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WORKMEN'S COMPENSATION

Robert E. Rodes, Jr.*

The four years since this subject was last surveyed have been eventful ones; we cannot hope to do more than hit the high spots. A considerable liberalization of the coverage of the compensation laws is to be discerned in this period, highly influenced, it may be suspected, by the recent and much-cited Larson treatise.¹ The liberal pattern Dean Larson imposes on his material has evidently commended itself to the courts.

I. WORK-CONNECTED MALADIES—HEART CASES, OCCUPATIONAL DISEASES, AND THE LIKE

At this point, we seem well on the way to a solution of the troublesome question of the heart cases. A majority of the Supreme Court still adheres to the "unusual strain" doctrine in heart cases, but the majority is only four to three, and any change in the personnel of the court may well result in the abandonment of the doctrine.² By admitting that the rule does not apply to other employment-connected deteriorations,³ the courts would seem to be abandoning any pretence of a rational foundation for it.

The original rationale of the rule, it will be recalled, is that the statutory requirement that there be an "accident" is not satisfied unless some event takes place beyond the mere employment.⁴ There is, perhaps, medical opinion that would have it that a heart attack cannot be causally attributed to the employment at all unless something happens beyond what the victim is used to. This, however, is a controversial medical question, and there would seem to be expert opinion available to attribute heart attacks causally to the employment even in the absence of any unusual strain.⁵ Thus, the unusual strain requirement must be regarded as a legal requirement over and above causality—which is

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1. LARSON, WORKMEN'S COMPENSATION LAW (1952).

2. *Mergel v. N.J. Conveyors Corp.*, 14 N.J. 609, 103 A.2d 594 (1954).

3. *Bialko v. H. Baker Milk Co.*, 38 N.J. Super. 169, 118 A.2d 412 (App. Div. 1955) (cerebral hemorrhage).

4. *Cf. Neylon v. Ford Motor Company*, 8 N.J. 586, 86 A.2d 577 (1952); 10 N.J. 325, 91 A.2d 569 (1952).

5. The resolution of this conflict in expert opinion presents some difficulty in achieving a uniform treatment for heart cases. The *Bialko* case *supra*, accomplished a resolution by holding that greater weight should be given to the testimony of the doctor who treated the patient. This doctrine is a great boon to the workingman, but if it is premised on the theory that treatment of a case will give a better insight into a controverted question of theory, it seems difficult to accept.

what the Supreme Court opinions indicate that it is.⁶ This being so, it seems fairly clear that we cannot have a coherent system of jurisprudence as long as we require an unusual strain in heart cases, but not in cerebral hemorrhage cases. The days of the unusual strain doctrine are obviously numbered.

Meanwhile, important qualifications have been introduced. First, the *Mergel* case⁷ indicates that a strain may be unusual so as to satisfy the doctrine even if it is prolonged over several days, and that an occupation may be so variegated that there can be no criterion of usualness advanced to defeat compensability. Second, the *Snoden*⁸ case indicates that the application of the unusual strain doctrine is factual in nature, so that the findings of the lower courts can be left undisturbed by the Supreme Court. This process of getting rid of troublesome legal questions by pretending they are factual is a familiar one under the federal compensation legislation,⁹ but in New Jersey it is new. Doctrinally, there is little to be said for it. A piece of terminology that lacks sufficient referent in reality to be applied by a judge will scarcely have sufficient referent to be applied by a trier of fact.¹⁰ It seems likely, however, that the lower tribunals will be so unsympathetic to the unusual strain doctrine as to make short work of it under the invitation given them in *Snoden*. This is probably the next best thing to an out-and-out abandonment of the rule by the Supreme Court.

All this learning on heart cases, however, should have been made obsolete by the 1949 amendment to N.J. REV. STAT. 34:15-31, defining a compensable occupational disease to include:

. . . all diseases arising out of and in the course of employment, which are due to causes and conditions which are or were characteristic of or peculiar to a particular . . . employment, or which diseases are due to the exposure of any employee to a cause thereof arising out of and in the course of his employment.

This is the clearest possible abandonment of the old rule that a disease to be occupational had to inhere *qua* disease in the employment.¹¹ Thus, recent cases have quite correctly held that a disease caught from a fellow-employee, and an aggravation of a pre-existing condition by an otherwise harmless industrial process are both compensable occupa-

6. The majority opinion in the *Mergel* case *supra*, requires "an event or happening *beyond the mere employment itself* which brings about the final result or contributes thereto and without which the injury or death would not have resulted." 14 N.J. at 613, 103 A.2d at 596 (1954) (*italics supplied*).

7. Note 2 *supra*.

8. *Snoden v. Borough of Watchung*, 15 N.J. 376, 104 A.2d 841 (1954).

9. See *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Davis v. Department of Labor*, 317 U.S. 249 (1942).

10. See this writer's *Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone*, 68 HARV. L. REV. 637 (1955).

11. For a fairly recent example from another jurisdiction, see *Matter of Harman v. Republic Aviation Corp.*, 298 N.Y. 285, 82 N.E.2d 785 (1948).

tional diseases under the quoted legislation.¹² Under the old conception of an occupational disease as one which inhered in the occupation, there could be gaps between compensable accident and compensable occupational disease, whereby some injuries causally related to the employment went uncompensated.¹³ But a proper interpretation of the quoted provision would seem to require that accident and compensable occupational disease be held between them to exhaust the class of employment-connected injuries.

This would seem particularly true of the heart cases. Assuming that a given heart attack is shown by competent medical testimony to be due to exertion on the job, the particular exertion would seem necessarily to be either an unusual one or one characteristic of or peculiar to the employment. The courts have been willing to find an unusual strain whenever anything out of the ordinary occurs; it remains only to bring the usual within the language of N.J. REV. STAT. 34:15-31—a result that should be inescapable under the broad language of that section. Since the compensation for an occupational disease is the same as that for an accidental injury,¹⁴ there would seem to be no need to decide which of the two a particular claim is once it is established that it must be one or the other.¹⁵ Thus, if N.J. REV. STAT. 34:15-31 is properly presented to the court, we may hope to hear no more of the heart cases.

