

**VICTORY SHIPPING LINES, INC., PETITIONER, VS.
WORKMEN'S COMPENSATION COMMISSION, ET AL.,
RESPONDENTS.***G.R. No. L-9268. November 28, 1959*

Ponente: PARAS, C.J.

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On February 23, 1954, Pedro Icong, an employee of the petitioner, was sleeping on board the latter's vessel, M/V "Miss Leyte," when it caught fire. Awakened by the fire, Pedro Icong jumped overboard. Since then, he has not been heard of. The employee was unmarried, receiving daily P4.00 with meals estimated at P1.20, and respondent Juan Icong, his father, was his partial dependent. On April 30, 1954, the latter filed with the Workmen's Compensation Commission and the petitioner a notice of claim for death compensation. The petitioner reported the matter to the Commission only on August 17, 1954. The Commission rendered an award in favor of respondent Juan Icong in the sum of P2,038.40, plus P200.00 for burial expenses and P20.00 as legal fee.

The petitioner has appealed to this Court for the review of the award and has presented three points of law, namely: I. That Article 391 of the Civil Code of the Philippines was not applied in determining whether or not Pedro Icong should be considered dead; II. That Section 49 of Republic Act No. 772, providing for the right of the employer to notice and hearing of the claim against him, was disregarded; III. That Pedro Icong should have been guilty of notorious negligence in jumping overboard.

The petitioner contends that in the absence of proof of, the death of Pedro Icong, the nearest approach to the matter, from the facts of his case, is the provision on the presumption of death established in Article 391 of the Civil Code of the Philippines, according to which the person to be presumed dead must be unheard of for at least four years; that inasmuch as Pedro Icong had been missing for only a few months from the alleged accident, there is as yet no legal presumption of death on which to base any award for compensation.

The petitioner next contends that it never had its day in court, because no notice of any hearing was ever served upon it; and as this error affects its substantive rights, the decision under review was without jurisdiction.

It is lastly contended that although there was admittedly an alarm of fire; no person other than Pedro Icong jumped overboard; that the usual course of a prudent man under the circumstance would be to resort to a life saver, life raft or life boat and to await instructions from the captain and his officers; that the act of Pedro Icong was in complete disregard of adverse consequences constituting gross negligence which is a bar to the right of compensation.

The respondent Commission obviously did not apply the rule on presumption of death because in the employer's report of the accident submitted by petitioner, laborer Pedro Icong was reported as the only casualty, and in transmitting said report petitioner's counsel had implicitly admitted the fact of Pedro Icong's death. We agree with this conclusion.

Quite recently, in the case of *Madrigal Shipping Co., Inc. vs. Nieves Baens del Rosario, et al.*, G. R. No. L-13130, promulgated Oct. 31, 1959, we reproduced with approval the explanation of the respondent Commissioner therein that Article 391 of the Civil Code of the Philippines relating to presumption of death of persons aboard a vessel lost during a sea voyage applies to cases wherein the vessel cannot be located nor accounted for, or when its fate is unknown or there is no trace of its whereabouts, inasmuch as the word "lost" used in referring to a vessel must be given the same meaning as "missing" employed in connection with an aeroplane, the persons taking both means of conveyance being the object of the rule expressed in the same sentence. In the instant case, none of the foregoing conditions appear to exist. The fate of petitioner's vessel is not unknown. It was not lost or missing. As a matter of fact, it had been definitely destroyed by fire and washed ashore. And in view of the further fact that when petitioner's vessel caught fire, Pedro Icong jumped overboard and since then had not been heard from, the aforementioned rule on presumption of death does not apply.

Instead the rule on preponderance of evidence applies to establish the fact of death. In the same case of *Madrigal Shipping Co., Inc.*, supra, we said:

"Where a person was last seen in a state of imminent peril that might probably result in his death and has never been seen or heard from again, though diligent search has been made, inference of immediate death may be drawn." (*Brownlee et al. vs. Mutual Benefit, Health and Accident Association*, 29 Fed [2nd] 71).

As to the alleged lack of notice of hearing, the records disclose that the petitioner did not file with the respondent Commission the employer's report of the accident within the period prescribed by Section 45 of Act No. 4328, as amended by Republic Act No. 772, and that neither was its right to controvert the claim ever alleged. Under the law such failure results in the loss of the right to controvert the claim on jurisdictional grounds; the employer cannot be subsequently heard to complain that the law was strictly construed against him.

We rule that the act of Pedro Icong in jumping overboard upon waking up and finding the vessel on fire is not constitutive of gross negligence. Respondent Commission correctly termed it as "rather impelled by fright or by the instinct of self-preservation." "The kind of negligence on the part of the employee which will exempt the employer from liability for injuries suffered by the former is notorious negligence. Such negligence must be proved, the burden of proof resting on the employer. The correct presumption to be followed is that when a warning of danger is given, the laborer by instinct of self-preservation takes precaution to avoid such danger unless an intention *fa* attributed to end his life." (*Francisco's Comments on Labor Laws*, 2nd Ed., p. 888.)

In view of what has been said, the decision appealed from is hereby affirmed, with costs against the petitioner.

Bengzon, Padilla, Montemayor, Bautista Angelo, Labrador, Endencia, Barrera, and Gutierrez David, JJ., concur.

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