WORKMEN'S COMPENSATION: PUBLIC POLICY AND THE VEST AT TIME OF INJURY RULE

AN INJURY arising out of and in the course of employment is compensated, under the general rule, according to the workmen's compensation act in force at the time of the injury.[1] The employee's rights are said to "vest" at that time and he is denied the benefit of post-injury amendments increasing the awards in the compensation schedule or allowing an award for an injury not previously compensable.[2] The Michigan Supreme Court, in two recent decisions, reached results in conflict with this rule.

In *Lahti v. Fosterling*,[3] a woodcutter was injured by a falling tree in October 1954. The workmen's compensation act in force at the time of the injury[4] required that the employer pay the employee's hospitalization expenses for a maximum of four six-month periods. Without a hearing before the workmen's compensation commission, the employer assumed Lahti's hospitalization expenses for the maximum period. In 1955 the applicable section of the act was amended to provide that the limits of the employer's liability should be within the commission's discretion.[5] In 1956, Lahti applied to the commis-

[1] See, *e.g.*, Snoka v. Industrial Comm'n, 412 Ill. 126, 105 N.E.2d 716 (1952); Price v. Railway Express Agency, Inc., 322 Mass. 476, 78 N.E.2d 13 (1948); Yurkovich v. Industrial Acc. Bd., 132 Mont. 77, 314 P.2d 866 (1957); McBride v. Royal Laundry Service Inc., 44 N.J. Super. 114, 129 A.2d 738 (1957); Scariato v. No. 9 Coal Co., 176 Pa. Super. 1, 106 A.2d 907 (1954).

[2] This result is compelled by statute in some states. See, *e.g.*, MINN. STAT. § 645.21 (1957); WYO. COMP. STAT. ANN. § 8.21 (1957). These statutes in effect determine that no statute or amendment shall be construed to have retrospective effect unless clearly and manifestly so intended by the legislature.

A number of jurisdictions have predetermined the issue of retrospective operation by construing the workmen's compensation act as part of the employment contract. When this is done, the employer's obligation is contractually fixed at the time of injury. See, *e.g.*, State *ex rel.* Conley v. Pennybacker, 131 W.Va. 442, 48 S.E.2d 9 (1948). In the event that the employer or employee, or both, may elect to come under the act or not, then there is a basis for such incorporation. See Tarnow v. Railway Express Agency, Inc., 331 Mich. 558, 50 N.W.2d 318 (1951). Where, however, the act compulsively includes all workmen engaged in certain occupations, then such construction is unwarranted. In such cases, the statute is incidental to the employment and not to any contractual provisions between the employer and employee. See Rookledge v. Garwood, 340 Mich. 444, 65 N.W.2d 785 (1954).

[3] 357 Mich. 578, 99 N.W.2d 490 (1959).

[4] MICH. COMP. LAWS § 412.4 (1948). [5] MICH. STAT. ANN. § 17.154 (1957).

sion for a hearing and adjustment of his claim pursuant to the 1955 amendment. A referee, ruling that the employer's liability is fixed at the time of injury, dismissed the claim. The workmen's compensation appeal board affirmed. On appeal, the Michigan Supreme Court held the amendment applicable and remanded the claim to the commission for rehearing and redecision pursuant to the 1955 amendment. While recognizing that statutes and amendments are generally interpreted prospectively,[6] the court reasoned that, where there is no expression of legislative intent, the circumstances surrounding adoption of the amendment must be considered to determine if the legislature intended retrospective operation.[7] Since this amendment was adopted to ease the financial burden on the employee whose injury required extended hospitalization, the court deemed it remedial legislation that should be given retrospective effect.[8]

In *Barger v. City of Saginaw*,[9] claimant was the wife of a fireman who died in January, 1943, following a heart attack suffered shortly after conducting snow removal operations in subzero temperatures. The workmen's compensation act in force at that time required as a condition of recovery that the injury be accidential.[10] An amendment passed in July, 1943,[11] deleted the word "accidental." The Michigan Supreme Court later held[12] that the amendment did not apply when the injury was an aggravation of a pre-existing disease. However, in

[6] McCAFFREY, STATUTORY CONSTRUCTION § 65 (1953).

[7] 357 Mich. at 589, 99 N.W.2d at 495.