One other point in the disease area needs comment—the case of the epileptic who hit his head on the cement floor of his factory when he fell during a seizure.¹⁶ It was held, four to three, that he was not entitled to compensation because his injury was not causally related to his employment. Since there was no showing that the employment contributed to the seizure itself, the real question of causality was as to the account to be taken of the concrete floor. If it were to be regarded as a hazard of the employment, there seems to be no doubt that compensation would be awarded—as it was when an employee fell against a hot stove on account of his epileptic seizure.¹⁷ But here the majority held that there is no difference between this floor and one he might encounter any-

12. *Reynolds v. General Motors Corp.*, 38 N.J. Super. 274, 118 A.2d 724 (Hudson Co. Ct., Law Div. 1955) *aff'd on other grounds* 40 N.J. Super. 484, 123 A.2d 555 (App. Div. 1956) (tuberculosis caught from fellow employee); *Giambattista v. Thomas A. Edison*, 32 N.J. Super. 103, 107 A.2d 801 (App. Div. 1954) (fungoid condition of hand aggravated by immersion in benzene).

13. What is necessary for such an eventuality is that the onset of the disease be gradual, thus running afoul of the requirement that an accident be a sudden event, and that the disease not be one which inheres in the employment.

14. N.J. REV. STAT. 34:15-32.

15. There appears to be no practice of bringing claims for accident or occupational disease in the alternative, but there does not appear to be anything to prevent doing so.

16. *Henderson v. Celanese Corp.*, 16 N.J. 208, 108 A.2d 267 (1954).

17. *Reynolds v. Passaic Valley Sewerage Comm'rs.*, 130 N.J.L. 437, 33 A.2d 595 (Sup. Ct. 1943), *aff'd* 131 N.J.L. 327, 36 A.2d 429 (Ct. Err. & App. 1944).

where he chanced to fall: "Rigidity and firmness are adjuncts of the average floor despite its particular composition."¹⁸

Judge Clapp's dissent in the Appellate Division,¹⁹ adopted by the dissenters in the Supreme Court, points out that the requirement that the injury arise out of a hazard peculiar to the employment or increased by it has no warrant in the statutory language, and has hitherto been applied in New Jersey only where an extraordinary force of nature, such as lightning, caused the injury. But Judge Clapp seems to reject not merely the requirement that there be a *hazard* peculiar to the employment, but also any requirement that there be a *condition* peculiar to the employment. He would compensate wherever he finds causally related to the injury any physical attribute of the employment, even if the same physical attribute could have been found anywhere else, and would have had the same effect wherever it was found.

There appear, then, to be involved here not two but three formulations of the meaning of the word "employment" in the phrase "arising out of the employment." Judge Clapp will be satisfied if the physical and human surroundings to which the employee is subjected on the job contributed to the injury, while the majority require further that the surroundings be those to which the employee is subjected because he is on the job *rather than elsewhere*. Thus, in the *Gargiulo*²⁰ case an employee who was hit by a boy's arrow while at work in the back yard of his employer's store was awarded compensation because but for the employment he would not have been there, and, therefore, would not have been hit. The injury was contributed to not only by his physical surroundings, as in the instant case, but by his physical surroundings *as distinguished from other physical surroundings*. The very terminology of a "but for" test for causation would seem to require that this distinction be taken into account. To be distinguished is the view, evidently advocated by the employer in *Gargiulo*, that there must be a *hazard* peculiar to the employment that contributes to the injury. This view Judge Clapp shows to be rejected by the New Jersey cases. In view of *Gargiulo*, it does not seem proper to read the instant case as adopting it. The law now seems to be that there must be a condition peculiar to the employment, but not necessarily one creating a special hazard.

There remains to be considered Judge Clapp's argument that the injury was contributed to by a condition peculiar to the employment—the fact that the floor was concrete instead of some softer material. This seems plausible, if not notably more plausible than the majority view that floors generally are so hard that relative hardness among them is insignificant. At any rate, there is no great legal issue involved on this level, and it is well settled that not everyone can have compensation. If

18. 16 N.J. at 214, 108 A.2d at 270.

19. 30 N.J. Super. 353, 360, 104 A.2d 720 (App. Div. 1954).

20. *Gargiulo v. Gargiulo*, 13 N.J. 8, 97 A.2d 593 (1953).

we turn to policy considerations, it is at least possible that a decision for compensation here would have an adverse effect on the employability of epileptics that would leave them as a class worse off than they are under the prevailing decision.

II. CUT UPS, FIGHTS AND FROLICS

Most significant of the course-of-employment cases seems to be the *Secor*²¹ case. Secor, a garage attendant, had been splashed with gasoline while filling a customer's tank. His employer told him—how firmly is in doubt from the testimony—to change his clothes. He stated that he was not afraid of gasoline, and lit a match—whether to light a cigarette or to demonstrate his lack of fear is again in doubt. Next thing, he was in flames. The majority held that even assuming the least favorable of the possibilities open on the testimony, Secor could not be said to have deviated from the course of his employment sufficiently to warrant denial of compensation. It having been admitted on all sides that the injury was not intentionally self-inflicted, the decision would seem to be unassailable, if unconventional. The dissenters in the Supreme Court did not file an opinion, but Judge Jayne's delightful one-page dissent in the Appellate Division more than supplies the defect.²² "As well", it concludes, "might he have chosen to bite the nozzle of the hose to display the strength of his teeth."

