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EVIDENCE AND PROOF UNDER WORKMEN'S COMPENSATION LAWS.

Under the old law of employers' liability the working people felt it a grievance that the burden of proof rested always upon them and that hearsay evidence of statements by deceased workmen as to the causes of their injuries, although often seemingly deserving of credibility, was always inadmissible. Consequently, in conjunction with the movement to substitute the compensation law in place of the old law of employers' liability there has commonly been a demand by the working people for relaxations in their favor of the rule of burden of proof and of the rules of evidence. That demand, as will be adverted to again later, has had no effect on the letter of European compensation acts. But in the compensation acts of many of our States provisions have been incorporated to the effect that the tribunal which determines issues of fact shall not be bound by the common law or statutory rules of evidence.[1] And the acts of four States—Maryland, Montana, New York and Oklahoma—go a step further and create presumptions open to constructions that would reverse the burden of proof.

[1] California, Connecticut, Louisiana, Maryland, Nevada, New York, North Dakota, Ohio, Oklahoma, Utah, Washington and West Virginia. In the Iowa and New Jersey acts a similar provision applies to the tribunals of first instance; but that tribunal's decisions seem to be subject to review upon the facts. The Missouri, Montana and Vermont acts provide that the tribunals shall not be governed by "technical" rules of evidence.

For a study of the questions raised by these provisions, the particular provisions of the New York act[2] will serve as the text. They are as follows:

"Sec. 68. Technical rules of evidence or procedure not required. The commission * * * in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or technical or formal rules of procedure * * *; but may make such investigation or conduct such hearing in such manner as to ascertain the substantial rights of the parties."

"Sec. 21. Presumptions. In any proceeding for the enforcement of a claim for compensation * * * , it shall be presumed in the absence of substantial evidence to the contrary

"1. That the claim comes within the provisions of this chapter;

"2. That sufficient notice thereof was given;

"3. That the injury was not occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another;

"4. That the injury did not result solely from the intoxication of the injured employee while on duty."

Under the compensation law "intent to injure" and "intoxication" are logically defenses, the burden of proving which unquestionably should rest upon the defendant. Therefore subdivisions 3 and 4 of §21, *supra*, call for no particular criticism, and attention will be confined to the remaining provisions above quoted.

The following is a summary of the decisions by the New York courts, to date, construing those provisions, arranged for convenience under topical headings. It is necessary to enter intensively into details in this summary in order to present clearly two divergent lines of construction, the one sought to be established by the Industrial Commission and a minority of the judges of the appellate courts and the other adopted by the majority of such judges.

Sec. 68—Hearsay Evidence.

Where an employee died from delirium tremens and his widow and physicians testified that he had told them he had suffered an accident such as might have aggravated or accelerated

[2] Chap. 67 of the "Consolidated Laws," entitled the "Workmen's Compensation Law," being Chap. 816, Laws of 1913, reenacted by Chap. 41, Laws of 1914, as amended.

the disease, but there were no marks on his body to indicate an accidental injury, and several eye-witnesses testified that they were present at the time and place of the alleged accident and saw nothing of the kind, an award by the Industrial Commission in favor of the widow, after affirmance by the Appellate Division, was reversed by the Court of Appeals, on the ground that, while the Commission may in its discretion accept any evidence that is offered, still in the end there must be a residum of legal evidence to support the claim before an award can be made. The Chief Judge concurred in the result on the ground that an award may not be based upon hearsay evidence alone when such hearsay evidence is contradicted by eye-witnesses. Two judges dissented.[3]

And where a builder's workman died from blood clot and pressure on the brain, after falling on the earthen floor of a cellar, his fellow workmen not seeing him fall but immediately observing him and finding him unconscious, trembling and frothing at the mouth, and the only evidence of an accident was his statement to his widow that he had tripped and fallen, contradicted by his statement to the attending physician that he did not know what had happened to him, an award by the Commission in favor of the widow was reversed by the Court of Appeals (two judges dissenting), on the ground that it was based upon mere guess or conjecture, without any legal basis therefor.[4]

But where a workman died from peritonitis and the only evidence of an accident was the employer's report thereof and hearsay evidence of statements by the deceased to his wife, son and attending physician, an award in favor of dependents was affirmed upon appeal, on the ground that in this case there were no denials of the accident by persons present at the time nor was the evidence "abhorrent to reason and common sense" as in the Carroll case.[5]

