55 Ohio App. 351, 9 N.E. (2d) 891, 23 Ohio L. Abs. 361, 9 Ohio O. 85 (1936). This case involved a set of facts similar to the case at bar, the plaintiff having been bitten while attempting to separate two dogs. The Court held that contributory negligence was no defense since the liability was predicated upon the statute and not upon the negligence of the defendant.

The phrase often used in dealing with cases of this nature that "every dog is entitled to one bite" certainly needs to be qualified in Ohio. The prevailing common law theory would say that he is entitled to one bite; the *Hayes* case, that he is entitled to more than one bite; but under section 5838 of the General Code, the unfortunate canine is entitled to no bites at all.

DAVID A. WIBLE

# WORKMEN'S COMPENSATION

WORKMEN'S COMPENSATION — AVAILABILITY OF COMMON LAW REMEDIES FOR NON-COMPENSABLE OCCUPATIONAL DISEASES

Smith brought an action in the Common Pleas Court of Marion County for damages for silicosis caused by the negligence of his employer, the Marion Brass & Bronze Foundry. In Cuyahoga County, on similar facts, the administratrix of the estate of one Triff, a deceased employee, filed an action for wrongful death against the National Bronze & Aluminum Foundry Co. Demurrers were sustained to each petition, which rulings were affirmed by the Courts of Appeal for the Third and Eighth Districts respectively. Motions to certify were allowed by the Supreme Court, which considered both cases in a single opinion. It was held that the common law remedy of an employee against his employer for occupational diseases, not compensable under the Workmen's Compensation Act, has not been taken away by the organic or statutory law of Ohio. *Triff* v. *National Bronze & Aluminum Foundry Co., Smith* v. *Lau,* 135 Ohio St. 191, 20 N.E. (2d) 232, 14 Ohio O. 48 (1939).

Thus, by a four to three decision, the court has directly reversed its former position, as set forth in *Zajachuck* v. *Willard Storage Battery* Co., 106 Ohio St. 538, 140 N.E. 405 (1919), and *Mabley and Carew* v. *Lee,* 129 Ohio St. 69, 193 N.E. 745, 100 A.L.R. 511 (1934). This may be attributed to the shifting personnel of the court, rather than to the inconstant attitude of any of the individual members. None of the majority group was on the court at the time of the *Zajachuck* case, and only Judge Zimmerman sat in the *Mabley and Carew* case,

in which he wrote a strong dissenting opinion. Judge Matthias, in dissenting, maintains the position he took in the *Zajachuck* and *Mabley and Carew* cases, and Chief Justice Weygandt has not changed the decision he made in the *Mabley and Carew* case. Of the four new members, Williams, Day, and Hart have aligned themselves with Zimmerman, while Myers has joined Weygandt and Matthias. All three of the dissenting justices have expressed their views in separate opinions, which indicates the strength of their convictions on this matter.

Occupational diseases were not compensable in Ohio until 1921, when Section 1465-68a, Ohio G.C., became effective. This section contained a schedule of 15 diseases which were made compensable; this number has been extended until it now has reached 22. Neither of the instant claims is compensable, since the exposures occurred prior to the addition of silicosis to the schedule. 117 Ohio Laws, 268 (1937). Plaintiffs' actions are predicated on tort for the negligence of the employer in failing to provide a safe place to work in violation of the laws of Ohio, failure to notify the employees of dangerous conditions, etc. The facts present two main issues: (1) Has an employee a right of action at common law for negligence of the employer proximately causing a non-compensable occupational disease? (2) If so, has this right of action been taken away by the organic and statutory law of Ohio?

In answering the first question in the affirmative Judge Williams follows the overwhelming weight of authority. *Gentry* v. *Swann Chemical Co.*, 234 Ala. 313, 174 So. 530 (1937); *Hurle's Case*, 217 Mass. 223, 224, 104 N.E. 336, L.R.A. 1916A 279 (1914); *Boal* v. *Electric Storage Battery Co.*, 98 Fed. (2d) 815 (Pa., 1938); *Barrencotto* v. *Cocker Saw Co., Inc.*, 266 N.Y. 139, 194 N.E. 61 (1934); *Pellerin* v. *Washington Veneer Co.*, 163 Wash. 555, 2 Pac. (2d) 658 (1931). None of the dissenting opinions contests this point, although there are *dicta* in Ohio which suggest the opposite view. *Industrial Commission* v. *Brown*, 92 Ohio St. 309, 316, 110 N.E. 744, L.R.A. 1916B 1277 (1915); *Zajachuck* v. *Willard Storage Battery Co.*, 106 Ohio St. 538, 140 N.E. 405 (1919).