Here is rationality responding to the wholly irrational. Can it be in the course of a man's employment to do what it would have been supposed that no one in his right mind would ever do? For the majority in both cases, the deviation is momentary, impulsive, and thus within the range of attention to the job at hand that is to be expected of a human, as distinguished from a mechanical, agent. Dean Larson, in a passage quoted and relied on by the Supreme Court, puts it this way:

Along with all the other frailties of the average man—his carelessness, his prankishness, his tobacco habit, his cola habit, his inclination to rest once in a while and chat with his neighbor—there must also be expected one more: his natural human proclivity for sticking his head in mysterious openings, putting his fingers in front of fan blades, and pulling wires and pins on strange mechanical objects that he finds.²³

It should be noted that the Supreme Court seems to be combining momentariness and naturalness into one thing, whereas there would seem no reason to suppose a deviation could not be prolonged but natural, or, indeed, momentary but unnatural. The former of these possible cases was disposed of adversely to the employee in *Robertson v. Express Container Corp.*²⁴ To Judge Jayne, the latter of them is the instant case, and is also to be disposed of adversely to the employee. But it seems that

21. *Secor v. Penn Service Garage*, 19 N.J. 315, 117 A.2d 12 (1955).

22. 35 N.J. Super. 59, 66, 113 A.2d 177, 181 (App. Div. 1955).

23. 1 LARSON, *WORKMEN'S COMPENSATION LAW* 369 (1952).

24. 13 N.J. 342, 99 A.2d 649 (1953).

the Supreme Court is advisedly combining the two factors into one. The question ought to be, in every case, whether the action asserted to be a deviation is that of a human being applying himself in a human way to his job. To this question both the time he spends and what he does with it are relevant, but neither is dispositive.

Given this criterion, does Secor come within it? His act was certainly momentary; was it natural in the way that curiosity is natural? Anyone who has kicked an automobile because it refused to start cannot deny that it is.²⁵ Secor was ill-advised in his attempt to assert his superiority over his inanimate environment, but the motivation is not unfamiliar. There seems to be no reason for denying Secor what we give to a woman who puts her head in the way of a descending dumb-waiter.²⁶

Another deviation case, *Green v. DeFuria*,²⁷ involved a gas station attendant who left his station to silence a horn that had started blowing in the middle of the night in an automobile parked in another station across the street. The trip was perhaps in violation of an order by the employer never to leave the station alone. Compensation was allowed by the Supreme Court for injuries sustained when he fell into a grease pit in the other station. The court advanced various considerations, and seemed to rely more on the cumulative effect of them all than on any one of them. It was pointed out that the employee might have regarded the deviation as in furtherance of his master's business, either because it enabled him to hear the telephone or because it increased the good will of his neighbors, and that even if the rule was violated by going so short a way away (leaving a friend watching the office), the violation might have been reasonable under the circumstances. The general idea of this case, then, is that a departure from the usual activities of the employment will not break the course of the employment if it was reasonable under all the circumstances, and that the existence of a rule will be only one of the circumstances to be taken into account. The court did not consider what the effect would have been had the employee gone to silence the horn because he could not stand listening to it, but it is likely that no different result would have been reached. Together, the two cases just discussed seem to be moving away from a rigid criterion for deviation, and toward a flexible standard that takes account both of the exigencies of the situation and of the foibles of human nature.

Among these foibles, belligerency has come in for a good deal of consideration during the period under survey.²⁸ Of the three cases involving assault victims, one, where the victim attempted to make the

25. Note also that we have made a folk-hero out of John Henry, who, according to the legend, died in a fruitless attempt to drive steel faster than a steam drill. It appears that no compensation law was in force at the time.

26. *Bethlehem Steel Co. v. Parker*, 64 F.Supp. 615 (D. Md. 1946), cited with approval in the instant case.

27. 19 N.J. 290, 116 A.2d 19 (1955).

28. Some attention seems also to have been paid to pub-hopping. *White v. Sindlinger*, 30 N.J. Super. 525, 105 A.2d 437 (App. Div. 1954).

assaulter stop heckling a third employee whose distraction was slowing the victim's work, is fairly obvious for compensation, and only one justice was for denying it.²⁹

The two other assault cases are delayed-action cases. In *Augelli v. Rolans Credit Clothing Store*,³⁰ Augelli, at work collecting bills, came upon one Belcher with whom, while on a similar errand some weeks previously, he had had words concerning the driving of their respective automobiles. Belcher was disposed to renew the quarrel, and Augelli sought compensation for the resulting injuries. The Appellate Division wrestled with the problem of distinguishing between a work-connected quarrel and a "personal feud." It pointed out that the delay between the work-connected quarrel and the assault is relevant only if assaulter and victim have meanwhile had some association extraneous to the employment which might have led to the assault. Augelli was fortunate that he had not seen Belcher before or since the original quarrel except when the assault took place.

He was fortunate also that he was again at work when assaulted. Had he not been, the accident would have been "arising out of" the employment, but would not have been "in the course of" it. This was a bitter lesson for one Lester who visited his place of employment in an off time, and there renewed a work-connected quarrel, thus getting himself beaten up. He was unable to persuade the trier of fact that he had an employment-connected reason for being there at the time, and only three justices of the Supreme Court thought the attempt of a supervisory employee to settle the quarrel brought him back in the course of his employment.³¹

The rule requiring that the victim be at work when assaulted is a harsh one, and has no reason behind it except an unimaginative reading of the statute. But it seems to be so solidly ensconced in the cases that not even Larson is willing to depart from it.³² To this writer, however, it seems arguable either that the course of the employment extends wherever the consequences of the employment extend, or that the course-of-employment requirement is satisfied whenever the injury is the culmination of a chain of events initiated by the employment. A man who falls into the river in the course of his employment abandons his master's business and devotes himself to his personal business of swimming; should he drown after a long period of such a deviation, no one doubts that compensation would be allowed. One who antagonizes a sufficiently vengeful adversary may well be in as great danger as one who has fallen into the water.

For a different analogy, if a radio repairman is awakened in the mid-

29. *Cierpal v. Ford Motor Co.*, 16 N.J. 561, 109 A.2d 666 (1954).

30. 33 N.J. Super. 146, 109 A.2d 439 (App. Div. 1954).

31. *Lester v. Elliott Bros. Trucking Co.*, 18 N.J. 434, 114 A.2d 8 (1955).

