

## Workmen's Compensation--Exclusive Statutory Remedy--Recovery for Partial Silicotic Disability Denied (Cifolo v. General Electric Co., 305 N.Y. 209 (1953))

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and it may be made before or after the execution of the will.<sup>31</sup> It must, however, be made by the testator.<sup>32</sup>

The court's stress on intent rather than form is the most reasonable construction in view of the phraseology and purpose of the statute. It accomplishes the desired result—repairing the effects of an oversight, avoiding regulation of testamentary provisions, and giving effect to parental intentions. A set form for the settlement would not only tend to control a parent's testamentary distribution of his property but also have a greater likelihood of frustrating the execution of his real intentions.



WORKMEN'S COMPENSATION—EXCLUSIVE STATUTORY REMEDY—RECOVERY FOR PARTIAL SILICOTIC DISABILITY DENIED.—Plaintiffs, partially disabled by silicosis, sued defendant in negligence, charging violation of the New York Labor Law.<sup>1</sup> The Court of Appeals affirmed dismissal of the complaints and *held* that the plaintiffs were barred from maintaining the actions by the provisions of the Workmen's Compensation Law covering total silicotic disability,<sup>2</sup> and that such exclusive remedy<sup>3</sup> was not unconstitutional. *Cifolo v. General Electric Co.*, 305 N. Y. 209, 112 N. E. 2d 197 (1953).

The usual workmen's compensation act has as its objective the protection of the employee against accidents<sup>4</sup> and illnesses arising

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80 N. Y. S. 2d 378 (Surr. Ct. 1948).

<sup>31</sup> See *Matter of Stone*, 200 Misc. 639, 107 N. Y. S. 2d 775 (Surr. Ct. 1951); *Matter of Kraston*, 58 N. Y. S. 2d 364 (Surr. Ct. 1945).

<sup>32</sup> *Matter of Bostwick*, 78 Misc. 695, 140 N. Y. Supp. 588 (Surr. Ct. 1912).

<sup>1</sup> N. Y. LABOR LAW § 200 ("General duty to protect health and safety of employees"); § 299 (ventilation and removal of dust in factories where dust producing machines are in use).

<sup>2</sup> N. Y. WORKMEN'S COMP. LAW § 3(2). "Occupational diseases. Compensation shall be payable for disabilities sustained or death incurred by an employee resulting from the following occupational diseases:

"28. Silicosis or other dust diseases resulting in total disability or death."

<sup>3</sup> *Id.* § 11. "The liability of an employer . . . shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death. . . ."

<sup>4</sup> See *Goldberg v. 954 Marcy Corp.*, 276 N. Y. 313, 317, 12 N. E. 2d 311, 312 (1938); *Choctaw County v. Bateman*, 252 P. 2d 465, 467 (Okla. 1952). "To constitute an accident within the Workmen's Compensation Act there must be an untoward, unforeseen or unexpected event or series of events causing injury." *Matter of Carrie*, 254 P. 2d 410, 411 (Idaho 1952).

from the nature of his occupation.<sup>5</sup> The theory underlying the law is that of strict liability of the employer toward his employees, regardless of negligence on the part of either.<sup>6</sup> If the employer has complied with the law and is insured,<sup>7</sup> the employee's exclusive remedy is under the statute.<sup>8</sup> If, however, the employer has not met the insurance requirements, the employee may elect either to sue in a common-law action for negligence,<sup>9</sup> or to prosecute an action under the Workmen's Compensation Law for statutory damages.<sup>10</sup> Of course, if the disability is not one covered by the statute, the common-law remedy remains.

New York enacted its first Workmen's Compensation Act in 1910,<sup>11</sup> and the Court of Appeals shortly thereafter declared it unconstitutional.<sup>12</sup> This decision led to the amendment in 1913 of the New York State Constitution,<sup>13</sup> and in the same year, a new compensation act was passed,<sup>14</sup> the validity of which was upheld by the

<sup>5</sup> See *Barrencotto v. Cocker Saw Co.*, 266 N. Y. 139, 143, 194 N. E. 61, 63 (1934).

