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# Workmen's Compensation--Deduction of Attorney's Fees in Computing Employer's Lien or Deficiency Award--Subrogation (Curtin v. City of New York, 287 N.Y. 338 (1942))

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case this decision was not followed, but the general rule above expressed was clearly adopted.[11] Although the subsequent forbearance agreement fell as usurious, this did not affect the first valid agreement. It has long been held that an obligation, valid when created, is not rendered usurious by a latter agreement calling for an illegal rate of interest, but the latter agreement alone is void.[12] Except for the few inconsistencies above stated [13] the law as expressed in the instant case is unchallenged.

S. C.

WORKMEN'S COMPENSATION—DEDUCTION OF ATTORNEY'S FEES IN COMPUTING EMPLOYER'S LIEN OR DEFICIENCY AWARD—SUBROGATION.—Claimant's husband, an employee of the City of New York, died February 2, 1938 as the result of injuries sustained in the course of his employment, which were caused by the negligence of a third person. On March 21, 1938, pursuant to the provisions of Section 29 of the Workmen's Compensation Law, claimant served a notice that an action had been commenced against the third person and that she made claim for all benefits due her under the Act. On March 22, 1938, an award of compensation was filed with the Department of Labor giving claimant $10.39 per week, and the City promptly gave notice that the first payment of compensation had been made. Thereafter, the action against the third person was settled for $14,000 with the employer's written consent. The widow's share in the recovery (after allowing for children) was $3,551.70 after deducting disbursements and attorney's fees, but was $4,368.37 without deduction of such fees. The employer claimed it was liable only for the deficiency between the amount of the recovery and the compensation provided or estimated, and that attorney's fees should not be deducted in computing the amount of the recovery "actually collected". *Held,* Workmen's Compensation Law § 29, subdivisions 1 and 4, must be read together, and when so read, provide that where a claimant has recovered from a third person the employer is liable to pay any deficiency between the compensation provided, or estimated, and the claimant's recovery *less* disbursements and attorney's fees. *Curtin* v. *City of New York,* 287 N. Y. 338, 39 N. E. (2d) 903 (1942).

A person whose employment falls within the scope of the Workmen's Compensation Act may not sue his employer at common law

(1932), *aff'g,* 233 App. Div. 766, 250 N. Y. Supp. 189 (2d Dep't 1931); *cf.* London v. Toney, 263 N. Y. 439, 446, 189 N. E. 485, 4 (1934), "Interest and forbearance do relate to a money debt originating otherwise than by a loan."

[11] *See* note 9, *supra.*

[12] Hinman v. Brundage, 13 N. Y. S. (2d) 363 (Sup. Ct. Del. Co. 1939); La Monte v. Handy, 250 App. Div. 657, 296 N. Y. Supp. 135 (3d Dep't 1937).

[13] *See* notes 5 and 9, *supra.*

for injuries occurring in the course of his employment, provided the employer has complied with the Act.[1] The employee's sole remedy is to secure an award of compensation.[2] This, however, in no way affects the employee's right to bring a civil action against a third person whose wrongful conduct caused his injuries.[3] If an employee is injured by a third person while engaged in his employment, he may take compensation, and at any time, either prior thereto, or within six months after the awarding of compensation, pursue his remedy against such third person.[4] The employer is given a lien upon the employee's recovery by subdivision 1 of Section 29, "after deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case." [5] Subdivision 4 of Section 29 deals with a case wherein the employee recovers from the third party tort feasor *before* an award of compensation is made, and provides that in such case the employer shall contribute only the deficiency, if any, between the amount of the recovery "actually collected", and the compensation

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[1] N. Y. WORK. COMP. LAW § 11; N. Y. WORK. COMP. LAW § 52 (the employer's failure to comply with the requirements of the Act is a misdemeanor).

[2] *Ibid.*

[3] Lester v. Otis Elevator Co., 169 App. Div. 613, 155 N. Y. Supp. 524 (1st Dep't 1915).

[4] N. Y. WORK. COMP. LAW § 29, subd. 1 provides: "If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to take compensation under this chapter or to pursue his remedy against such other but may take such compensation and at any time either prior thereto or within six months after the awarding of compensation, pursue his remedy against such other subject to the provisions of this section. If such injured employee, or in case of death, his dependents, take or intend to take compensation under this chapter and desire to bring action against such other, such action must be commenced not later than six months after the awarding of compensation and in any event before the expiration of one year from the date such action accrues. In such case, the state insurance fund, if compensation be payable therefrom, and otherwise the person, association, corporation or insurance carrier liable for the payment of such compensation, as the case may be, shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid by it and to such extent such recovery shall be deemed for the benefit of such fund, person, association, corporation or carrier. Notice of the commencement of such action shall be given within thirty days thereafter to the commissioner, the employer and the insurance carrier upon a form prescribed by the commissioner." *See* Hession v. Sari Corp., 283 N. Y. 262, 28 N. E. (2d) 712 (1940).