32. 1 LARSON, WORKMEN'S COMPENSATION LAW 445 (1952).

dle of the night and asked to repair a radio, and electrocutes himself, he is in the course of his employment because repairing radios is an incident of his job. If a man comes to his door to discuss a radio already repaired, and he trips going downstairs to let him in, probably the same result—talking about work done is an incident of doing it. But if talking about it is such an incident, why is not being beaten up over it? Can it be that a brief self-justificatory harangue before or during the scuffle will make all the difference? The only difference discernible between a discussion of the job and a beating over the job is that one is active on the part of the employee, the other passive. This distinction has no warrant at all in the statute.

III. THE COVERED EMPLOYMENT RELATION

During the period under survey, it was held that a parishoner working on a church building is not an employee of the church,³³ that a man sent by his union as a one-day replacement for another union member is not a casual employee,³⁴ that a limited partnership is an entity so distinct from its members that it may in appropriate circumstances be the employer of one of them,³⁵ and that where four men who make explosives as a spare-time business are so thoughtful as to incorporate, and to agree that the two among them who do the work will get paid when the business pays off, the widows of the latter two will be entitled to compensation when they blow themselves up.³⁶

More interesting in the last of the cases just referred to—the *Nitroform* cases—is the determination that the wages of the decedents are to be computed on the basis of what they earn at their regular full-time jobs, rather than what they expect to get from their spare-time work for the employer in whose service they are killed. This holding has in its favor the policy consideration stated by Dean Larson in a passage used by the Supreme Court to head off its discussion of this topic:³⁷ “compensation is for the economic loss to the worker, and the computation based on wages is merely a basis for computing that loss.” Since the loss is of his whole productivity, the court argues from this premise, compensation for his whole productivity is in order. The decision seems on the whole sound, although it may have ramifications worth further consideration, such as if a person's two jobs should be at entirely different ranges of remuneration, or if a person should be working two full-time jobs at a pace no one could possibly keep up for more than a

33. *Armitage v. Trustees of Mt. Fern M.E. Church*, 33 N.J. Super. 367, 110 A.2d 154 (Morris Co. Ct., Law Div. 1954).

34. *Malloy v. Capitol Bakery*, 38 N.J. Super. 516, 119 A.2d 487 (Middlesex Co. Ct., Law Div. 1955).

35. *Carle v. Carle Tool & Engineering Co.*, 36 N.J. Super. 36, 114 A.2d 738 (App. Div. 1955).

36. *Mahoney v. Nitroform Co., Inc.*, 20 N.J. 499, 120 A.2d 454 (1956).

37. 2 LARSON, WORKMEN'S COMPENSATION LAW 71 (1952).

short period. It should be noted also that the holding introduces a certain discrepancy into insurance rates based on the payrolls of the particular employer, since the quantum of compensation will be influenced by factors extraneous to that payroll. No doubt, however, the incidence of double employment is so slight that it will find its way into the rates without a serious problem.

One case, allowing compensation to a man who ran his own earth-moving service with his own heavy equipment,³⁸ seems to this writer objectionable in that it used as a test the amount of control exercised over the workman, to the exclusion of the "economic dependency" test which generally gives sounder results. The idea that a man is my employee if I exercise control over him is a product of the law of vicarious liability, where it makes perfect sense. But the term employee should not be used univocally in the vicarious liability context and in the social legislation context. The one considers a business with respect to the impact of its activities on outsiders, the other with respect to the distribution of its economic proceeds. There is no necessary connection between the two. Thus, the courts have very wisely refused to be bound by the precedents created under the law of vicarious liability when the employment status under a piece of social legislation was in issue.

Instead, the "economic dependency" test was developed, whereby a workman is an employee for these purposes if his status in the operation is such that he is dependent on his employer for his support. Thus, in the well-known *Silk* case, men who brought their own shovels to shovel coal into bags were held to be employees, although under almost no control, whereas men who brought their own trucks to drive off the coal thus loaded were not.³⁹ Thus, for social legislation, including workmen's compensation, ownership of equipment representing a substantial investment, as there was in the instant case, should be a far more significant factor than control. This is not to deny that the exigencies of a given business may be such as to make the owner of substantial equipment economically dependent on the contractor for whom he uses it. But, the court is silent on the point. If, as would seem from the instant case, our Supreme Court is going to regard control as of more significance than economic dependency in determining who is an employee, the general effect will be to deny compensation where it should be given.

The subject of the covered employment relation gave rise to an extremely peculiar constitutional case during the period under survey. In *DeMonaco v. Renton*,⁴⁰ it was held that the constitutional requirement of equal protection was offended by excluding from the coverage of the act a class consisting of all persons "[e]ngaged in the vending,

38. *Piantanida v. Bennett*, 17 N.J. 291, 111 A.2d 412 (1955).

39. *United States v. Silk*, 331 U.S. 704 (1947).

40. 18 N.J. 352, 113 A.2d 782 (1955).

selling or offering for sale or delivering directly to the general public newspapers, magazines or periodicals or acting as sales agent or distributor as an independent contractor of or for any such newspaper, magazine or periodical. . . ." As legislation, the provision has little or nothing to be said for it. It denies compensation to a group of working people in one of the lowest economic brackets, obviously economically dependent and incapable of providing for their exigencies out of their own means. As to workers in this class who are of age, denying compensation seems inexcusable. Where minors are involved, it is perhaps arguable that the primary responsibility for their injuries should fall on the parents rather than on the employer. But the parents themselves are in all likelihood unable to provide properly for serious injuries to their children. One who employs the child would seem to have a moral responsibility, if not to the child himself, to the family unit of which the child is a part. Thus, exclusionary legislation like that quoted would seem to be open to serious moral objection.

But can that moral objection be translated into a constitutional objection? If there is a legitimate way of doing so, the court has not used it. The opinion in the instant case begins by construing the statutory language as broadly as possible—indeed, more broadly than this writer would have thought possible—to apply to every person whose duties include, as however insignificant a part, the selling or delivery of newspapers, magazines or periodicals. Thus, we are told, under this statute we can have two clerks behind the counter at a soda fountain. The grill is at the right-hand end, while the cash register is on the left with a pile of *Star-Ledgers* beside it. The right-hand man who makes sandwiches and the left-hand man who takes care of the cash register both slip in a pool of chocolate syrup while making ice cream cones in the middle. The right-hand man is compensated and the left-hand man is not on account of those *Star-Ledgers*. Having thus elongated the neck of the statute, the court proceeds to chop. There can be no legitimate reason for a statute that thus irrationally distinguishes between soda clerks. The result is obvious.

