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Workmen's Compensation--Permanent Total Disability Fating-- Effect of Returning to Work

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If, under the West Virginia statute, the requirement as to time for filing is mandatory and jurisdictional even in the presence of fraud, the claimant would be deprived of his right to compensation and be left to an uncertain action against his employer. It is submitted that this possibility should be prevented by a statutory provision allowing additional time for filing, if, due to false representations of the employer, the employee should not file his claim within the six months' period. Such a proviso would eliminate all benefits arising from the fraud, and secure to the employee his right to compensation.

A. A. A.

WORKMEN'S COMPENSATION — PERMANENT TOTAL DISABILITY RATING — EFFECT OF RETURNING TO WORK. — The claimant suffered an injury to his right leg necessitating amputation about two inches above the knee. Afterwards osteomyelitis developed in the remaining portion of the right thigh and spread to the left forearm, requiring bone surgery which resulted in permanent deformity of the left forearm and wrist. The medical evidence proved conclusively that the claimant had little use of his left arm; that a slight bruise or strain thereto would probably bring about a recurrence of the osteomyelitis; that the condition of the arm is such that the serious reappearance of this affection would necessitate surgical treatment, perhaps to the extent of amputation, and there would be a strong likelihood that osteomyelitis would spread to other members of the body. It was contended that a permanent total disability award should not be granted as the claimant had returned to work in the employer's lamp house and was receiving wages. *Held*, that this employee's right to compensation on a permanent total disability rating was not defeated by his returning to work and receiving wages. *Gay Coal & Coke Co. v. Workmen's Compensation Commissioner*.¹

Disability results from the loss of parts of the body or the efficient use thereof.² The purpose of the act is to compensate the employee for the impairment of his physical efficiency,³ and in determining the percentage of present disability the claimant's

the *liability*, and not of the remedy alone. It is a condition attached to the right to sue at all.' *Keser v. U. S. S. Lead Refinery*, 88 Ind. App. 246, 163 N. E. 621 (1928).

¹ 2 S. E. (2d) 265 (W. Va. 1939).

² *Johnson v. Compensation Comm'r*, 109 W. Va. 316, 154 S. E. 766 (1930);
² SCHNEIDER, *WORKMEN'S COMPENSATION* (2d ed. 1932) 1341.

³ *Ashworth v. Compensation Comm'r*, 117 W. Va. 73, 183 S. E. 912 (1936).

future ability to work must be considered.⁴ This being so, does it not follow that where an injured employee has sustained a distinct loss of earning power in the near or remote future, he should receive compensation for that, even though at the present he has returned to work and is receiving wages?⁵

Under the compensation act to obtain a rehearing to get an award reduced there must be shown conditions which had not been considered by the commissioner when the former award was made,⁶ *i. e.*, a reduction in the employee's disability. The fact that an injured employee has returned to work and is receiving wages is no sign that the disability has been reduced, but is only some evidence of a change in the employee's condition, not of itself sufficient to justify a change in the award made.⁷

The courts should construe the term "disability" liberally, for a narrow construction of it would encourage idleness on the part of injured employees and would discourage them from making efforts to help themselves for fear that any activity by them might furnish evidence against their right to compensation which the law has provided for them.⁸ By the term "permanent total disability", it seems the drafters of the act did not intend to require the injured employees to remain inactive and inert to avoid imperiling their right to compensation. The courts in determining the percentage of disability have recognized the fact that a laborer in an endeavor adequately to provide for his family may earn wages for a time after the injury as he did before, but that in due time the injury will exact its toll.⁹ Usually these jobs are given to dis-

⁴ McCormick S. S. Co. v. United States E. C. Comm'r, 64 F. (2d) 84 (C. C. A. 9th, 1933); Roller v. Warren, 98 Vt. 514, 129 Atl. 168 (1925); Johnson v. Compensation Comm'r, 109 W. Va. 316, 154 S. E. 766 (1930).

⁵ Mercury Aviation Co. v. Industrial Acc. Comm'n, 186 Cal. 375, 199 Pac. 508 (1921); Ridge Coal Co. v. Industrial Comm'n, 314 Ill. 509, 145 N. E. 643 (1924); Gailey v. Peet Bros. Mfg. Co., 98 Kan. 53, 157 Pac. 431 (1916); Clark's Case, 120 Me. 133, 113 Atl. 51 (1921).