[5] N. Y. WORK. COMP. LAW § 29, subd. 1.

provided or estimated.[6] Prior to the amendment of 1937,[7] which added subdivision 1 of Section 29, it had been held that the words "actually collected" did not mean the net recovery after the deduction of attorney's fees.[8] In the instant case, the court has held that the method of computing the amount the employee actually collects when proceeding under subdivision 1, is expressive of a legislative intent to have the same method apply to the computation of the amount "actually collected" as those words are used in subdivision 4.[9] In the instant case the court held that attorney's fees and disbursements should be deducted from claimant's recovery before determining the *deficiency* which the employer is bound to contribute between such recovery and the total estimated compensation. It is submitted that the statute provides that the employer shall contribute "the deficiency" only in the event that the employee recovers from a third person *before* an award of compensation is made.[10] Here, the award *preceded* the recovery, and therefore the case does not fall under subdivision 4.[11] When the making of an award precedes the recovery from a third

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[6] N. Y. WORK. COMP. LAW § 29, subd. 4 provides: "If such injured employee, or in case of death, his dependents, proceed against such other, the state insurance fund, person, association, corporation, or insurance carrier, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case."

[7] N. Y. Laws 1937, c. 87, § 29. A later amendment, N. Y. Laws 1937, c. 684, merely numbered the divisions of the section.

[8] Matter of Solomone v. Degnon Contracting Co., 194 App. Div. 50, 184 N. Y. Supp. 735 (3d Dep't 1920); Matter of Kabel v. Lane Engineering Co., 196 App. Div. 669, 187 N. Y. Supp. 833 (3d Dep't 1921); Matter of Mohr v. Wiebusch & Hilger, Ltd., 247 App. Div. 679, 289 N. Y. Supp. 421 (3d Dep't 1936), *aff'd*, 272 N. Y. 655, 5 N. E. (2d) 378 (1936); Matter of Mundt v. William Spencer & Son Contracting Corp., 250 App. Div. 693, 295 N. Y. Supp. 888 (3d Dep't 1937), *modified*, 276 N. Y. 677, 13 N. E. (2d) 57 (1937).

[9] Said the court: "They [subdivisions 1 and 4] must be read together and each must be given the construction which will effectuate the legislative intent. So read, there can be no reasonable doubt that the words 'amount of the recovery * * * actually collected' are intended to mean 'actually collected' after the claimant has paid the expenses reasonably and necessarily incurred in obtaining any recovery." 287 N. Y. 338, 343, 39 N. E. (2d) 903, 905.

[10] *See* note 6, *supra*.

[11] In *Hobbs* v. *Dairymen's League Co-operative Ass'n, Inc., et al.*, 258 App. Div. 836, 15 N. Y. S. (2d) 694 (3d Dep't 1939), claimant actually recovered from the third person responsible for his injuries, and *thereafter* claimed compensation for the deficiency pursuant to subdivision 4 of Section 29 of the Act. The court held that although subdivision 4 had not been altered by the 1937 amendment to Section 29, the amendment clearly expressed the legislature's intent that attorney's fees should be deducted in computing the deficiency which the employer is bound to contribute under subdivision 4.

person, as in the instant case, subdivision 1 applies.[12] By reading subdivision 1 into subdivision 4 the court reached the correct result, because the facts of the instant case fall squarely under subdivision 1. Reference to subdivision 4 was unnecessary, and therefore the court's holding that subdivisions 1 and 4 must be read together is *dictum*.[13]

A. J. G.

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[12] *See* note 4, *supra*. Note that under subdivision 1 the employer's lien upon the employee's recovery is given not only where the compensation has been *fully paid*, but also for the *estimated amount* of compensation which the employer will be bound to pay in future installments, where compensation is awarded in that manner.

[13] *See* Hobbs v. Dairymen's League Co-operative Ass'n, Inc., *et al.*, 258 App. Div. 836, 15 N. Y. S. (2d) 694 (3d Dep't 1939), wherein it was necessary to determine the effect which the addition of subdivision 1 by the 1937 amendment of the section has had upon subdivision 4. For a more extended discussion of some of the problems which have arisen in connection with Section 29 of the WORKMEN'S COMPENSATION LAW, *see* (1940) 15 ST. JOHN'S L. REV. 283.