The chief controversy lies in the consideration of the second question, which involves the interpretation of constitutional and statutory provisions, specifically Section 1465-70, Ohio G.C., and Section 35, Art. II of the Constitution of Ohio. The latter gives the legislature the power to pass laws establishing a state fund for the purpose of providing compensation to workmen and their dependents, for death, injuries, or occupational disease, and further provides that "Such compensation shall

be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium . . . shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease . . ." Of this Judge Williams says: "This section of the Ohio Constitution, in our judgment, does not deprive the employee of the right of action growing out of occupational disease in cases in which the disease was not made compensable. The words 'for such death, injuries, or occupational disease,' clearly refer back to the prior language of the provision, and mean death, injury or occupational disease for which compensation has been provided by the statute. If the word 'any' had been used for the word 'such' in the phrase quoted, the meaning would have been much broadened. An intent to narrow the meaning is therefore necessarily implied by the reference to preceding phraseology."

Section 1465-70, Ohio G.C., provides: "Employers who comply with the provisions of the last preceding section (Ohio G.C. sec. 1465-69) shall not be liable to respond in damages at common law or by statute . . . for injury or death of any employee, wherever occurring, during the period covered by such premium . . ." The majority argues that, since this statute was enacted before occupational diseases were made compensable, it could not have removed the common law right of action. This interpretation is bolstered by the similar treatment of closely analogous statutes in many other states. *Jones, Admx.* v. *Rhinehart & Dennis Co.*, 113 W. Va. 414, 168 S.E. 482 (1933); *Berkeley Granite Corporation* v. *Covington*, 183 Ga. 801, 190 S.E. 8 (1937); *Barrencotto* v. *Cocker Saw Co., Inc.*, 266 N.Y. 139, 194 N.E. 61 (1934); *Downing* v. *Oxweld Acetylene Co.*, 112 N.J.L. 25, 169 Atl. 709 (1933), 100 A.L.R. 519 (1936). The attitude evinced by these courts is that the Workmen's Compensation Acts were designed primarily to improve the plight of the disabled workman and his dependents—not to assure the employer of immunity from open liability.

Another majority argument, stressed by Judge Zimmerman in his *Mabley and Carew* dissent, is that to abolish the employer's liability at common law under these conditions is to give him protection for which he does not pay through contribution to the State Insurance Fund or otherwise. No cost of underwriting non-compensable occupational diseases is reflected in the premiums paid by the employer.

Each dissenting judge attacks the decision on different grounds. Chief Justice Weygandt argues that it is unnecessary to construe the language of Section 35, Art II, since the meaning and intent of the amendment was fully agreed upon by a joint committee representing

the employers and employees and set forth in a statement for the guidance of the voters of Ohio. This statement recited the effects of the amendment, among which were the wiping out of open liability and a fixed limit of financial liability, thus protecting the assets and credits of the employer. Weygandt also observes that none of the many decisions cited by the majority involves the constitutional language here employed.

Judge Myers' contribution to the dissent is one of policy rather than of construction. He considers that to so reverse a once settled issue is to "play fast and loose with fundamental principles."

Judge Matthias contends that Section 1465-70, in the light of the subsequently enacted Section 1465-69b (which provides for payments into the occupational disease fund) has completely abolished open liability. He also fears that the majority ruling will open the gate to a flood of litigation.

The view which the Supreme Court has now reached was advocated by the writer of a note in this LAW JOURNAL, criticizing the unjust effects of the *Mabley and Carew* decision. 1 O.S.L.J. 317 (1935). It is submitted that the instant decision more nearly effectuates the general purpose of the Act—to provide support to the disabled worker and his dependents. See Note, 47 Harv. L. Rev. 1074 (1934). To take from the employee a long-standing common law right and give him nothing in its stead cannot be reconciled with the motivating spirit and purpose of the Act. "The employee should not be made to suffer by giving up all his common law rights for an incomplete system of compensation, unless an express provision makes this interpretation inescapable." Note, 3 Duke Bar Ass'n Journal, 96 (1935). Under the reasoning of the majority opinion no such provision exists in Ohio. The argument that the decision will create a flood of litigation should carry little weight, since no action can be maintained without the establishing of the employer's negligence, even though proving such negligence has been facilitated by statutory standards. What justification can there be for permitting violation of these standards with complete impunity?

