ALCYON SHIPPING CO. LTD. (*Defendant*) ..... APPELLANT; *Jan. 25, 26 Mar. 27 1961

AND

FRED O'KRANE (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Labour—Workmen's compensation—Subrogated action by Workmen's Compensation Board—Whether action lies—Determination of certain matters by Board—Board's exclusive jurisdiction—Workmen's Compensation Act, R.S.B.C. 1948, c. 370, ss. 11(3), 12(1) and (4), 76.

The plaintiff was injured while working as a longshoreman in the employment of a stevedoring company which was loading lumber on a ship owned by the defendant shipping company. The latter was incorporated under the laws of Greece with head office in Athens. The cause of the injury was the breaking of a rung in a steel ladder attached to the hull of the ship. The workman claimed and was awarded compensation under the *Workmen's Compensation Act* of British Columbia, and subsequently the Board, acting under the right of subrogation given to it by s. 11(3) of the Act, brought an action in the name of the workman and claimed damages for the injury.

*PRESENT: Taschereau, Locke, Martland, Judson and Ritchie JJ.

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After the writ was issued and before the action was tried, the Board held a hearing and found, *inter alia*, that the defendant company was not an employer within the scope of Part I of the Act, and that the action against the defendant was one the right to which was not taken away by Part I. These findings were filed at trial, where judgment was given in favour of the plaintiff. The Court of Appeal dismissed the appeal and the defendant then appealed to this Court.

Held: The appeal should be dismissed.

The matters whether the defendant company was an employer within Part I of the *Workmen's Compensation Act* and whether the right to bring the action had been taken away were conclusively determined by the Board, and that Board had exclusive jurisdiction in these matters whether before or after the institution of an action. With respect to whether it was an employer within Part I of the Act, the defendant's submission that the Board may determine this matter in the administration of the Act but that nothing done in the administration of the Act can preclude an independent determination of the problem by the Court was rejected. *The Dominion Canners Ltd. v. Costanza*, [1923] S.C.R. 46, discussed and followed.

It was questionable whether, as claimed by the defendant, the Board's assertion of a workman's common law rights in an action such as this could be characterized as an invalidating interest in any decision which the Board might make in the performance of its statutory duties, but interest or no interest, this was expressly what the Board was authorized to do by the plain terms of the Act and no such limitation could be imposed on the plain meaning of the Act.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Lett C.J.S.C. Appeal dismissed.

Hugo Ray, Q.C., and *W. J. Walker*, for the defendant, appellant.

Ray Anderegg, for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—The appellant is a corporation incorporated under the laws of Greece and has its head office in Athens. It is the owner of the freighter *Eleni D.* In April 1953 this ship docked in Tahsis, B.C., to take on a cargo of lumber. The respondent was injured while working as a longshoreman in the employment of the stevedoring company which was loading lumber on the ship. The cause of his injury was the breaking of a rung in a steel ladder attached to the hull of the ship. The stevedoring company was an employer

[1] (1960), 24 D.L.R. (2d) 119, 32 W.W.R. 178.

within the meaning of Part I of the *Workmen's Compensation Act,* R.S.B.C. 1948, c. 370. The workman claimed and was awarded compensation under the Act, and subsequently the Board, acting under the right of subrogation given to it by s. 11(3) of the Act, brought an action in the name of the workman and claimed damages for the injury.

The only defence argued by the shipping company on this appeal was that this action does not lie because it is an employer within Part I of the Act. If it is, the right of action of the workman is taken away by s. 11(4) of the Act. At trial the workman recovered judgment for $21,548.60. The Court of Appeal[1] dismissed the appeal and the shipping company now appeals to this Court.