Where the deceased workman had made an immediate statement of the alleged accident to a co-employee, followed promptly by like statements to his wife and others, an award in favor of his widow was unanimously affirmed upon appeal, on the ground that such award was amply corroborated by facts, circumstances and evidence other than the declarations of the deceased and that no substantial evidence was offered to overcome the presumption created by §21.[6]

And an award based upon hearsay evidence, received without objection, was unanimously affirmed in Hernon v. Holahan.[7]

[3] Carroll v. Knickerbocker Ice Co., 218 N. Y. 435 (July, 1916). To similar effect, see Belchery v. Carthage Machine Co., 224 N. Y. 326 (1918), three judges dissenting.

[4] Hansen v. Turner Construction Co., 224 N. Y. 331 (1918).

[5] Lindquist v. Holler, 178 App. Div. 317 (N. Y. 1917).

[6] Folts v. Robertson, 188 App. Div. 359 (N. Y. 1919).

[7] 182 App. Div. 126 (N. Y. 1918).

Sec. 68—Not the Best Evidence.

Where the mother of a fatally injured employee, residing in Germany, claimed compensation as a "dependent" of such employee, and the only evidence of dependency consisted of statements by her son-in-law that he had been told by the deceased that the latter had been sending money to his mother in Germany, but in what amounts or how often the deceased did not tell the witness, an award in favor of the mother was reversed upon appeal, on the ground that better evidence on the disputed question was obtainable and should have been offered.[8]

And an award for dependency on a deceased employee to parents residing in Italy, based solely upon documents purporting to be by the authorities of the town in Italy where the alleged dependents resided and stating that the latter were very poor and absolutely depended upon the deceased for support, was reversed upon appeal (two justices dissenting), on the ground that there is no presumption of dependency and that no reason seems to exist why the requirement of evidence should not be the same in reference to the persons who are to receive the benefits, as upon the question of the accident, etc.[9]

Sec. 21, subdiv. 1—Burden of Proof—Employment Subject to the Act.

Where a painter, injured by falling from a scaffold, claimed the benefits of the compensation act, although the evidence all indicated that he was an independent contractor, it was held by the Appellate Division (two justices dissenting), reversing the Commission, that there was a presumption that the claim came within the provisions of the act and consequently that the claimant was an "employee."[10] But, the case coming up again on appeal, after rehearing, the Appellate Division reversed its former decision; and the Court of Appeals affirmed the later decision, holding summarily that the claimant was not an "employee" but an independent contractor, and therefore not subject to the act.[11]

And, the same question coming up again later on appeal, the Appellate Division reversed an award in favor of the claimant, holding that a "contract of employment" is a jurisdictional fact that must be established by "due process of law"—i. e., by such evidence as would be required to establish any other contractual relation.[12]

[8] Tirre v. Bush Terminal Co., 172 App. Div. 386 (N. Y. 1916); and cf. Drummond v. Isbell-Porter Co., 188 App. Div. 374, 377 (N. Y. 1919).

[9] Pifumer v. Rheinstein, 187 App. Div. 821 (N. Y. 1919); followed in Profeta v. Retsof Co., 188 App. Div. 383 (N. Y. 1919); and Bonnano v. Metz, 188 App. Div. 380 (N. Y. 1919).

[10] Rheinwald v. Builders' Co., 168 App. Div. 425 (N. Y. 1915).

[11] 223 N. Y. 572 (N. Y. 1918).

[12] Kackel v. Serviss, 180 App. Div. 54 (N. Y. 1917); followed in Tsangournos v. Smith, 183 App. Div. 751 (N. Y. 1918).

Where some of the operations of the employers involved were subject to the compensation law and some were not so subject, awards in favor of the claimants, based upon a presumption that the employees had been engaged when injured in occupations subject to the law, there being no evidence to the contrary, have been uniformly affirmed upon appeal.[13]

But where the injured person's occupation was shown to have been not one of those enumerated as subject to the compensation law, an award in favor of the claimant was reversed upon appeal, on the ground that the occupation in question could not be presumed to be subject to the act, since the presumption under §21 applies to facts and not to the construction of the statute.[14]

Sec. 21, subdiv. 1—Burden of Proof—"Arising out of and in the Course of."