However much one may sympathize with the desire to get rid of so obnoxious a statute, so flagrant a violation of the principle that a statute is to be so construed as to save it can scarcely be condoned. What the statute is meant to apply to, is those in the business of news-vending, as distinguished from those in the business of soda-clerking or the like. The distribution of periodicals is an established industry having, no doubt, like any other, twilight zones around the edges, but constituting on the whole a fairly distinguishable class. This class—whether from sinister motives or from a desire to see cheap, plentiful literature in the hands of their constituents we cannot tell—the legislature desired to favor specially with a special financial advantage. However reprehensible it may be thus to subsidize industry at the expense of the working-

man, it cannot be said to be an irrational system of classification. It should be noted that a good many of the moral objections to this exemption would seem to apply with equal force to that of farm labor, a class that is excluded from workmen's compensation benefits in almost every state except New Jersey.

IV. ATTORNEY'S FEES

The important *Neylon* litigation terminated during the period under survey with an award of counsel fees under R. R. 5:2-5(f) of \$2,850, slightly less than ten times the amount of the award. The employer contended that counsel should be given no more than the claimant might reasonably be expected to pay for services resulting in the \$296.43 actually recovered. Judge Jayne in the Appellate Division gave the contention the treatment for which he is famous.⁴¹ The result of this holding will be that when a test case turns out to be small in amount it will still be possible to have competent counsel on both sides.

The other case during the survey period on attorney's fees in the compensation case proper, involved the interpretation of the 1952 amendment respecting the effect of a settlement offer on the amount of the fee. Before that amendment, the statute provided that when, prior to the hearing, compensation is offered, the fee must be based on only the difference between the amount offered and that awarded. The amendment inserted the words "at a reasonable time" before "prior."⁴² In *Seitz v. The Singer Mfg. Co.*⁴³ it was held that an offer made two working days before the hearing, particularly when it was not communicated to counsel, did not come within the purview of the statute as amended. The reasonableness of the time was held to be dependent on the probability that counsel would not have to go through the work of preparing for the hearing.

But the most important attorney's fee cases during the survey period were those involving third-party claims. The 1951 amendment to N.J. REV. STAT. 34:15-40, whereby the employer or insurance carrier is responsible for a share of the attorney's fee on a third-party recovery by the employee,⁴⁴ has been thoroughly treated in five cases in various courts. In two cases, the Supreme Court held that the liability of the employer for his share of attorney's fees extends to no more than the same percentage of the compensation liability that the attorney is to receive of the total recovery,⁴⁵ that the percentage is of estimated future

41. *Neylon v. Ford Motor Co.*, 27 N.J. Super. 511, 99 A.2d 664 (App. Div. 1953). No one thought to raise the question of the constitutionality of R. R. 5:2-5(f), but there would seem to be at least some question whether making a litigant pay his adversary's counsel fees is merely procedural.

42. N.J. REV. STAT. 34:15-64, as amended N.J. Laws 1952, c. 318, p. 1040.

43. 36 N.J. Super. 546, 116 A.2d 641 (App. Div. 1955).

44. N.J. Laws 1951, c. 169.

45. *Caputo v. The Best Foods*, 17 N.J. 259, 111 A.2d 261 (1955).

compensation liability as well as of compensation already paid,⁴⁶ and that the sum is a reimbursement to the employee for attorney's fees incurred or paid by him, so that the attorney cannot have a percentage of the total recovery from the employee and the same percentage of the employer's share in addition.⁴⁷

In another case, the Appellate Division held that on a proper showing (not made in the particular case) the injured employee could be held to have waived his right to reimbursement of his attorney's fees.⁴⁸ This holding seems objectionable in that the only occasion that will present the employee with a bona fide reason for waiving attorney's fees will be one in which, as in the particular case, the employer or insurance carrier is involved in the third party's liability, as an indemnitor or as a liability insurer. For everyone except the attorney, the waiver of the attorney's fee is tantamount to a reduction of the amount to be paid into the settlement by the employer or insurance carrier, together with a corresponding reduction in the amount accepted by the employee in settlement. Let us consider how this will work. Assume a certain employee has sustained injuries resulting in a compensation liability of \$21,000. He sues a third party, who, either by contract or under some common-law rule, is entitled to indemnity from the employer. Negotiations have proceeded to such a point that the employer-indemnitor is willing to expend another \$16,000 to settle the case. The employee's attorney has two alternative methods of settling. Assuming that he has been retained on a one-third contingent fee, and he advises the employee not to waive reimbursement, a settlement of \$30,000 will result in the desired \$16,000 out-of-pocket for the employer. The third-party tortfeasor will pay \$30,000, for all of which the employer will indemnify him. The employer, meanwhile, will get back the \$21,000 compensation liability (or an equivalent remission of future liability⁴⁹), less \$7,000 attorney's fee, or \$14,000. \$30,000 out less \$14,000 in makes a total of \$16,000 out. Under the other alternative, with waiver of attorney's fees by the employee, the settlement figure can be fixed at \$37,000—that figure less this time the full \$21,000 reimbursement again making the desired \$16,000.

But let us see who gets the \$16,000 under the two alternatives. Under the first alternative, the settlement figure is \$30,000, entitling the attorney to a fee of \$10,000. \$7,000 of this is paid by the employer, as we have seen, leaving \$3,000 to be made up by the employee out of his \$9,000 (\$30,000 less \$21,000 compensation reimbursement) net. Final

46. *Ibid.*

47. *Dante v. Gotelli*, 17 N.J. 254, 111 A.2d 267 (1955).

48. *McDermott v. Standard Accident Ins. Co.*, 40 N.J. Super. 119, 122 A.2d 371 (App. Div. 1956).