[8] "Believing as we do that no vested right or contractual right exists that prohibits the legislature from making a change in the *remedies* afforded employees under the workmen's compensation law, and keeping in mind the express primary purpose of the act to transfer to industry the expense of injuries to employees growing out of and in the course of their employment, it is apparent that the legislature intended . . . to substitute for the existing remedies under the act some expansion thereof. We find from all facts and circumstances that the legislature intended the amendment to be applicable to an existing award entered prior to the effective date of the amendment and intended to allow . . . additional medical benefits even though all previous benefit periods had been exhausted." *Id.* at 595, 99 N.W.2d at 499. (Emphasis added.)

[9] 358 Mich. 423, 100 N.W.2d 208 (1960).

[10] P.A. 1912 (1st Ex. Sess.), part 7, § 1, added by P.A. 1937, No. 61 at 78.

[11] MICH. COMP. LAWS § 417.1 (1948).

[12] "[I]t can hardly be said that the 1943 amendment broadens the act to allow an award in a case of aggravation of a pre-existing disease without an accident or fortuitous event." Croff v. Lakey Foundry & Mach. Co., 320 Mich. 581, 585, 31 N.W.2d 728, 729 (1948).

1957, the court, reinterpreting the statute,[13] held that the 1943 amendment required only that the employee show that his injury was a result of his normal work.[14] The history of the *Barger* case spans this development of the law. The claim for death benefits submitted in 1944 was denied by the workmen's compensation commission. Leave to appeal was granted by the Michigan Supreme Court, but, because of the lack of a no-progress rule,[15] the claim was not brought to issue until January of 1960, when the commission's decision was reversed. The opinion justifies the court's action on the grounds that the "pertinent provisions of the statute and case law as they bear on this set of facts have been materially changed."[16] The claim was thus remanded for new findings in light of the 1957 reinterpretation of the 1943 amendment, which disposed of the requirement of accidental injury as a condition of recovery. Claimant's rights were not, therefore, fixed by the statute in force at the time of the injury but by the statute as amended six months after her husband's death.

The *Lahti* and *Barger* decisions indicate that the Michigan Court does not consider the date of injury the pivotal time for the determination of compensation rights. This is a marked departure from the generally accepted rule,[17] which is predicated on the assumption that all legislation affecting substantive rights must have been intended to have prospective operation only, unless a contrary intent is clearly indicated.[18] In *Lahti*, the court deemed the amendatory legislation

[13] Sheppard v. Michigan Nat'l Bank, 348 Mich. 577, 83 N.W.2d 614 (1957); Coombe v. Penegor, 348 Mich. 635, 83 N.W.2d 603 (1957).

[14] 348 Mich. at 580, 83 N.W.2d at 628.

[15] MICH. COURT RULE 70(B), 352 Mich. xvii (1958).

[16] A fuller discussion of the rationale of the court's decision would have been helpful. It is relevant to note that the *Lahti* case was decided less than two months prior to the date of decision in the *Barger* case. In both cases there was a divided court, with Kelly, Dethmers, and Carr, JJ., dissenting. The bulk of Justice Carr's dissent in the *Barger* case is concerned with showing that the decedent's injury was unaccompanied by a fortuitous event. He concludes, however, "The right to compensation is governed by the law applicable at the time of death (January, 1943), and therefore, P.A. 1943, No. 245, effective July 29, 1943 . . . would not apply . . . ." 358 Mich. at 427, 100 N.W.2d at 210.

[17] Aetna Cas. & Sur. Co. v. Industrial Acc. Comm'n, 30 Cal. 2d 388, 182 P.2d 159 (1947), contains a thorough exposition of the rationale of this rule, plus a vigorous dissenting opinion.

[18] *Id.* at 396, 182 P.2d at 183. This conclusion is occasionally reached by stating that the legislature is presumed to know the rules of statutory construction, hence omission of a statement of intent in this regard is presumed to be indicative of intended prospective operation. See Heil v. Big Horn Constr. Co., 65 Wyo. 175, 197 P.2d 692 (1948).