Where the claimant's evidence to the effect that his injury was accidental and arose out of and in the course of the employment was very meager but the defendant did not offer any explanatory evidence whatsoever, an award in favor of the claimant was affirmed upon appeal (one justice dissenting), partly on the ground of a presumption under §21.[15]

Where a workman's death had been caused by his setting fire to his clothes while on duty in his employer's establishment, but the exact circumstances of the accident could not be ascertained, an award in favor of his defendants was affirmed upon appeal, on the ground that the claim is presumed to be within the law, in the absence of substantial proof to the contrary.[16]

Where a night watchman, who had begun his duties for the night, was found dead about midnight at the bottom of a well under a staircase in the building he had to watch, without any witnesses of the circumstances, an award in favor of his dependents was affirmed upon appeal (two judges dissenting), on the ground that there was no substantial evidence to overcome the presumption that death was the result of an accident arising out of and in the course of the employment.[17]

But where the claimant was shown to have been injured while on a public highway on his way to work, an award in his favor was reversed upon appeal, the Appellate Division holding that where the undisputed facts show that the injury did not

[13] McQueeny v. Sutphen and Myer, 167 App. Div. 518 (N. Y. 1915); Kohler v. Frohman, 167 App. Div. 533 (N. Y. 1915); Larsen v. Paine Drug Co., 169 App. Div. 838 (N. Y. 1915); Fogarty v. National Biscuit Co., 221 N. Y. 20 (1917); and to similar effect, see Kobyrav Adams, 176 App. Div. 43 (N. Y. 1916).

[14] Tomassi v. Christensen, 171 App. Div. 284 (N. Y. 1916).

[15] Powley v. Vivian, 169 App. Div. 170 (N. Y. 1915).

[16] Chludinski v. Standard Oil Co., 176 App. Div. 87 (N. Y. 1916).

[17] Fogarty v. National Biscuit Co., 221 N. Y. 20 (1917); and cf. Driscoll v. Gillen, 226 N. Y. (1919), three judges dissenting.

occur in the course of the employment there is no room for a presumption under §21 and "the employer is still entitled to his property until it is taken from him by due process of law."[18]

Where a workman employed and living on a dredge in a river went ashore for recreation, got dead drunk; in that condition and at night staggered down to the boat-landing and in some unknown manner was drowned, an award in favor of his dependents was reversed upon appeal, on the ground that the uncontradicted evidence clearly overcame the presumption created by §21 and proved that the accident did not arise in course of the employment.[19]

And where a workman employed on a dredge in a river reported for work so violently intoxicated that he was absolutely unfit for employment and had to be restrained and confined and then dismissed, after regaining his employer's landing stage fell therefrom, under unwitnessed circumstances, and was killed, an award in favor of his dependents was reversed upon appeal, on the ground that the accident did not arise in the course of his employment and that under the facts shown there was no presumption to the contrary.[20]

Sec. 21, subdiv. 1—Burden of Proof—"Accidental Injury."

Where a workman died from pneumonia and the shock of an operation rendered necessary by hernia, and the evidence showed that he had recently been medically examined and found free from hernia, and that in the course of his work, which was heavy, he had suddenly stopped, complaining of pain, and had gone to his doctor, who found him then suffering from hernia, an award for death as the result of an accidental injury was affirmed upon appeal, on the ground that §21 required the Industrial Commission to presume that the claim came within the provisions of the act in the absence of substantial evidence to the contrary, and that there was no evidence to the contrary, all the evidence favoring the presumption.[21]

But where an employee collapsed while sweeping a sidewalk, bumping his head in the fall, and subsequently died, all the evidence indicating that both the fall and the death were due to an attack of cardiac syncope, an award in favor of his dependents was reversed, the Appellate Division (one justice dissenting) holding that there was no evidence to sustain a finding that the

[18] McCabe v. Brooklyn R. R. Co., 177 App. Div. 107 (N. Y. 1917); to somewhat similar effect see Whalen v. Stamwood Towing Co., 186 App. Div. 190 (N. Y. 1919); and cf. Kuy v. Standard Oil Co., 184 App. Div. 453 (N. Y. 1918).