<sup>6</sup> N. Y. WORKMEN'S COMP. LAW § 10. This differs from the Federal Employers' Liability Act, which provides compensation for an employee injured through the negligence of the employer, while engaged in interstate commerce. 35 STAT. 65 (1908), 45 U. S. C. § 51 *et seq.* (1946). However, the federal act is an exclusive remedy, and the absence of negligence on the part of the employer in such a case does not permit the employee to invoke a state statute. *New York Central R. R. v. Winfield*, 244 U. S. 147 (1917), *reversing* 216 N. Y. 284, 110 N. E. 614 (1915); *cf.* *Atlantic Coast Line R. R. v. Strickland*, 87 Ga. App. 596, 74 S. E. 2d 897, 910 (1953). However, where both parties have waived their rights under the federal act, and have voluntarily submitted their cause to a state compensation board, such board's decision is binding. *So. Buffalo Ry. v. Ahern*, 73 Sup. Ct. 340 (1953).

<sup>7</sup> N. Y. WORKMEN'S COMP. LAW § 50.

<sup>8</sup> *Id.* § 11. See PRASHEK, *CASES AND MATERIALS ON NEW YORK PRACTICE* 114 n. 2 (4th ed. 1953).

<sup>9</sup> ". . . [I]n such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee." N. Y. WORKMEN'S COMP. LAW § 11. See *Great A. & P. Tea Co. v. Robards*, 161 F. 2d 929 (4th Cir. 1947).

<sup>10</sup> N. Y. WORKMEN'S COMP. LAW § 11. An action for the statutory amount is usually resorted to when there is no negligence on the part of the employer.

<sup>11</sup> Laws of N. Y. 1910, c. 674. ("AN ACT to amend the labor law, in relation to workmen's compensation in certain dangerous employments."). For an excellent treatment of the development and administration of workmen's compensation laws throughout the United States, see DODD, *ADMINISTRATION OF WORKMEN'S COMPENSATION* (1936).

<sup>12</sup> *Ives v. So. Buffalo Ry.*, 201 N. Y. 271, 94 N. E. 431 (1911). "It is conceded that this is a liability unknown to the common law and we think it plainly constitutes a deprivation of liberty and property under the Federal and State Constitutions. . . ." *Id.* at 294, 94 N. E. at 439. See 1 LARSON, *WORKMEN'S COMPENSATION* 37 (1952).

<sup>13</sup> N. Y. CONST. Art. I, § 19 (1894) (as amended in 1913, and renumbered § 18 by the Constitution of 1938).

<sup>14</sup> Laws of N. Y. 1913, c. 816. In 1914, the statute was "re-enacted because

United States Supreme Court.<sup>15</sup>

Until 1935, the coverage of the act was limited to certain specified diseases, and did not include silicosis.<sup>16</sup> The employee, therefore, still had his common-law remedy—a suit for negligence arising from violation of the Labor Law.<sup>17</sup> In a leading case, *Barrencotto v. Cocker Saw Co.*,<sup>18</sup> the Workmen's Compensation Board dismissed the complaint on the ground that silicosis was not one of the diseases compensable under the act and that the plaintiff therefore had no cause of action. In reversing, the Court of Appeals held that "[b]y no construction . . . can these words [exclusive remedy] be found to mean that the right to compensation in case of certain injuries should be exclusive and in place of liability for other injuries."<sup>19</sup> This case remains the law in New York.<sup>20</sup>

In 1935, however, the statute was amended to cover both partial and total disability arising from silicosis.<sup>21</sup> When the list of compensable diseases was thus extended, the common-law remedy was taken from the employee, and he was relegated to the statutory compensation provided by the act.<sup>22</sup>

The present uncertainty arose in 1936, when the legislature expressly excluded partially-disabling silicosis from the list of compensable diseases<sup>23</sup> which by then had grown to include "any and all

of doubt having arisen as to its constitutionality, the amendment to the constitution authorizing its enactment not having become part of the constitution until January 1, 1914." Laws of N. Y. 1914, c. 41. This was declared constitutional by the New York Court of Appeals in *Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514, 109 N. E. 600 (1915), *rev'd on other grounds*, 244 U. S. 205 (1917). "It is plainly justified by the amendment to our own State Constitution and the decisions of the United States Supreme Court. . . ." 215 N. Y. at 528, 109 N. E. at 604.