49. The mechanics will be somewhat more complex than they are here shown to be if the payments have not yet been made. It would seem, however, that the sums ultimately pocketed by the respective parties will turn out to be the same.

return to the employee is therefore \$6,000. Under the second alternative, the settlement figure is \$37,000, entitling the attorney to a fee of \$12,333.33, all of which must be made up by the employee, who has waived his right to have the employer pay part. Thus, out of the \$37,000, he must pay \$21,000 in compensation reimbursement plus \$12,333.33 attorney's fee or \$33,333.33 all told. This leaves him \$3,666.67 for his very own.

To summarize our calculations, in each case the employee pays out \$16,000 in addition to the compensation liability already paid or incurred. This is distributed between the employee and his attorney as follows:

	Alternative 1 (no waiver)	Alternative 2 (waiver)
Employee	\$6,000.00	\$3,666.67
Attorney	10,000.00	12,333.33
	<u>\$16,000.00</u>	<u>\$16,000.00</u>

However highly we regard the integrity of the bar, a rule of law that puts this kind of temptation in the way of an attorney negotiating a settlement would seem inadvisable. On the contrary, the public policy enunciated some time ago against compromise settlements of compensation liability would seem equally strong here.⁵⁰

Another case that seems to lead to results open to somewhat similar objections is one in the Chancery Division in which the attorney for an injured workman, having negotiated with a third-party tortfeasor a settlement for an amount less than the compensation liability, was allowed to proceed in his own name for a judgment compelling the tortfeasor to pay the agreed-on settlement into court, and the compensation carrier to release its subrogation rights in exchange for the money thus paid in less the attorney's fee.⁵¹ The court, although it questioned the desirability of denying the employer or carrier any control over a settlement for less than the compensation liability, felt compelled under the law to grant the relief sought. The upshot of the case is that an attorney is left free to negotiate in a case in which his client has no stake. The employee has no financial interest in the settlement to be effectuated, and the wishes of the financially interested employer or carrier are not to be consulted. The attorney, then, seems to be in a position of representing no one but himself. The workmen's compensation law may contain nothing against such a result, but a sound regulation of the practice of law would seem to require something different. Perhaps it would not be going too far to say that the attorney is under a secondary responsibility to the subrogee, subordinate, of course, to his duties to his own client, but superior to his right to his own private cut of the take. At

50. *P. Bronstein & Co., Inc. v. Hoffman*, 117 N.J.L. 500, 189 Atl. 121 (1936).

51. *Belfatto v. Massachusetts Bonding and Ins. Co.*, 39 N.J. Super. 507, 121 A.2d 431 (Ch. Div. 1956).

any rate, he should not be given standing to enforce the settlement in his own name without any showing of authority from his client.

The last case in this series, although earlier in time, is one in the Law Division holding that where the compensation proceeding was brought in New York and the third-party action in New Jersey, the New York law, under which the attorney's fee all comes out of the employee's share, was controlling, so that the insurance carrier was entitled to reimbursement of the full amount of the compensation award, without deduction.⁵² This seems to be perfectly sound conflicts doctrine, but, in the light of the cases just discussed, it may indicate not only the possibility of the third-party claim affecting the advantage for the employee of choosing New Jersey instead of some other state as a compensation forum—as will be discussed below—but also the possibility of a conflict of interest between the employee and the attorney advising him as to the proper compensation forum to choose.

The attorney's lien cases, then, seem to have reached an effective adjustment between the employee and the employer or carrier. There remains for further judicial consideration only the attorney himself, whom the ramifications of the law have thrust into an unfortunate position of playing a lone hand in the midst of the negotiations involved in the third-party settlement. It would seem to be vital to the preservation of the traditional conception of the attorney as representing a client that some change be made either in the case law or in the rules respecting the practice of law.

V. CONFLICT OF LAWS

The survey period produced two Supreme Court cases and two lower court cases meriting discussion. One of the latter is the one just mentioned that applies the law of the state in which the award is entered to the question of whether attorney's fees in a third-party recovery are payable out of the reimbursement to the employer or insurance carrier, or whether the latter is entitled to reimbursement in full. The upshot is that the New Jersey compensation forum, with a benefit level usually somewhat less advantageous than those under the New York law or under the Longshoremen's Act, may turn out to be a more favored forum for injured workmen with a possibility of a third-party recovery. This may turn out to be especially true in the maritime area, where there is often both a choice between the state and federal forums and a valuable third-party claim. The Longshoremen's Act gives the employer complete control over the third-party claim, unless the employee is willing to forego compensation until the claim is prosecuted to com-

⁵². *Privitera v. Hillcrest Homes, Inc.*, 29 N.J. Super. 591, 103 A.2d 55 (Law Div. 1954).

pletion.⁵³ Where the third-party claim is apt to be substantial, the most important use of compensation is to enable the injured workman to maintain himself while waiting for the third-party claim to be tried or settled. Maritime employers seem to have been in the habit of voluntarily paying compensation for this purpose, although they are not obliged under the law to do so. But, as Justice Black pointed out in dissent, their enthusiasm for this procedure is apt to be dampened by the case in the United States Supreme Court recognizing a rather broad liability on the part of the employer to indemnify the third-party tortfeasor.⁵⁴

The New Jersey law will fill in the breach in a good many cases. Under it, the worker will not only be able to have compensation while prosecuting his third-party claim, he will, under any given third-party settlement, be richer by one third of the New Jersey compensation than he would have been if he had sought his remedy under the Longshoremen's Act.⁵⁵

This being the case, the question of the extent to which the New Jersey act is an alternative to the Longshoremen's Act becomes of considerable importance. The Supreme Court expressed itself on this point in *Green v. Simpson & Brown Construction Co.*,⁵⁶ an unfortunate opinion which makes no attempt to set forth a state policy with respect to jurisdiction for injuries on navigable waters, and badly misapprehends the federal authorities. While the opinion is quite right in saying that the United States Supreme Court adheres verbally to the proposition that a state cannot provide compensation to workers injured on navigable waters in maritime employment, the statement that "a state has no power to enact statutes granting compensation for injuries sustained on navigable waters"⁵⁷ is in direct conflict with a number of federal authorities, and supported by none. And even the verbalization about injuries on navigable waters in a maritime employment is no longer being applied in practice to limit the availability of state compensation. The process by which this was accomplished is too complicated to be set forth here,⁵⁸ but the present situation is that all assumptions of jurisdiction by either state or federal authorities have been met by per curiam affirmances in the United States Supreme Court.⁵⁹ On

53. *Czaplicki v. The S.S. Hoegh Silvercloud*, 76 S. Ct. 946 (1956) has qualified this control where the employer or carrier is not timely in prosecuting the employee's case, and has adverse interest.