[19] Berg v. Great Lakes Co., 273 A. D. 8 (N. Y. 1916).

[20] Pope v. Merritt & Chapman Co., 177 A. D. 69 (N. Y. 1917).

[21] Fleming v. Gair, 176 App. Div. 23 (N. Y. 1916); followed in Gibbons v. Marx & Rawolle, 181 App. Div. 142 (N. Y. 1917); and *cf.* Foltz v. Robertson, 188 App. Div. 359 (N. Y. 1919); and Sullivan v. Industrial Engineering Co., 173 App. Div. 65 (N. Y. 1916).

injury was "accidental" or that it "arose out of the employment," and that the presumption under §21 does not arise until there is evidence of the employment, of an injury in the course of the employment and of the injury as the result of something arising out of the employment.[22]

Where an employee suffered an injury by accident, was operated on therefor and some weeks later, after apparent recovery from the operation, died from a preexisting disease, and there was no evidence that the death in any way or degree resulted from the accidental injury, an award in favor of the claimant was reversed upon appeal (one justice dissenting), on the ground that it would not be presumed, without evidence, that the death resulted from the accident.[23]

Where the claimant had been disabled by hernia, which hernia came on while he was engaged in heavy work but without any strain or unusual exertion, an award in his favor was reversed by the Court of Appeals, on the ground that the direct connection between the personal injury as a result and the employment as its proximate cause "must be proved by facts."[24]

And where the claimant had become blind from congenital syphilis not long after fracturing his leg by accident and there was some expert opinion evidence that the accident might have aggravated or accelerated the disease, an award in favor of the claimant was reversed upon appeal (two justices dissenting) on the ground that such evidence was insufficient to bring the case within the letter of the statute.[25]

Sec. 21, subdiv. 1—Burden of Proof—Degree and Duration of Disability.

Where an award was made, nine months after injury, for permanent total loss of use of a foot, although the evidence showed that the loss of use in fact was far from total and that there was still some doubt as to the permanency of such partial loss of use, the award, after affirmance by the Appellate Division, was reversed by the Court of Appeals, on the ground that the presumption under §21 had no application to the case, the burden of establishing permanent total loss of use resting upon the claimant and the evidence in the case not supporting such conclusion.[26]

Sec. 21, subdiv. 1—Burden of Proof—Dependency.

Where an award to a father and mother as dependents upon a deceased son was based solely upon evidence that the deceased had from time to time sent them money, the award was reversed

[22] Collins v. Brooklyn Gas Co., 171 App. Div. 381 (N. Y. 1916).
[23] Tucillo v. Ward Co., 180 App. Div. 30a (N. Y. 1917).
[24] Alpert v. Powers, 223 N. Y. 97 (1918).
[25] Borgstedt v. Shults Co., 180 App. Div. 229 (N. Y. 1917).
[26] Modra v. Little, 223 N. Y. 452 (1918); and to similar effect, see Kanzar v. Acorn Co., 219 N. Y. 326 (1916).

upon appeal (one justice dissenting), on the ground that the presumption under §21 does not apply to claims of dependency; but that the conditions constituting dependency must be established by competent proof.[27]

Sec. 21, subdiv. 2—Burden of Proof—Notice of Accident.

Where a claimant for compensation had failed to give the written notice required by statute, having merely telephoned his foreman that he was sick and later told such foreman the nature of his trouble but not its cause, an award in favor of the claimant, based upon a ruling that there is a presumption under §21 that the notice was sufficient, was reversed upon appeal, on the ground that the presumption disappeared with the establishment of the fact that the notice required by statute had not been given.[28]

Reviewing the foregoing decisions it appears that after nearly five years of burdensome litigation the statutory provisions under consideration are still far from being definitely construed. It still remains uncertain whether an award may be based upon hearsay evidence, uncorroborated by other evidence. And the practical effect of the presumption created by §21 is still obscure. For, while in many of those decisions awards have been affirmed expressly for want of evidence to overcome the presumption, yet in others we are told that there is no presumption of dependency or disability and that, in order to sustain an award, there must be evidence of the employment, of an injury in the course of the employment and of an injury as the result of something arising out of the employment. Statutory provisions resulting in so much litigation and obscurity *prima facie* deserve condemnation.