"remedial." This term is not usually given the broad meaning ascribed to it by the Michigan court; rather, it is normally limited to legislation that affects modes of procedure or confirms existing rights.[19] However, in a sense, all statutes that purport to correct some existing defect or remedy an injustice have a remedial character.[20] It is believed that the Michigan Court had in mind this broad meaning when it described the legislation in the *Lahti* case as remedial.[21]

Upon analysis, it becomes apparent that the conflicting decisions of courts confronted with this problem do not result from definitional difficulties; rather, courts differ as to the emphasis to be placed on conflicting policy considerations. Thus, the question presented when an amendment increases the employee's benefits or gives him a new right to compensation is whether it is better social policy to impose an unanticipated cost on the employer than to deny the injured employee the extended benefits created by a post-injury amendment.[22] The labeling of amendments as "remedial" or "substantive" actually reflects the choice made. Admittedly, the result of the *Lahti* and *Barger* cases is that the employee's injury will cost his employer or his employer's insurance carrier more than could have been anticipated at the time of the injury.[23] On the other hand, the injured employee's compensation

[19] See generally, MCCAFFREY, *op. cit. supra* note 7, § 70.

[20] *Ibid.* See Levy v. Birnschein, 206 Wis. 486, 240 N.W. 140 (1932); 2 SCHNEIDER, WORKMAN'S COMPENSATION LAW § 577 (2d ed. 1932).

[21] If the post-injury amendment decreases the award for the type of injury sustained, the general rule will work to the employee's advantage. See, *e.g.*, Price v. Railway Express Agency Inc., 322 Mass. 476, 78 N.E.2d 13 (1948). The policy influencing the Michigan court's decisions indicate that the general rule would be followed in this situation.

[22] In the *Aetna Cas. & Sur. Co.* case, the court said, "[T]he injustice that might be suffered by an employer if the amendment were applied retrospectively, would afford an ample basis for an intentional difference in treatment of workmen injured before and after adoption of the amendment." 30 Cal. 2d at 396, 182 P.2d at 162. Justice Carter, dissenting, remarked: "This philosophy inheres in the concept that property rights are above personal rights and that laws granting benefits to employees must not be so construed as to affect the status quo adverse to employer . . . . The majority opinion is a product of the reactionary legalistic philosophy of an era preceding . . . the Workman's Compensation Laws." *Id.* at 397, 182 P.2d at 163.

[23] See Schmidt v. Wolf Contracting Co., 269 App. Div. 201, 55 N.Y.S.2d 162 (1945); Hogan v. Lawlor & Cavanaugh Co., 286 App. Div. 600, 146 N.Y.S.2d 119 (1955). In the *Schmidt* case, the court asserted that the legislature could not have failed to include those receiving compensation on the effective date of the amendment. The amendment was enacted during the war, and was labeled a wartime measure. The California court, in *Aetna Cas. & Sur. Co.*, 30 Cal. 2d at 396, 182 P.2d at 162, distinguished the *Schmidt* case on this ground. This distinction does not seem to have

will not be based on a statute which has been determined by the legislature to be inadequate. Decisions such as *Lahti* and *Barger* extend the effect of a legislative attempt to correct this inadequacy.

While the policy announced by the Michigan Court is appealing, the practical value of these decisions must be considered in light of countervailing circumstances, including problems of scope. The *Lahti* case, for example, does not indicate whether the controlling factor was that plaintiff's initial claim was not filed until after the effective date of the amendment or whether the Michigan Court intended to promulgate a general rule of retrospective operation. If the latter was intended, then the rule is at best uncertain, and likely to confuse the commissions who must apply it. Conversely, if the decision is construed to limit retrospective operation to cases in which the claim is not filed until after the amendment becomes effective, then there will be no significant effectuation of the court's avowed policy. For, in a situation comparable to *Lahti*, the employer will not assume responsibility voluntarily because of the attendant risk of statutory change. On the other hand, the likelihood of such change occuring between the time of injury and the filing of the claim is at best slight.

Barger v. City of Saginaw presents a more extreme holding, inasmuch as the injury was noncompensable when it occurred. Here the policy of extending the benefit of statutory change must be balanced against the cost of unanticipated liability. Moreover, the court gives no guide by which to determine the scope of its decision. In contrast is the relative certainty of the generally accepted "vest at time of injury" rule. The difficulties inherent in judicial attempts to formulate a rule of retrospective operation suggest that such formulation, if any, should be left to legislative determination. Absent such determination, deviation from the general rule is unwarranted.

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been given weight in subsequent New York decisions, *e.g.*, Hogan v. Lawlor & Cavanaugh Co., *supra;* Basarbavich's Estate v. Nat'l Housecleaning Contractors Inc., 275 App. Div. 1012, 91 N.Y.S.2d 703 (1949); nor in the *Lahti* case, 357 Mich. 578, 99 N.W.2d 490 (1959).