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use of the automobile by such member of the household, and cannot be established merely by facts and circumstances which would lead a reasonable person to believe that actual consent had been given.[25]

3. If a trial judge recognizes the necessity of further consideration by a jury of its verdict or answers to interrogatories and re-submits the case for further jury deliberation, this should be done by the judge without comment or emphasis on any single phase or instruction in the case.[26]

The last three cases, *Yockey Trucking v. Handy*,[27] *Book v. Paddock*,[28] and *Siefried v. Mosher*,[29] had similar fact situations, in that each involved a collision of automobiles on our state highways. The decisions were not reached by application of tort law, but simply affirmed jury verdicts for the plaintiffs, on the premises that all inferences fairly deducible from the evidence are drawn in favor of the verdict by an appellate court and in favor of the other party by a trial court when it is asked to direct a verdict. The *Yockey Trucking* case further stated that this rule of law is equally applicable to those situations where the facts are undisputed, if fair minded persons may form different opinions and draw different conclusions from the facts.

DAMAGES, WORKMEN'S COMPENSATION AND LABOR LAW

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DAMAGES

In the past year, four cases involving the general question of damages have been decided by our Supreme Court. Two of the cases deal with the question of the substantive right to damages and two cases deal with the question of the proper measure of damages.

In the case of *Weng v. Schleiger*,[1] several interesting questions of damages were determined. Mr. and Mrs. Schleiger owned an automobile jointly. They and their minor son, John, were in the automobile when it was struck by the defendant's truck, causing injuries to all three and damages to the car. All three brought an action against defendant which contained causes of action as follows: (1) a cause of action by Mr. and Mrs. Schleiger for the damage to the automobile; (2) a cause of action by Mrs. Schleiger for the loss of support and companionship of her husband; (3) a cause

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[25] See Footnote 23, *supra*.
[26] See Footnote 22, *supra*.
[27] 262 P. 2d 930, 1953-54 C. B. A. Adv. Sh., No. 4, p. 72.
[28] 267 P. 2d 247, 1953-54 C. B. A. Adv. Sh., No. 9, p. 196.
[29] 268 P. 2d 411, 1953-54 C. B. A. Adv. Sh., No. 10, p. 218.
[1] 273 P. 2d 356, 1953-54 C. B. A, Adv. Sh. No. 17.

of action for the injuries to Mrs. Schleiger; and (4) a cause of action for injuries to the son John. This complaint was dismissed under the District Court Rule for want of prosecution. Mrs. Schleiger and son John moved for reinstatement of the case, which motion was granted. Mr. Schleiger did not move to reinstate his case. The case was tried to a jury which returned verdicts in favor of Mrs. Schleiger in the sum of $8000 and in favor of son John in the sum of $10,000. As to the first cause of action (property damage), the Court held, first, that the husband, being a joint owner of the automobile, was an indispensable party, and since he was dismissed from the case under the rule, the trial court had no jurisdiction to hear the question of damages to the automobile. For good measure, the Court also stated that the plaintiff had failed to prove the value of the car before and after the accident and for that reason also was not entitled to recovery on the first cause of action. As to the second cause of action (loss of support and companionship of husband), the Court held that the defendant's motion to strike that casue of action should have been sustained and that it was error to submit the question of damages to the wife for loss of support and companionship of her husband to the jury, even though by special interrogatory, the jury had said it granted no damages on that cause of action. As to the third and fourth causes of action (personal injuries to wife and son), the Court held that if the major portion of the verdicts was based on these causes of action, then the verdicts were not supported by the evidence, there being no evidence of any permanent injury.

In *Kling v. Phayer*,[2] the Court held that in an automobile accident case in which one driver was killed but left no "heirs" surviving as the term "heir" is used in the wrongful death statute, his administrator may bring an action against the other driver for the amount of the funeral expenses.

In *McEntyre v. Jones*,[3] the question before the Court was whether the damages in an action for the wrongful death of a thirteen-year-old girl were excessive. The Court held damages in such a case are to be measured, not for the period of the child's minority, but for the period of the child's life expectancy, but confined to the expectancy of the parent or parents involved. In other words, the Court said that parents are entitled to damages for loss of services of a child during minority and for loss of support and maintenance from him during the declining years of life. The Court also held that funeral expenses are a proper element of damage in a wrongful death action even though not specially pleaded.