But it is now a subject of complaint among the working-people that this litigation and uncertainty is largely due to the courts' adoption of a line of construction contrary to the "liberal" purposes of the Act. In contrast, as may be seen from the foregoing summary of decisions, the Industrial Commission and a minority of the Judges have sought to construe the statutory provisions in question so liberally

[27] Drummond v. Isbell-Porter Co., 188 App. Div. 374; and *cf.* Birmingham v. Westinghouse Co., 180 App. Div. 48 (N. Y. 1907); followed in Fry v. McLoughlin Bros., 187 App. Div. 824 (N. Y. 1919).

[28] Dorb v. Stearns, 180 App. Div. 138 (N. Y. 1917).

as to mean that any assertion of fact in an unsworn claim for compensation, no matter how improbable or suspicious in the light of surrounding facts and circumstances, shall or may be taken as true unless the defendant proves the negative, and that mere hearsay or secondary evidence in favor of a claim, howsoever flimsy or suspicious, shall or may be given greater weight than legal evidence to the contrary.[29] But the only legitimate object of judicial inquiry is truth. And to require or even to authorize a judicial or quasi-judicial tribunal thus to disregard the rational criteria of truth would lead inevitably to a substitution of fiction for fact and a reign of falsehood, chicanery and fraud. Such result has already been indicated. Among the reversed cases above cited are a number wherein awards were based either upon sheer pretense, contrary to the known truth, or upon evidence "abhorrent to reason and common sense," and one at least wherein the best evidence was almost certainly deliberately withheld. It is self-evident that statutory rules of evidence and proof which would thus pervert judicial inquiry into a means for avoiding a truthful application of the substantive provisions of the law, would violate the "due process of law" clause of the Federal Constitution. Consequently, the narrower construction adopted by the majority of the judges in effect saved the provisions in question from entire invalidity.

A number of the judges of the appellate courts seem to have favored the extremely broad construction just criticised, under an impression that they were following precedents and that in Europe the "sociological purposes" of the compensation law have been deemed to entail a wide abandonment or relaxation of juridical principles.[30] To show how slight is the basis for such impression, it is worth while to run through the compensation law of evidence and proof

[29] *Cf.* dissenting opinion in Driscoll v. Gillen, 187 App. Div. 908, in which case, however, the sustained presumption was a not unreasonable inference from the facts proved.

[30] See dissenting opinion in Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, at pp. 443–4.

in the three leading industrial countries of Europe, noting how closely it adheres to established juridical principles.

In the British statute[31] there are no provisions expressly affecting the general rules of evidence and proof. Under that statute as constructed by the courts, the burden of proving an injury by accident, that the accident arose out of the employment, that it arose in the course of the employment, and that the injury resulted from the accident, rests upon the claimant; and where the evidence is equally consistent with an accident or no accident the burden of proof has not been discharged.[32] The proof need not be direct but may be by circumstantial evidence; however, there must be facts proved from which an inference may legitimately be drawn, as distinguished from mere conjecture, surmise or guess; (Barnabas v. Bersham Co., *supra*). As to drawing inferences, the general rule is that a finding of fact by the trial judge will not be disturbed upon appeal unless it is such as a reasonable man would not have arrived at from the evidence.[33]

In the French statute[34] there is no express provision affecting the general rules of evidence and proof. Under that statute as construed by the courts, the burden is upon the claimant to prove an accident, and the connection between the employment and the accident and between the accident and the injury, without derogation from the principles of "common law"; and where the proof is equally consistent with an accident or no accident the burden of proof has not been discharged.[35] Where, however, the exact cause of death cannot be ascertained, but the facts proved strongly and

[31] "Workmen's Compensation Act, 1906." There is a presumption created in this statute, but it relates solely to "industrial diseases."

[32] Barnabas v. Bersham Co., (H. of L., 1910), 4 B. W. C. C. 119; Pomfret v. Lancashire Ry. Co. (1903), 5 M-S. W. C. C. 22; O'Brien v. Star Line (1908); Morgan v. Cynon Co., (1915), 8 B. W. C. C. 499; Hugo v. Larkins, (1910), 3 B. W. C. C. 288; Paton v. Dixon, (1913), 6 B. W. C. C. 882.