<sup>15</sup> *New York Cent. R. R. v. White*, 243 U. S. 188 (1917). ". . . [I]n our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations." *Id.* at 207. See DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 33 (1936).

<sup>16</sup> Laws of N. Y. 1928, c. 754; see *Powers v. Porcelain Insulator Corp.*, 285 N. Y. 54, 57, 32 N. E. 2d 790, 791 (1941); *Goldberg v. 954 Marcy Corp.*, 276 N. Y. 313, 317, 12 N. E. 2d 311, 312 (1938).

<sup>17</sup> See *Powers v. Porcelain Insulator Corp.*, *supra* note 16.

<sup>18</sup> 266 N. Y. 139, 194 N. E. 61 (1934).

<sup>19</sup> *Id.* at 145, 194 N. E. at 64.

<sup>20</sup> See *Cifolo v. General Elec. Co.*, 305 N. Y. 209, 220, 112 N. E. 2d 197, 202 (1953) (dissenting opinion).

<sup>21</sup> Laws of N. Y. 1935, c. 254; see *Mapes v. Massey-Harris Co.*, 19 F. Supp. 667 (W. D. N. Y. 1937).

<sup>22</sup> See *Cope v. General Elec. Co.*, 101 N. Y. S. 2d 46, 47 (Sup. Ct.), *aff'd*, 279 App. Div. 886, 111 N. Y. S. 2d 16 (1st Dep't 1950), *aff'd sub nom.* *Cifolo v. General Elec. Co.*, *supra* note 20.

<sup>23</sup> Laws of N. Y. 1936, c. 887; see *Mapes v. Massey-Harris Co.*, *supra* note 21; *Powers v. Porcelain Insulator Corp.*, 285 N. Y. 54, 58, 32 N. E. 2d 790, 792 (1941).

occupational diseases.”<sup>24</sup> Immediately thereafter, attempts were made to circumvent the statute on the theory that since the disease was no longer compensable under the act, the common-law rules were restored, and the *Barrencotto*<sup>25</sup> case again became applicable; and if this were not so, then the statute was unconstitutional.<sup>26</sup> These claims were met by the argument that since the legislature had expressly excluded the remedy for partial silicotic disability, it must have been their intention to deprive the employee of all compensation for such disability, rather than restore the common-law remedy.<sup>27</sup> It was further pointed out that even if the amendment were unconstitutional, the employee would be thrown back upon the 1935 statute, covering both forms of disability, and the common-law remedy would still be unavailable.<sup>28</sup>

With the law in this state of confusion, the Court of Appeals in the instant case decided for the first time on the merits,<sup>29</sup> that the employee's common-law remedy had in fact been abolished by the 1936 amendment excluding partial disability cases from coverage, and further that “. . . the Legislature acted within its powers in producing that result.”<sup>30</sup> The effect has been to deprive the workingman of any compensation at all for an illness resulting from the inherent nature of his occupation—one for which he formerly had a remedy either in negligence or under the compensation act; and this despite the fact that defendant may have violated a statutory duty imposed by the Labor Law, which is, in itself, negligence per se.<sup>31</sup>

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<sup>24</sup> N. Y. WORKMEN'S COMP. LAW § 3(2), col. 1, ¶ 28; see *Goldberg v. 954 Marcy Corp.*, 276 N. Y. 313, 317, 12 N. E. 2d 311, 312 (1938); see *Dodd, ADMINISTRATION OF WORKMEN'S COMPENSATION* 41 (1936).

<sup>25</sup> 266 N. Y. 139, 194 N. E. 61 (1934).

<sup>26</sup> See, e.g., *Scherini v. Titanium Alloy Co.*, 286 N. Y. 531, 37 N. E. 2d 237 (1941); *delBusto v. E. I. Dupont deNemours & Co.*, 167 Misc. 920, 5 N. Y. S. 2d 174 (Sup. Ct. 1938), *aff'd mem.*, 259 App. Div. 1070, 21 N. Y. S. 2d 417 (4th Dep't 1940).