The writ was issued on September 6, 1956. Two years later, on September 15, 1958, and before the action was tried, the Board held a hearing at which both sides were present and made the following findings:

> THIS BOARD DOES FIND AND DETERMINE that on April 30, 1953, Tahsis Company Ltd., was an employer in or about an industry within Part I of the Workmen's Compensation Act; that on April 30, 1953, the Plaintiff was a workman within the scope of Part I of the said Act; that on the date aforesaid the Plaintiff sustained personal injuries by accident arising out of and in the course of his employment with Tahsis Company Ltd.; that on the date aforesaid Alcyon Shipping Co. Ltd. was not an employer in or about an industry within the scope of Part I of the Workmen's Compensation Act.
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> AND THIS BOARD DOES FIND AND DETERMINE that the said action against the Defendant Alcyon Shipping Co. Ltd. is one the right to bring which is not taken away by Part I of the said Workmen's Compensation Act.

When the action came on for trial on March 11, 1959, these findings were filed before the learned trial judge.

It will be seen that the Board made five findings. The two that are attacked on this appeal are the last two, namely: (a) that Alcyon was NOT an employer in or about an industry within the scope of Part I of the *Workmen's Compensation Act,* and (b) that the action against Alcyon is one the right to bring which is NOT taken away by Part I of the Act.

The learned trial judge held that he was precluded by the Board's determination from entering into any inquiry whether the shipping company was an employer within the

[1] (1960), 32 W.W.R. 178, 24 D.L.R. (2d) 119.

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scope of Part I of the Act and whether the right to bring the action was one which was taken away by Part I of the Act. In the Court of Appeal, Smith J.A. took the same view. Davey J.A. expressed doubt concerning the jurisdiction of the Board to make this finding but he held that it was unnecessary to make a final determination on this matter because he came to the same conclusion of fact as the Board, namely, that this shipping company was not an employer within Part I of the Act, the *Workmen's Compensation Act* not applying to foreign ship owners. On this appeal the shipping company says that the Court, and the Court alone, should have made the determination whether the shipping company was an employer within Part I of the *Workmen's Compensation Act* and whether the right to bring the action had been taken away.

I would dismiss the appeal but on the grounds given by the learned trial judge and the minority opinion in the Court of Appeal, namely, that these two matters were conclusively determined by the Board and that the Board had exclusive jurisdiction in these matters whether before or after the institution of an action.

The scheme of the Act is well-known by this time. Most industries are under Part I of the Act and if a workman employed in one of these industries is injured in the course of his employment, he has no right of action against his employer but must claim compensation. This is the simplest situation. Not only this, the right of action is taken away against any other employer within Part I of the Act. This follows from s. 11(4), which reads:

> (4) In any case within the provisions of subsection (1), neither the workman nor his dependent nor the employer of the workman shall have any right of action in respect of the accident against an employer in any industry within the scope of this Part;

Therefore, no employer within Part I of the Act whether or not he is the employer of the particular workman may be sued for an accident arising out of and in the course of the employment.

But the workman may have a right of action against a person who is not his employer or another employer within Part I of the Act. This is dealt with by s. 11(1) of the Act:

> 11. (1) Where an accident arising out of and in the course of his employment happens to a workman in such circumstances as entitle him or his dependents to an action against some person other than his employer

and other than an employer in an industry within the scope of this Part or against the Crown, the workman or his dependents, if entitled to compensation under this Part, may claim such compensation or may bring such action.

The present action is brought under the provisions of s. 11(3) of the Act. This injured workman did claim compensation and the Board awarded it. In consequence the Board was entitled to be subrogated to the rights of the workman and it brought this action in the name of the workman as authorized by the subsection:

11. (3) If any such workman or his dependents makes application to the Board claiming compensation under this Part, neither the making of such application nor the payment of compensation thereunder shall restrict or impair any such right of action against the party or parties liable, but as to every such claim the Board shall be subrogated to the rights of the workman or his dependents and may maintain an action in his name or their names or in the name of the Board, and if more is recovered and collected than the amount of the compensation to which the workman or his dependents would be entitled under this Part, the amount of the excess, less costs and administration charges, may be paid to the workman or his dependents.

