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Workmen's Compensation--Silicosis--Application for Benefits

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promote justice, but such statutes should not be so construed as to make them useless and contrary to the apparent intent of the legislature. Petitioner's overpayment was caused by his own failure to claim a statutory exemption which demonstrates that there was no injustice on the part of the state. A taxpayer is given an adequate remedy by this statute and if he does not avail himself of it he should be denied relief.

J. M. H.

WORKMEN'S COMPENSATION—SILICOSIS—APPLICATION FOR BENEFITS.—Under an application for compensation filed July 17, 1951, because of silicosis, it was established that claimant had been employed in West Virginia for ten years prior to the time of the filing of his application. It was further established that claimant had worked for at least two years continuously during this period; that the two years had been spent in contact with the hazard of silicon dioxide dust; and that although claimant had been *employed* by the United States Steel Company from August, 1949 to March 18, 1950, he had *worked* only fifty-five days during that period. After the State Compensation Commissioner awarded compensation, the employer appealed to the Workmen's Compensation Appeal Board, which reversed the commissioners order. Claimant appealed. *Held,* that the order of the commissioner should be reinstated inasmuch as the claim had been filed within two years of the last exposure to the hazard, although the claimant had not worked sixty days during the two-year period. It was further *held* that the word "continuous" and the phrase "continuous period" as used in the Compensation Act mean with "reasonable continuity". *Richardson v. State Compensation Comm'r,* 74 S.E.2d 258 (W. Va. 1953).

This case is of prime importance in that it decides two points of "first impression" in West Virginia. First, when must a claimant file an application for compensation on the ground that he is suffering from silicosis; and second, what constitutes an exposure for "a continuous period of sixty days"?

Three statutory provisions were construed in answering the questions stated. They appear in W. VA. CODE c. 23, art. 4 (Michie, 1949). The following are pertinent excerpts therefrom:

§ 1. ". . . the commissioner shall disburse the compensation

fund. . . . Provided, however, that compensation shall not be payable for the disease of silicosis, . . . unless in the State of West Virginia the employee has been exposed to the hazard . . . over a continuous period of not less than two years during the ten years immediately preceding the date of his last exposure. . . [and the commissioner may charge the account of the employer by whom the employee was employed] for as much as sixty days during the period of two years immediately preceding the filing of the application."

§ 15. ". . . to entitle any employee to compensation . . . the application must be . . . filed in the office of the commissioner within two years . . . from and after the last day of the last continuous period of sixty days . . . during which the employee was exposed. . . ."

§ 15b. ". . . the commissioner shall determine whether the claimant was exposed to the hazard . . . for a continuous period of not less than sixty days while in the employ of the employer within two years prior to the filing of his claim . . . ."

In deciding that Section 15 was controlling and that there was present no ambiguity or inconsistency between and among the statutes in point, the court appears to have reached a desirable conclusion. To say, however, as the court did, that such a decision gives effect to the intent of the legislature is another matter. Reading Sections 1 and 15b together it is found that in order to charge the account of any one employer the claimant must have been employed by that employer for as much as sixty days during the two years immediately preceding the filing of the application. This case holds that if the application is filed within two years from the last exposure of at least sixty days, it is timely and fulfills the requisites set up in Section 15.

Suppose now that the following case would arise: *A,* who has worked in West Virginia for a period of ten years and who has been exposed to the hazard for a period of two years during that ten years, upon completing a sixty day period of work for *B,* is fired. Twenty-three months later, without having worked in the meantime, finding that he is suffering from silicosis, he filed his application for compensation. This is clearly a case in which all the statutory requirements have been fulfilled and *A* is entitled to benefits. But which employer's account in the compensation fund shall be charged? It is obvious that *no* employer account can be

charged because *A* had not worked sixty days during the two years immediately preceding the application. And if no employer can be charged—no payment can be made from the geneal compensation fund. The solution to this problem lies in the surplus fund. W. VA. CODE c. 23, art. 3, § 1 (Michie, 1949) provides for the establishment of such a fund to cover the "catastrophe hazard, the second injury hazard, and all losses not otherwise provided for in this chapter." Since this type of loss is "not otherwise provided for", payment must be made from the surplus fund. Was such the intent of the legislature—or did they not intend that whenever a recovery was allowed for silicosis it always be charged to an employer's account and paid out of the general fund?