54. *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 348 U.S. 813 (1955).

55. Since the compensation collected will in any case have to be given back, the difference in the benefit level will not matter.

56. 14 N.J. 66, 101 A.2d 10 (1953).

57. *Id.* at 71, 101 A.2d at 12.

58. See this writer's *Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone*, 68 HARV. L. REV. 637 (1955).

59. *Bethlehem Steel Co. v. Moores*, 335 U.S. 874 (1948); *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366 (1953).

this state of the federal law, the state can either assume all jurisdiction the federal precedents allow it, or limit jurisdiction under rules of its own, based either on the verbalization still given lip service in the federal Supreme Court, or on its own statute. But our Supreme Court in *Green* did none of these things. Had this aspect of the case gone to the federal Supreme Court, the holding would certainly have been vacated as resting on an erroneous interpretation of federal law.⁶⁰

Thus, the *Green* case cannot be regarded as authority on the availability of state compensation to maritime workers in New Jersey. Leaving that case out of consideration, we find nothing to guide us but the general federal practice, which has been to allow all assumptions of state jurisdiction. This practice has never been extended to longshoremen proper (although such an extension in the future cannot be said to be inconceivable), nor has federal jurisdiction ever been extended to injuries on land except in the case of a marine railway or dry dock. But between these two limits it seems that the worker will be able to choose between federal and state compensation in every case. The difference between the two laws with respect to attorney's fees in third-party actions should have a certain amount of effect in influencing the choice in favor of New Jersey.

In the area of interstate conflicts, our Supreme Court has delivered an opinion that should be a real contribution to the clarification of the complex problems of the effect of proceedings in one state on the right to proceed in another. *Buccheri v. Montgomery Ward & Co.*⁶¹ involved a New York resident, employed in New York, injured while on business for his employer in New Jersey. Compensation was awarded in New York, and subsequently was sought in New Jersey. The Supreme Court, after reviewing the well-known federal cases held the law to be this: 1) Since the New York award did not purport to preclude an award elsewhere, the *Magnolia Petroleum*⁶² decision was not applicable.⁶³ 2) The federal decisions, such as *Bradford Electric*,⁶⁴ *Alaska Packers*,⁶⁵ and *Pacific Employers*⁶⁶ indicate that what is called for is a balancing of the interests of the two states involved; under such a balancing of interests, the law of the state of residence, unless obnoxious to the public policy of the state of injury, should be given effect. 3) The law of New York is not obnoxious to the public policy of New Jersey, since benefits are comparable, the administration is equally liberal, and it is

60. As was done in *Baskin v. Industrial Accident Comm'n*, 338 U.S. 854 (1948). In fact, the case turned alternatively on an adequate state ground—that there was no evidence that the injury was employment-connected.

61. 19 N.J. 594, 118 A.2d 21 (1955).

62. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943).

63. *Industrial Comm'n v. McCartin*, 330 U.S. 622 (1947).

64. *Bradford Elec. Light Co. v. Clapper*, 386 U.S. 145 (1932).

65. *Alaska Packers Ass'n v. Industrial Accident Comm'n.*, 294 U.S. 532 (1935).

66. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n.*, 306 U.S. 493 (1939).

as easy for these parties to litigate in New York as in New Jersey, if not easier.

This kind of common sense approach to conflicts problems seems very well calculated to effectuate the policies of the workmen's compensation legislation, which are common to the various states. The remedies afforded in New York should be at least as satisfactory as those available here; at the same time, the instant case leaves it open to New Jersey to supplement the remedy afforded by one of the less liberal states. Thus, New Jersey can see that those employees in whom she has an interest receive the measure of compensation her policy considers adequate without the necessity of reviewing awards made in states with similar standards of adequacy.

It should be noted, however, that Buccheri has a third-party suit pending in New Jersey. It is to be feared that the ubiquitous attorney's fee problem is again to be discerned here. Had Buccheri prevailed in the instant case, there would have been a New Jersey award in his favor on the books, whereupon a pro rata share of the attorney's fee would be payable out of the compensation returned to the employer out of the third-party recovery. In this respect, the law of New York is emphatically not comparable to that of New Jersey. In applying the principles stated above, the court ignored the discrepancy in the treatment of attorney's fees. This discrepancy although monetarily substantial, would seem not to go to the policy of the respective acts. The effect of the New York rule is to cut the amount, not of the compensation received, but of the tort recovery retained. If this were to be considered a sufficient violation of our policy, we might apply the New Jersey rule as to attorney's fees even though the award was entered in New York; there seems no reason for a New Jersey award. It should be reiterated, however, that the conflicts aspects of the attorney's fee situation, like the legal practice aspects, present serious problems that have not yet been attended to.

One other case of interstate conflict, this time in a county court, is of interest.⁶⁷ It involves an airline stewardess who was hired in Missouri, but had been operating out of Newark for some years. A number of personnel records on her were kept in Missouri. She was injured on an interstate flight, long enough after takeoff from Newark to make it inconceivable that the injury took place in New Jersey. The court denied compensation, finding neither place of hiring nor place of injury to support jurisdiction. Since state boundaries are themselves fairly arbitrary lines on the map, any legal distinction based on them will itself have some savor of arbitrariness, and this may be as good a solution as any. This writer would, however, have held that the existence of a

67. *Crawford v. Trans World Airline*, 27 N.J. Super. 567, 99 A.2d 673 (Hudson Co. Ct., Law Div. 1953).

home base in Newark localized the employment sufficiently in New Jersey to warrant an award of compensation here.