The other relevant sections of the Act are ss. 12(1) and 12(4) and 76. They provide:

12. (1) The provisions of this Part shall be in lieu of all rights and rights of action, statutory or otherwise, to which a workman or the members of his family are or may be entitled against the employer of such workman for or by reason of any accident happening to him or any industrial disease contracted by him on or after the first day of January, 1917, while in the employment of such employer, and no action in respect thereof shall lie.

12. (4) Where an action in respect of an injury is brought against an employer by a workman or a dependent, the Board shall have jurisdiction upon the application of any party to the action to adjudicate and determine whether the action is one the right to bring which is taken away by this Part, and such adjudication and determination shall be final, and conclusive; and if the Board determines that the action is one the right to bring which is taken away by this Part the action shall be for ever stayed.

Section 76 provides:

(1) The Board shall have exclusive jurisdiction to inquire into, hear, and determine all matters and questions of fact and law arising under this Part, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any Court . . .

The shipping company complains that the Board had no jurisdiction to determine that it was not an employer within Part I of the Act so as to preclude the independent

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determination of this problem in the Supreme Court of British Columbia. It says that the Board may determine this matter in the administration of the Act but that nothing done in the administration of the Act can preclude an independent determination by the Court.

In my opinion there is a conclusive decision of this Court adverse to this submission in the case of *Dominion Canners v. Costanza*[1]. This case was decided under the provisions of the Ontario *Workmen's Compensation Act* but there are no differences between the Ontario Act and the British Columbia Act in scheme, structure or wording which would affect the application of the decision to the British Columbia Act.

In the *Costanza* case the workman sued his employer for damages caused by negligence. He obtained judgment at trial and an appeal by the employer failed. The Ontario Courts ruled that this was not an action the right to bring which was taken away by *The Workmen's Compensation Act* because the injury of which the workman complained was not an accident within the meaning of the Act. Not until after the judgment of the Court of Appeal was there any reference to the Board for a determination of this matter in spite of the fact that the defendant had pleaded that the plaintiffs ought to apply to the Board for a determination. It had not, however, pleaded that the Board had exclusive jurisdiction. After the judgment of the Court of Appeal the plaintiffs did so apply *ex parte* and the Board decided that the accident was not one arising out of and in the course of employment. The consequence of this finding was that the workman's right of action was not taken away by the Act. This was the position when the case reached this Court where the judgment was that the Board had exclusive jurisdiction in this matter. This Court had before it the *ex parte* order made by the Board. The proceedings on the appeal were stayed pending the determination of the matter by the Board in a proper proceeding on notice to the defendant. This was an explicit recognition of the exclusive jurisdiction of the Board.

As far as I know, this principle has never been in doubt since this decision. If it is departed from it will involve a serious breach in the administration of the *Workmen's*

[1] [1923] S.C.R. 46, 1 D.L.R. 551.

Compensation Acts across the country. The Acts were drawn as they are to avoid "the waste of energy and expense in legal proceedings and a canon of interpretation governed in its application by refinement upon refinement leading to uncertainty and perplexity in the application of the Act." (Per Duff J. in *Dominion Canners Limited v. Costanza, supra,* at p. 54)

The shipping company questions the application of the *Costanza* case on the ground that the Board has an interest in its own decision when it is asserting the rights of a workman against a third party by way of subrogation under s. 11(3) of the Act. Such a situation, it is urged, should suggest to the Court a limitation of the Board's powers of exclusive decision to those cases where it has no interest—and this as a matter of interpretation and not by way of attack on the constitutional validity of the legislation. I question whether the Board's assertion of a workman's common law rights in an action such as this can be characterized as an invalidating interest in any decision which the Board may make in the performance of its statutory duties, but interest or no interest, this is expressly what the Board is authorized to do by the plain terms of the Act and no such limitation can be imposed on the plain meaning of the Act.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Bull, Houser, Tupper, Ray, Guy & Merritt, Vancouver.

Solicitors for the plaintiff, respondent: Howard & Anderegg, Vancouver.