⁶ Igo v. Compensation Comm'r, 112 W. Va. 595, 166 S. E. 8 (1932); Phillips v. Compensation Comm'r, 114 W. Va. 648, 174 S. E. 561 (1934).

⁷ Consolidated Coal v. Industrial Comm'n, 314 Ill. 526, 145 N. E. 675 (1924); Septimo's Case, 219 Mass. 430, 107 N. E. 63 (1914); Kinyon v. Kinyon, 230 Mo. App. 623, 71 S. W. (2d) 78 (1934); Superior Smokeless Coal & Mining Co. v. Bishop, 85 Okla. 204, 205 P. (2d) 909 (1933); Ashworth v. Compensation Comm'r, 117 W. Va. 73, 183 S. E. 912 (1936).

⁸ Kinyon v. Kinyon, 230 Mo. App. 623, 71 S. W. (2d) 78 (1934).

⁹ Dennis v. Cafferty, 99 Kan. 810, 163 Pac. 461 (1917); Henry Tidd Const. Co. v. Mead, 163 Okla. 64, 20 P. (2d) 909 (1933); Johnson v. Compensation Comm'r, 109 W. Va. 316, 154 S. E. 766 (1930).

abled employees as acts of charity or sympathy and not due to actual capacity to do the work.¹⁰

Assuming the award were reduced to a permanent partial disability rating of eighty-five percent or less, under the compensation act such claim could not be reopened after the expiration of one year from the date of the last payment thereunder.¹¹ In such cases the employer, if wages alone were indicative of the degree of disability, could provide work for the injured employee, who could not secure employment elsewhere, and pay more than his services are worth, later to dispense with his services after the year from the time of the last payment of compensation.¹² Thus the injured employee would be in the future without compensation and without an opportunity of securing work, for due to his disability no one would hire him.¹³ Such employee would then become a public charge, unless he had other sources of income, a contingency against which it was the purpose of the compensation act to guard.¹⁴

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¹⁰ *Hulo v. New Iberia*, 153 La. 284, 95 So. 719 (1923); *Roller v. Warren*, 98 Vt. 514, 129 Atl. 168 (1925); *cf. McDaniel v. Compensation Appeal Board*, 118 W. Va. 596, 601, 191 S. E. 362 (1937) holding: "The fact that he might get occasional and rare work at lighter employment which he could discharge, or that through some special arrangement such work may be made temporarily available to this one individual, does not prevent him from receiving a permanent and total disability rating. But the fact that he could do light remunerative work that was ordinarily available to a person in his situation, would prevent him from receiving a total and permanent disability rating." (The court in the instant case found that the employee was permanently and totally disabled by this standard.) *Johnson v. Compensation Comm'r*, 109 W. Va. 316, 321, 154 S. E. 766, 768 (1930) held: "In ascertaining the degree of physical impairment, the occupation to be considered in making a disability rating, is usually that at which the employee was engaged at the time of the injury." (In the principal case the claimant was totally and permanently disabled by this test too.)

¹¹ W. VA. REV. CODE (Michie, 1937) c. 23, art. 4, § 16: "... that no further award may be made . . . in cases of non-fatal injuries, except . . . within one year after the commissioner shall have made the last payment in any permanent disability case." As to a permanent total disability this problem does not arise, as compensation is paid the rest of the employee's life. *Id.* at 6: "For a disability from eighty-five to one hundred per cent, sixty-six and two-thirds of the average weekly earnings during the remainder of life." Under the same section for a disability of eighty-five per cent or less payments expire after they have been made for a designated number of weeks.

¹² *Gailey v. Peet Bros. Mfg. Co.*, 98 Kan. 53, 157 Pac. 431 (1916); *Johnson v. Compensation Comm'r*, 109 W. Va. 316, 154 S. E. 766 (1930).

¹³ *Kinyon v. Kinyon*, 230 Mo. App. 623, 71 S. W. (2d) 78 (1934).

¹⁴ *Ferrel v. Compensation Comm'r*, 108 W. Va. 477, 172 S. E. 609 (1930).