VI. MISCELLANEOUS

The notice requirements of the Statute were considered in two cases in the Supreme Court, both of which found sufficient notice. In one,⁶⁸ a man presented a letter from his doctor that he was not to do any twisting, turning, or bending—which his usual work required. In the other case,⁶⁹ a man complained to his foreman of a pain, and took the day off. More than 90 days thereafter his disability set in. The upshot of these cases would seem to be that anything sufficient to put the employer on inquiry as to whether or not there was a compensable injury is sufficient to satisfy the statutory provision that sets up actual notice as an alternative to formal written notice.

In the latter of these two cases, it was noted in passing that the requisite notice is not of the injury but of the accident, a holding complemented by the holding in another case that it is the accident, not the injury, that sets the statute of limitations running.⁷⁰ This is hard on an employee who does not learn of the seriousness of what has happened to him until it is too late to file a claim. It seems, however, that the result is required by the statute.

On the subject of notices, incidentally, a County Court has held that an insurer who was not notified of the accident by the insured can have reimbursement for the amount of compensation paid out by it, regardless of prejudice.⁷¹ This seems consonant with the general principle that the rights and duties of employer and insurance carrier *inter se* are not affected by the workmen's compensation law beyond what is necessary to carry out the overriding purpose of seeing that the injured worker knows where to look for his compensation.

The rule that medical treatment constitutes payment of compensation so as to toll the statute of limitations came in for consideration by the Supreme Court in two cases. In the first case, the rule was qualified by a holding that medical examination for the purpose of deciding whether a case is compensable is not treatment.⁷² In the second, the qualification was qualified by finding treatment where the doctor had administered admitted treatment a year or so before, and on the occasion in question, in addition to advising the employer that the injury was not compensable, advised the patient to consult a certain neurolo-

68. *Goldstein v. Continental Baking Co.*, 16 N.J. 8, 105 A.2d 848 (1954).

69. *Panchak v. Simmons Co.*, 15 N.J. 13, 103 A.2d 884 (1954).

70. *Schwarz v. Federal Shipbuilding and Dry Dock Co.*, 16 N.J. 243, 108 A.2d 417 (1954).

71. *United National Indemnity Co. v. Sangiuliano*, 38 N.J. Super. 400, 118 A.2d 35 (Law Div. 1955).

72. *Schwarz v. Federal Shipbuilding and Dry Dock Co.*, 16 N.J. 243, 108 A.2d 417 (1954).

gist.⁷³ These cases are too much dependent on their particular facts to merit extended discussion.

Also in the medical area, the Appellate Division has held that an employee can have medical treatment for a compensable condition after a final award has been entered based on permanent disability arising from the condition.⁷⁴ This is obviously sound. Compensation as an aim of the law should, wherever possible, be subordinated to rehabilitation, and the principles of *res judicata* relied on by the employer should have no place in defeating this important policy.

The specific awards for losses of members figured in two curious cases. In one, it was held that a man who some time previously had lost four fingers, and received the compensation provided for loss of a hand, could, upon losing the rest of the hand, receive once again the compensation provided for the loss of a hand.⁷⁵ In the other, it was held that the amputation of one phalanx of a thumb plus a "therapeutic-cosmetic" cutting into the flesh of the next phalanx would be compensated as "the loss of the first phalanx and any portion of the second" or the loss of the whole thumb.⁷⁶ Both these holdings seem to be required by the statute; whether they are good or bad in the abstract, one can hardly venture to say.

Two other cases worth brief note are one in which a widow of an employee who did not apply for compensation, and died of something else was allowed to collect permanent disability benefits accrued during his lifetime,⁷⁷ and one holding that a director of a corporate employer cannot be sued as a third party for negligence committed in his capacity as director.⁷⁸

Finally, the Appellate Division has handed down a long opinion on the subject of the liability of an employer for common-law indemnity to a third-party tortfeasor.⁷⁹ It is well settled that such indemnity can be had where there is a contract, but in the absence of a contract there has been no holding in New Jersey. Judge Speakman discerns two possibilities of indemnity, one where the indemnitor-employer owes an independent duty to the third-party tortfeasor seeking indemnity, and the other where the right to indemnity is predicated on a distinction between active and passive negligence, without an independent duty. He

73. *Pfahler v. Eclipse Pioneer Div. of Bendix Aviation Corp.*, 21 N.J. 486, 122 A.2d 644 (1956).

74. *Van Tuyl v. Federal Shipbuilding and Dry Dock Co.*, 32 N.J. Super. 406, 108 A.2d 483 (App. Div. 1954).

75. *Heidel v. Wallace & Tiernan*, 37 N.J. Super. 522, 117 A.2d 678 (Essex Co. Ct., Law Div. 1955).

76. *Nicolai v. Fedders Quigan Corp.*, 39 N.J. Super. 137, 120 A.2d 499 (Mercer Co. Ct., Law Div. 1956).

77. *Kozielec v. Mack Manufacturing Corp.*, 29 N.J. Super. 272, 102 A.2d 404 (Middlesex Co. Ct., Law Div. 1953).

78. *Evans v. Rohrbach*, 35 N.J. Super. 260, 113 A.2d 838 (App. Div. 1955).

79. *Public Service Elec. and Gas Co. v. Waldroup*, 38 N.J. Super. 419, 119 A.2d 172 (App. Div. 1955).

addresses himself only to the second, holding that the law of New Jersey recognizes no right of indemnity, and that even if it did it would be barred by the workmen's compensation law, and that even if it were not barred, the facts do not warrant it in the particular case. He distinguishes the leading case of *Westchester Lighting Co. v. Westchester County S. E. Corp.*⁸⁰ by finding that there was an independent duty there; on this class of cases he expresses no opinion. Since, as he points out, the facts of the case before him do not warrant indemnity on any theory, an evaluation of Judge Speakman's distinction must await the advent of cases that turn on it. It seems quite likely that it will turn out to be useful.

80. 278 N.Y. 175, 15 N.E.2d 567 (1938).