The tremendous significance of the ruling is reflected in its immediate consequences. The Ohio Manufacturer's Association, representing the organized employers, and the American Federation of Labor, representing the employees, went into conference and emerged with an agreed bill, now before the legislature, which would close the open liability in return for several concessions to labor. The proposed bill, S. B. No. 297, would protect against open liability by amending Section 1465-70 to read: "Employers who comply with the provisions of Section 1465-69 shall not be liable to respond in damages at common law or

by statute, for any injury, disease, or bodily condition, *whether such injury, disease or bodily condition is compensable under this act or not,* or for any death, resulting from such injury, disease or bodily condition . . ." (writer's italics). In addition the amendment prescribes a six months statute of limitations within which any action must be brought for occupational diseases not heretofore compensated from the fund. This is designed to limit the risk of suits at law for diseases contracted prior to the effective date of the amendment.

Foremost among the gains for labor in the proposed bill is the extension of Section 1465-68a to cover all occupational diseases, which term is defined as "a disease peculiar to a particular industrial process, trade or occupation and to which an employee is not ordinarily subjected or exposed outside his employment." Under the existing law compensation for silicosis is to be awarded only if the employee has been subjected to injurious exposure to silica dust, in his employment in Ohio, for periods aggregating five years, and only then if the disability or death results within one year after the last injurious exposure. Under the proposed amendment to Section 1465-68a the required period of exposure is reduced to three years, and the time limit after the last injurious exposure raised to two years.

A new section, 1465-68d, proposes to establish a Board of Review of three especially qualified physicians, to be appointed by the dean of the medical school of Ohio State University, the director of the Department of Health, and the Industrial Commission, each of which shall have one vote. The function of this board is to hear appeals of occupational disease claims which have been denied by the Industrial Commission. Decisions of this board as to medical facts will be binding.

Little, if any, opposition is expected to impede the passage of the proposed bill under an emergency clause. If it does pass the *Triff* decision has enabled labor to achieve a long-sought objective, blanket coverage for occupational diseases. Labor has definitely relinquished all right to common law remedy in return for an apparently complete system of compensation. Full coverage for occupational diseases, as distinguished from the schedule plan, has been adopted in a number of other states in one of two ways: (1) by broad construction of the word "injury," so as to include occupational as well as accidental injuries. Mass. Gen. Laws (1932) c. 152, sec. 26, interpreted in *Johnson's* case, 279 Mass. 481, 181 N.E. 761 (1932); (2) by specific statutory provisions making all occupational diseases compensable. Cal. Gen. Laws (Deering, 1931) Act 4749 sec. 3 (4); Conn. Gen. Stat. (1930) sec.

5223; N.D. Comp. Laws Ann. (Supp. 1925) sec. 396 a(2); N. Y. Session Laws of 1935, c. 254; Wis. Stat. (1937) sec. 102.01.

It is submitted that the all-inclusive type of statute is preferable to those which enumerate lists of compensable diseases. 16 Ore. L. Rev. 84 (1937); Wilcox, *The Schedule Fraud in Occupational Disease Compensation*, 24 Am. Lab. Leg. Rev. 119 (1934). That occupational diseases occupy a relatively significant position in *days lost* ratings is pointed out by Dr. Emery Hayhurst, *Current Status of Silicosis and Other Occupational Diseases in Ohio*, Industrial Medicine, May, 1939. The principal argument for discriminating in favor of certain specified occupations and diseases is that the cost of full coverage is prohibitive and too heavy a burden on industry. Whatever weight this objection has ever had has been largely nullified by the experience of those states operating under all-inclusive statutes. Rabinowitz, *Compensation of Occupational Diseases from a Legal Viewpoint*, 12 Wis. L. Rev. 198 (1937). Should blanket coverage prove too expensive we may expect a long-needed preventive movement, aimed at the elimination of the causes of occupational diseases. Such a movement, in addition to being socially desirable, should increase efficiency and improve employer-employee relations.

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