Apparently, the commissioner has been allowing claims only when some employer's account could be charged, for, as indicated in *Bumpus v. State Compensation Comm'r.* 74 S.E.2d 262 (W. Va. 1952), unless a claim was filed within twenty-two months from and after the last sixty-day continuous period of employment, benefits were being denied. The Supreme Court of Appeals, of course, overruled the denial in that case, holding that the decision of the instant case controlled.

Thus, the law stands decided that Section 15 is the controlling statute with reference to the *time for filing* an application for benefits because of silicosis, and that although Sections 1 and 15b deal with related subjects their function is to set up a standard on which to base the allocation of charges against the accounts of multiple employers. They do not control the right of a claimant to compensation if, in West Virginia, he "has been exposed to the hazard . . . over a continuous period of not less than two years during the ten years immediately preceding the date of his last exposure."

In resolving the answer as to what the legislature meant by a "continuous period" the court had little difficulty, despite a decided split of authority in other jurisdictions.

Although the following cases, decided in other jurisdictions, do not deal with the word "continuous" or the phrase "continuous period" as used in compensation statutes, they show that "continuous" can be interpreted to have several meanings. It has been said to mean: more or less frequently according to the nature of the use intended, *Von Meding v. Strohl,* 319 Mich. 398, 30 N.W.2d 363 (1948) (easement); and with reasonable regularity under normal

conditions to be applied with reference to the incidents of a given employment, *Anair v. Mutual Life Ins. Co.,* 114 Vt. 217, 42 A.2d 423 (1945) (disability provision). On the contrary, it has been construed as meaning: for an unbroken, uninterrupted period, *Jordon v. Jordon,* 69 Idaho 513, 210 P.2d 934 (1949) (desertion); connected, extended or prolonged without separation or interruption, *Hode v. Sanford,* 101 F.2d 290 (5th Cir. 1939) (criminal sentence); and without intervening space or time, constant and unceasing, *Wolfe v. State,* 127 Tex. C.L. 213, 75 S.W.2d 677 (1934) (criminal statute).

It is, of course, the natural assumption that the word "continuous" refers to a period which has not been interrupted or terminated, and the most which can be said against such an assumption is that it is not an inevitable conclusion, meaning that the word is ambiguous. Finding such an ambiguous word in the statute dealing with workmen's compensation provides a proper situation in which to apply the rule of construction set out in *Pannell v. State Compensation Comm'r,* 126 W. Va. 725, 30 S.E.2d 129 (1944), where it was held that applications for compensation should be viewed most liberally in favor of workers and their dependents.

It is with the above liberality which the court seems to have decided the principal case when they held that the phrase "continuous period", as used in Sections 1, 15 and 15b, means with *reasonable* continuity.

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BOOK REVIEW

CONDUCT OF JUDGES AND LAWYERS. By Orie L. Phillips and Philbrick McCoy. Los Angeles: Parker and Company. 1952. Pp. xiii, 247.

This book is a report compiled by judges and lawyers, about the conduct of judges and lawyers, for the benefit of judges and lawyers and the public generally. It is a sort of microscopic mirror by which judges and lawyers may see themselves as others see them. It is a study of professional ethics, discipline and disbarment.

A word about the background will be helpful. Some years ago a "Survey of the Legal Profession" was undertaken under the auspices of the American Bar Association. In substance, the function of the survey was to marshal the assets and examine the liabilities of the legal profession. An examination of the survey organization, as set out in 37 *American Bar Association Journal*