[33] Taylor v. Clark, (H. of L., 1914), 7 B. W. C. C. 871; Sneddon v. Greenfield, (1910), 3 B. W. C. C. 557.

[34] Law of April 9, 1898, as amended by Laws of March 22, 1902, March 30, 1905, and April 17, 1906.

[35] Cour de Cassation—Chambre Civile, June 10, 1902; Chambre des Requetes, Feb. 29, 1904, Jan. 19, 1903, April 27, 1903, and May 4, 1905.

consistently point to that conclusion the fact of an accident may be inferred.[36] And where an accident is proved to have occurred during the time and at the place of work, it is presumed to have been due to the employment in the absence of evidence to the contrary.[37]

In the German statute[38] there is no provision expressly affecting the general rules of evidence and proof. Under that statute, as applied by the Imperial Insurance Office, to establish a claim for compensation, it must be proved that the employment was subject to the law, that there was an accident, that the accident occurred in the course of the employment, that the accident was caused by the work, and that the injury resulted from the accident.[39] Unusually strong proof is required to establish a causal relation between the work and sudden outbreaks of latent diseases occurring during the work.[40] On the other hand, where workmen are found dead in their work-places and, under certain conditions, where seamen are found dead in the water near their ships, and the exact cause of the death cannot be ascertained but there appears a high degree of probability that there was an accident due to the employment, that conclusion will be inferred.[41]

A comparison of European and New York cases in detail would show that the rule, developed abroad, of drawing reasonable inferences from circumstantial evidence, supplementing general presumptions of law, goes about as far in favor of compensation claimants as does the statutory presumption in any of the affirmed cases in New York, the final

[36] Chambre des Requetes, July 18, 1904, and July 6, 1903.

[37] Chambre Civile, Feb. 8, 1911; Chambre des Requetes, Oct. 25, 1910.

[38] "Workmen's Insurance Code of July 9, 1911."

[39] "Handbuch der Unfallversicherung, 1909," pp. 49, 73, 76. The writer is unable to cite any authority for the proposition that the common rules of evidence are not relaxed in compensation cases in Germany; but in a fairly wide study of the authorities he has found no indication that they are.

The writer is unable to cite any authority for the proposition that the common rules of evidence are not relaxed in compensation cases in Germany; but in a fairly wide study of the authorities he has found no indication that they are.

[40] Id., pp. 73–76.

[41] This inference was cited in the dissenting opinion in Carroll v. Knickerbocker Ice Co., *supra*, as a ground for relaxing the rules of evidence in compensation cases.

results in all the New York cases being the same as they probably would have been under English law. Consequently, save upon the improbable assumption that our Courts would not have followed precedents in sustaining reasonable inferences from facts proved, those particular presumptions have been wholly useless for good and yet productive of much harm.

In the opinion of the writer there is no need or justification for any arbitrary presumptions of law in connection with the accident compensation law.[42] Even such an apparently reasonable presumption as that of "dependency," created in many American compensation acts in favor of widows, children, etc., of fatally injured employees, is unsound, the proper method of accomplishing the reasonable purpose intended being to provide that such persons shall, under conditions specified, be entitled to compensation whether actually dependent or not. Similarly, in the writer's opinion, there is no justification for any relaxation of the principles of evidence in compensation cases. Howsoever proper it may be to specialize the procedure so as to aid claimants in the presentation of their cases, to penalize defendants for unreasonably putting claimants to their proof, to modify purely technical or arbitrary rules of proof and to excuse errors in the admission of evidence, yet where an essential allegation in a claim for compensation is duly controverted the issue thereby raised ought to be determined by the universally recognized criteria of truth, as are issues of fact in other judicial proceedings. The problem is to find a remedy for unavoidable failure of proof. To permit the substitution of methods of deception in place of right methods of proof is no true remedy therefor. The only reasonable remedy is to give claimants the benefit of every reasonable doubt in drawing inferences from facts properly proved.

P. Tecumseh Sherman.

New York, October, 1919.

[42] This sweeping proposition may be subject to qualifications. Under some conditions it may be expedient to write into the statute law a presumption the truth of which is established by experience. Such is the presumption as to the causation of "industrial diseases" created by §8(2) of the British Act.