<sup>27</sup> See *Cifolo v. General Elec. Co.*, 305 N. Y. 209, 213, 112 N. E. 2d 197, 198 (1953).

<sup>28</sup> See *Scherini v. Titanium Alloy Co.*, *supra* note 26 at 535, 37 N. E. 2d at 238. By Laws of N. Y. 1940, c. 548, a statute of limitations was imposed on prior claims. In 1947, the Workmen's Compensation Law was again amended, and Article 4-A was repealed. Totally-disabling silicosis is now included in section 3, subd. 2, ¶ 28. Laws of N. Y. 1947, c. 431. The substance of the law was not changed, however, with respect to partial and total disability.

<sup>29</sup> See *Cifolo v. General Elec. Co.*, 279 App. Div. 884, 885, 110 N. Y. S. 2d 759, 760 (1st Dep't 1952) (dissenting opinion); see, e.g., *Scherini v. Titanium Alloy Co.*, *supra* note 26; *Powers v. Porcelain Insulator Corp.*, 285 N. Y. 54, 32 N. E. 2d 790 (1941).

<sup>30</sup> *Cifolo v. General Elec. Co.*, *supra* note 27 at 214, 112 N. E. 2d at 199.

<sup>31</sup> *Schmidt v. Merchants Despatch Trans. Co.*, 270 N. Y. 287, 200 N. E. 824 (1936). “The duty imposed by statute is absolute and proof of disregard of a duty created by statute for the protection of a special class establishes . . . negligence as a matter of law.” *Id.* at 304, 200 N. E. at 829; cf. *Bellows v. Merchants Despatch Trans. Co.*, 257 App. Div. 15, 17, 12 N. Y. S. 2d 655, 657 (4th Dep't 1939), *aff'd mem.*, 283 N. Y. 581, 27 N. E. 2d 440 (1940); *Anderson*

This result would seem inconsistent with the objective of the statute—to compensate for injuries and diseases arising from the nature of the occupation, rather than to deprive the employee of an existing remedy without substituting another in its place.<sup>32</sup> The argument that coverage for total disability is an adequate substitute<sup>33</sup> is fallacious. Rather, the fact that the statute is in derogation of the common law and therefore subject to strict construction<sup>34</sup> should be controlling. The decision in the instant case seems to indicate, however, that only the legislature can remedy the present situation, either by restoring partially-disabling silicosis within the coverage of the statute, or by an express declaration that the common-law remedies, which formerly adhered to a violation of the Labor Law in such a case, be restored.

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v. Milliken Bros., 123 App. Div. 614, 617, 108 N. Y. Supp. 61, 63 (2d Dep't 1908), *aff'd mem.*, 194 N. Y. 521, 87 N. E. 1114 (1909).

<sup>32</sup> See *Cifolo v. General Elec. Co.*, *supra* note 29.

<sup>33</sup> See *delBusto v. E. I. Dupont deNemours & Co.*, 167 Misc. 920, 924, 5 N. Y. S. 2d 174, 177 (Sup. Ct. 1938), *aff'd mem.*, 259 App. Div. 1070, 21 N. Y. S. 2d 417 (4th Dep't 1940). "While it is true the legislature would have been powerless to take away the common law right of remedy and provide no relief, here it not only substituted relief as provided by the Workmen's Compensation Law, but a reasonable period of limitation was fixed in which to bring the common law action." *Ligiecki v. E. I. Dupont DeNemours & Co.*, 46 F. Supp. 266, 269 (W. D. N. Y. 1942).

<sup>34</sup> See BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 237 (1896). "Statutes in modification or derogation of the common law will not be presumed to alter it further than is expressly declared, or further than may be fairly and reasonably inferred from the purpose and nature of the statute or from the language employed in it. Such acts will be liberally construed if their nature is remedial, but their operation will not be extended by a forced construction." *Id.* at 242. "... [I]f the statute is to be considered ambiguous it should be construed most favorably to the claimant." *Brown v. Adlers Monument & Granite Works*, 274 App. Div. 861, 82 N. Y. S. 2d 85 (3d Dep't 1948).