The final case under this heading is *Ark-Valley Alfalfa Mills v. Day*,[4] wherein the Court held that the damages awarded to the plaintiffs were excessive. James E. Day, who had bruises on his

[2] 1953-54 C. B. A. Adv. Sh. No. 18.
[3] 263 P. 2d 313, 1953-54 C. B. A. Adv. Sh. No. 5.
[4] 263 P. 2d 815, 1953-54 C. B. A. Adv. Sh. No. 5.

chest and left knee, nervousness and a bump on his head, was awarded $1517 actual damages and $1000 exemplary damages. Inez Day, who suffered a cut on her head, had black and blue knees, and claimed she was upset and suffered nervous headaches, was awarded $1200 actual and $1000 exemplary damages. Eileen Day, who had a cut on her head and claimed nervousness, was awarded $600 actual and $500 exemplary damages. There was no evidence of any permanent disability to any of the plaintiffs. The Court restated the well-established rule that if exemplary damages are awarded, they must bear some relation to the compensatory damages.

WORKMEN'S COMPENSATION

Eleven cases have been determined by our Supreme Court in the past year involving situations arising under Chapter 97 Colorado Statutes Annotated. Eight of the cases fall under what is commonly known as the Workmen's Compensation Act. Two fall under the heading of unemployment compensation. One falls under the Occupational Disease Act. The cases will be considered in that order.

The cases under the Workmen's Compensation Act will be considered in the order in which the sections of the statute that they deal with appear.

In *Industrial Commission v. Pacific Employers Insurance Company*,[5] and *Montgomery Ward, Inc. v. Industrial Commission*,[6] the Supreme Court reaffirmed the well established principle that findings of fact by the Industrial Commission which are supported by competent evidence will not be disturbed by the courts on review. The former case involved a claimant who had hemorrhoids which did not bother him; in fact, he didn't know he had them. While at work, he pulled on a wrench, felt a pain in his groin, and on emerging from his working place, noticed for the first time that he had hemorrhoids which caused him some discomfort and pain. A doctor's report introduced in evidence stated flatly that the strain did not cause the hemorrhoids but that it was probably responsible for the symptoms as described. The Commission found that the claimant's hemorrhoids were aggravated by the strain. The Court held that the claimant's testimony and the medical report constituted some evidence of aggravation of a pre-existing condition and the award was affirmed. The latter case involved a claimant who fell from ladder and struck her head. She did not appear to have any injury of consequence but shortly thereafter she suffered severe headaches and nausea, and lost her sense of balance. The question involved was whether she had been injured in the accident or had had a stroke not connected with the accident. The Court reviewed the evidence given by the doctors, both oral testimony and written reports, some of which had not been formally introduced in evidence before the Commission and determined that the compe-

[5] 262 P. 2d 926, 1953-54 C. B. A. Adv. Sh. No. 4.
[6] 263 P. 2d 817, 1953-54 C. B. A. Adv. Sh. No. 5.

tent evidence, together with reasonable inferences which could be made therefrom, were sufficient to support the award.

In *School District v. Schmidt,*[7] the claimant was employed as a janitor by the School District. The School District made a deal with a local church under which the church sent some of its members to the school to do the janitor's work while the janitor stuccoed the church. He fell from a scaffolding and claimed compensation under Section 11 of the act which provides compensation for an employee loaned by employer "who has accepted the provisions of this act." The argument was that since the School District is required to accept, it was not covered under Section 11. The Court held the case compensable, stating that it could see no intent to distingush between a private employer and a school district.

Section 49 of the Workmen's Compensation Act was considered by the Supreme Court in *Flake Motors v. Industrial Commission,*[8] Flake Motors was a partnership in the used car business in Denver. The firm entered into a contract with one Carter to erect a sign on its used car lot. The claimant was an employee of Carter and was injured while working on the sign. He filed a claim against both Carter and Flake Motors for compensation, claiming that Flake Motors was contracting out part of its business when it engaged Carter to build and maintain the sign. Claimant was hired, supervised, paid, and furnished with tools by Carter. The Commission and the District Court held that Flake Motors was jointly liable with Carter. The Supreme Court reversed, holding that Flake Motors was in the business of buying and selling automobiles, not in the sign business.

