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## Workmen's Compensation—Effective Date of Modification of Award

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WORKMEN'S COMPENSATION — EFFECTIVE DATE OF MODIFICATION OF AWARD. — Claimant was injured and awarded a 50% permanent partial disability rating. Final payment thereunder was made on July 16, 1937. On April 2, 1938, he filed a petition asking for a total and permanent disability rating. He continued to work until June 24, 1939, in another capacity and received wages in excess of the sum he would have received as compensation. On June 24, 1939, the compensation appeal board increased claimant's award to a total and permanent disability rating and directed compensation to be paid beginning as of that date. Claimant appealed, contending that the award should have commenced as of July 17, 1937. *Held*, two judges dissenting, that the compensation commissioner or appeal board may in the discretion of either provide that payments shall begin at the date of the order finding the increased percentage of disability. *Burgess v. State Compensation Commissioner*.<sup>1</sup>

Where the award is modified there are four possible dates that could be used as the beginning point of the new award: (1) date of last payment of the preceding award;<sup>2</sup> (2) date of actual increase of disability; (3) date of filing of application; and (4) date of entry of order.

The Kentucky, Virginia and Georgia statutes specify that no review shall touch any money award already paid.<sup>3</sup> The Kentucky court, in interpreting its statute to authorize payment from the date of filing of application, recognizes that the result it reaches is not always just, but to achieve uniformity it balances the severity of the result in cases where disability has increased against the likelihood of equal harshness if the award were retroactive, and the disability had decreased.<sup>4</sup> There is nothing in the statute, though, that prevents the award from having a retroactive effect if it embraces a period during which no money payments have

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<sup>1</sup> 5 S. E. (2d) 804 (W. Va. 1939). If the new award were for anything short of total permanent disability the date of its beginning would not be important, as payment would necessarily be made for a designated number of weeks. In the case of total permanent disability, payment is for life. W. VA. CODE (Michie, Supp. 1939) c. 23, art. 4, § 6.

<sup>2</sup> The preceding award ordinarily would date back to the time of the original injury.

<sup>3</sup> VA. REV. CODE (Michie, 1936) § 1837: "No such review shall affect such award as regards any monies paid." KY. REV. STATS. (Baldwin, 1936) § 4902: "Review under this section . . . shall not affect the previous order or award as to any sums already paid thereunder." GA. CODE (Harrison, 1933) § 114-709: "No such review shall affect such award as regards any moneys paid."

<sup>4</sup> *Lincoln Coal Co. v. Watts*, 275 Ky. 130, 120 S. W. (2d) 1026 (1936).

been made.<sup>5</sup> The Georgia statute is construed to make the order effective as of the time entered.<sup>6</sup> The Virginia decisions are imperative in their holding that no award shall be retroactive.<sup>7</sup>

The statutes of Oregon and Arizona<sup>8</sup> adopt the third possible date, *i. e.*, date of filing of application, and thus combine the beauty of simplicity with the injustice that necessarily emanates from inflexibility. No leeway is allowed for extenuating circumstances.<sup>9</sup>

A more liberal attitude is evidenced by the Michigan court which has allowed compensation from the date of inability to work though the application for a new award was not filed until some years later.<sup>10</sup> It is a full recognition of the fact that delay may be due to good faith. However, the court also recognizes the right of the board to allow compensation to date from the filing of the new application where testimony as to the commencement of the added disability is conflicting and unsatisfactory.<sup>11</sup>

The West Virginia statute involved provides that "In all cases where compensation is awarded or increased, the amount thereof shall be calculated and paid from the date of disability."<sup>12</sup> The dissenting judges in the *Burgess* case believe that the language bars any discretionary power in the commissioner or appeal board and that a subsequent award must begin at the time of the expiration of the last preceding award, *i. e.*, from the date of disability.<sup>13</sup>

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<sup>5</sup> Wallins Creek Collieries Co. v. Jones, 114 Ky. 775, 283 S. W. 1067 (1926).

<sup>6</sup> South v. Indemnity Ins. Co., 39 Ga. App. 47, 146 S. E. 45 (1928).

<sup>7</sup> Bristol Door & Lumber Co. v. Hinkle, 157 Va. 474, 161 S. E. 902 (1932) (the new award was effective as of the day of application); Gray v. Underwood Bros., 164 Va. 344, 180 S. E. 317 (1935) (new award can be made effective as of time entered). Here entertaining of an application to review compensation on grounds of changed condition before expiration of outstanding award was reversible error.

<sup>8</sup> ORE. STATS. (Supp. 1935) § 49-1836 ("No increase or rearrangement in compensation shall be operative for any period prior to application therefor"); ARIZ. REV. CODE (Supp. 1937) § 1447 ("No increase in compensation shall be operative for any period prior to application therefor").

<sup>9</sup> Chebot v. State Industrial Acc. Comm., 106 Ore. 660, 212 Pac. 792 (1923); Wise v. Six Companies, Inc., 43 Ariz. 24, 28 P. (2d) 1007 (1934); Zagar v. Industrial Comm., 40 Ariz. 479, 14 P. (2d) 472 (1932).

<sup>10</sup> Giampì v. Chrysler Corp., 272 Mich. 327, 262 N. W. 259 (1935).

<sup>11</sup> Louwaert v. D. Graff & Sons, 256 Mich. 337, 240 N. W. 44 (1932).

<sup>12</sup> W. VA. REV. CODE (Michie, Supp. 1939) c. 23, art. 4, § 18.

<sup>13</sup> The preceding award would ordinarily date back to the original injury. W. VA. CODE (Michie, 1937) c. 23, art. 4, § 6 provides that 66 2/3% of the average weekly earnings will be the weekly compensation allowed. The period for which the award is given varies with the percentage of disability, *i. e.*, for a 5% disability, compensation is allowed for 20 weeks; for a 40% disability, compensation is allowed for 160 weeks; for an 80% disability compensation is paid for 320 weeks (four weeks' compensation is allowed for every percentage of disability). When the injury is classed as an 85% or greater disability, the

In the instant case evidence of actual employment by the claimant during the period between the last payment and the settlement of his claim by the appeal board is important. Though his ability to work in some capacity does not always bar his right to additional compensation,<sup>14</sup> it is an important evidentiary fact that should be considered by the commissioner or board in setting the date of actual increased disability. Since the employee has been working he is not prejudiced by making his payments begin at the date of award. In the ordinary situation where the claimant has been unable to work, and his disability has increased it could readily be assumed that the legislature meant the order to date from actual disability, and not from the date the award is made. If the latter were true, the employee might be forced to lose compensation for the period involved in litigation, it being presumed that he did not apply in anticipation of later total disability, but under the stress of its immediate presence. The holding of the *Burgess* case does not necessarily mean that an increase in compensation will always date from the day of entry of the award, and is not inconsistent with the view that usually the date of the last payment of preceding award will prevail.

If the object of the statute is to provide the injured workman with suitable compensation it would appear eminently fair that the increased award be allowed from the date of actual change in condition, regardless of the fact that application may not be immediately made. Each such award would then, as in the present case, be judged on its own merits. It is obvious that the workman, in spite of the presumption that he knows the law, is frequently unaware of his full rights. He should not be punished for his understandable ignorance of them.

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employee receives 66 2/3% of his average weekly earnings for the remainder of his life. In the instant case if the award is not allowed to date back to the period of last payment of the preceding award, there is a period of approximately two years during which claimant will have received no compensation.

<sup>14</sup> *Gay Coal & Coke Co. v. Workmen's Compensation Comm'r*, 2 S. E. (2d) 265 (W. Va. 1939).