring tort-
feasor and, similarly, that an employee may recover full damages
from an independent tort-feasor subsequent to receipt of a com-
pensation award. It is to be noted that the court drew no distinc-
tion between a situation where the employer and the third person
concur in a tort and a situation where only the third person's act
is tortious. This fact, coupled with the inclusive language of the
two cases, seemed to indicate the court's desire to permit independ-
ent recoveries from persons who are not covered by the act. See
3 SCHNEIDER, WORKMEN'S COMPENSATION 476-477 (3d ed. 1948):
Hardman, Common Law Right to Subrogation under Workmen's
Kirkhart, 130 W. Va. 550, 563, 44 S.E.2d 634, 641 (1947) (where
the employer is faultless, employee may sue fellow employee for his
tort: the act, prior to amendment, protected only the employer);
employer is negligent, employee cannot sue physician for negligent
treatment of a compensable injury: the malpractice is but aggrava-
tion of the original injury).

It is, also, significant that these cases expressly negative the
reason given by those courts who preserve separate action with but
one satisfaction (O'Brien case, supra) as well as the reason for the
common law rule of pro tanto satisfaction between joint tort-
feasors (New River case, supra, cited in the instant case), that is,
a prohibition against double recovery. Further, the West Virginia
court has expressly classified the act as a form of industrial insurance, which as has been noted, is the rationale of those jurisdictions which permit double recovery. *Rhodes v. J.B.B. Coal Co.*, 79 W. Va. 71, 90 S.E. 454 (1916).

To permit the introduction in evidence of the award by a defendant whose tort concurs with that of the employer raises problems which are difficult to resolve. First, it seems to bestow on the tort-feasor benefits which should accrue to the injured employee by virtue of a "contract" with the employer and not by way of satisfaction for any wrong by the employer. *Gooding v. Ott*, 77 W. Va. 487, 87 S.E. 862 (1916) (employee's right under the act arises *ex contractu* not *ex delicto*); *Hardin v. Workmen's Compensation Appeal Board*, 118 W. Va. 198, 189 S.E. 670 (1937) (retrospective amendment of award invalid since it is a right vested under contract); see *Crab Orchard Improvement Co. v. Chesapeake & Ohio Ry.*, 33 F. Supp. 580, aff'd 115 F.2d 277 (4th Cir. 1940) (construing the *Mercer case, supra*). Second, the amount of the award may bear little or no relationship to the tort in which the employer and the defendant concurred. It may represent a composite value of several injuries, W. Va. Code c. 23, art. 3, § 1 (Michie, 1949), and, of more import, it is subject to subsequent review by the commissioner and thus may be modified or terminated after an employee pursues his remedy against the concurring tort-feasor. W. Va. Code c. 23, art. 4, § 16 (Michie, 1949).

In the instant case, the court was confronted for the first time with the claim of a concurring tort-feasor who, in the absence of the act, would have had every right to invoke the common law rule of *pro tanto* satisfaction by the plaintiff's employer. Suffice it to say that the court by application of the rule in the *Mercer case, supra*, could well have reached an opposite conclusion in the instant case. A more interesting aspect of the instant case is the apparent difficulty awaiting the court in future application of the rule now propounded. Too, the paradox now exists that a concurring tort-feasor can invoke the rule so as to have only a limited liability to the employee whereas neither the employer nor the custodian of the compensation fund has any recourse against the tort-feasor even when his act alone necessitates payment of compensation to the employee.

N. E. R.