An interesting decision under Section 52 of the Workmen's Compensation Act is *U. S. National Bank v. Industrial Commission.*[9] Mr. and Mrs. Conway, parents of two minor children, were both employed by the same employer, and while engaged in such employment, were simultaneously killed in an airplane crash. The bank as guardian of the children filed claims before the Industrial Commission in both the father's case and the mother's case. On the strength of the case of *London Guarantee and Accident Co. v. Industrial Commission,* 78 Colo. 478, the Commission granted compensation to the children in the father's case, but denied it in the mother's case, holding that the children were totally dependent upon the father. The District Court affirmed, but the Supreme Court reversed and granted full compensation in both cases. The Court held tha under Section 52, children of the deceased are conclusively presumed to be totally dependent. It is wholly a question of law under the statute. The Commission erred in determining as a matter of fact that the children were wholly dependent on the father. If they are children of the deceased, whether the deceased

[7] 263 P. 2d 581, 1953-54 C. B. A. Adv. Sh. No. 5.
[8] 262 P. 2d 736, 1953-54 C. B. A. Adv. Sh. No. 4.
[9] 262 P. 2d 731, 1953-54 C. B. A. Adv. Sh. No. 4.

be their father or mother or both, they are conclusively presumed to be dependents and entitled to compensation.

The case of *Colorado Fuel & Iron Corp. v. Industrial Commission,*[10] involves the provisions of Section 81 of the Workmen's Compensation Act. In that case, the claimant was injured at work and was put under the care of company physicians. After being treated by these physicians for some time, he became dissatisfied with their services and without permission of the employer went to his own doctor who performed an operation to relieve his condition. The employer took the position that since the claimant changed doctors without the approval of the employer or of the Commission, he was not entitled to any benefits, either compensation or medical, from the time the change was made. The Commission granted full compensation and medical benefits and the District Court affirmed. The Supreme Court held that under Section 81 the employer did not have to pay for any medical or hospital expenses incurred by the claimant without its consent, but that it was liable to pay compensation for temporary total disability and permanent partial disability resulting from the accident.

Section 84, dealing with the statute of limitations, was considered by the Supreme Court in *Colorado Fuel & Iron Corp. v. Indutrial Commission.*[11] In that case the claimant died as a result of a burn on his foot which in turn caused a pulmonary embolus, or at least that was the finding of the Commission on conflicting evidence which the Court would not disturb on review under the well established rule discussed above. The widow, on behalf of herself and two minor children, did not file claim for compensation until more than one year after the accident. After the accident, the widow went to the employer to collect some group insurance benefits. At that time she asked if the Colorado Fuel & Iron Corp. did not have "state insurance" and the reply was, "No, this is all the insurance we carry. We're self-insured." The Court held that this reply was misleading and that that fact, coupled with the fact that the widow did not know that the death had been caused by accident, was sufficient evidence of a "reasonable excuse" to prevent the running of the statute. The Court also held that the burden of proving that the employer has been prejudiced by failure to file a claim is on the employer.

Finally, in the cases of *Sterns-Roger Manufacturing Co. v. Casteel*[12] *and Devore v. Industrial Commission,*[13] the court considered procedural questions under Section 97. In the Sterns-Roger's case the claimant and a fellow worker were on their way from Denver to Grand Junction to work for the employer. On the way they bought a bottle of whiskey and apparently imbibed generously therefrom. When the friend was driving and the claimant was

[10] 269 P. 2d 1070, 1953-54 C. B. A. Adv. Sh. No. 13.
[11] 269 P. 2d 696, 1953-54 C. B. A. Adv. Sh. No. 12.
[12] 261 P. 2d 288, 1953-54 C. B. A. Adv. Sh. No. 1.
[13] 266 P. 2d 774, 1953-54 C. B. A. Adv. Sh. No. 8.

asleep in the back seat, an accident occurred injuring claimant. The insurance carrier contested the case on two grounds: First, that the accident did not arise out of the employment and, second, that if it did, that the 50 per cent penalty provided for in Section 83(c) where the injury results from intoxication, be invoked. The referee ruled against the carrier on both of these points and granted full compensation. The carrier, within 15 days, filed a petition to review, raising both points. The Commission then reviewed the file and affirmed the award of the referee but invoked the 50 per cent penalty. The carrier did not petition to review this award but the claimant filed a petition to review the Commission's award in sofar as it invoked the penalty. On this petition, the Commission reversed itself and found the case compensable and did not invoke the penalty. The carrier then filed a petition to review, raising both the questions of compensability and of the penalty. By this time, the Commission had made up its mind and it affirmed its award of full compensation. The carrier appealed, raising both the question of whether the accident arose out of the employment and the question of penalty. The Supreme Court held that the first question was not before it. When the Commission found the case to be compensable but invoked the penalty, no petition to review the determination of compensability was filed within 15 days and that issue became final even though the claimant did petition to review on the penalty determination. On the question of penalty, the court held that since the claimant was asleep in the car when the accident happened, his injury did not result from his intoxication and the Commission was correct when it finally decided not to invoke the penalty.

In the Devore case the claimant admittedly failed to file a petition to review an award within the 15 day period prescribed by statute but contended that she was excused from doing so because the award was not sent to the correct address. She contended that at the time of the award, she was in General Rose Hospital in Denver, and that the Commission knew this because a hearing had been held at her bedside. The award was sent to her Fort Collins home where all former papers in the matter were sent. The Court held that the notice had been properly sent in accordance with Section 97, and that the courts had no jurisdiction to hear the appeal.

The two unemployment compensation cases both involve situations arising under Section 5 and 6 of the Colorado Unemployment Security Act, dealing with disqualification of a claimant for voluntarily leaving work or refusing suitable employment. In the first, *Industrial Commission v. Brady*,[14] the claimant was a journeyman painter and a member of the painters' union. He was out of work and drawing compensation, when the department of unemployment security located a job for him with one Davis. This was a non-union job and paid $2.00 per hour. The union rate was $2.35 per hour. He refused the job and was accordingly disqualified for un-

[14] 263 P. 2d 578, 1953-54 C. B. A. Adv. Sh. No. 5.

employment compensation. At a hearing before a referee, it was found that the prevailing wage was $2.39 per hour with time and a half for overtime. The referee held that the offered work was at a wage substantially less favorable than that prevailing for similar work in the locality and ruled the claimant was not disqualified. The Commission reversed the referee. The District Court reversed the Commission. The Supreme Court held the claimant was not disqualified. The Court said all of the evidence proved that the prevailing wage rate was $2.39 per hour, and that the offer to the claimant was substantially less favorable than the prevailing wage rate.

In the second case, *Industrial Commission v. Wilbanks*,[15] the claimant, a union carpenter, quit a job at Estes Park which paid $2.00 per hour but no overtime. There was testimony concerning the prevailing wage rate in a number of different localities, including Estes Park, and there was conflict in the evidence as to what the rate was. The Court held that Estes Park was a distinct locality and there being conflict in the evidence as to the prevailing wage rate in that locality; the Court would not disturb the findings of fact of the Commission which had found the claimant *was* disqualified.

In *Colorado Fuel & Iron Corp. v. Alitto*,[16] our court had occasion to construe the provisions of the Occupational Disease Act which deal with silicosis. The claimant went to work in 1908 as a bricklayer. It was undisputed that in this work he was exposed to harmful quantities of silicon dioxide. He continued in this work until 1945 when he became a master brick mason. There was evidence that from that date until his death in 1952, he was still exposed to silicon dioxide dust on numerous occasions in his supervisory job. The employer took the position that there was not any evidence of an injurious exposure to silicon dioxide dust for at least sixty days after the effective date of the act. The Court held there was such exposure. The Court held further that it was not necessary that the claimant have been exposed sixty days after the effective date of the act. The Court again repeated its previous holding that the Occupational Disease Act is to be liberally construed to effect its purpose.

LABOR LAW

Under this heading there have been two decisions in the past here: one involving a labor dispute in the usual sense of the word, and one a policeman's pension case.

In *United Mine Workers v. Sunlight Coal Co.*[17] the court was called upon to construe the language of the Labor Peace Act which provides that the Industrial Commission has jurisdiction over employers who regularly engage the services of eight or more em-

[15] 271 P. 2d —, 1953-54 C. B. D. Adv. Sh. No. 17.
[16] 273 P. 2d 725, 1953-54 C. B. A. Adv. Sh. No. 18.
[17] 270 P. 2d 776, 1953-54 C. B. A. Adv. Sh. No. 14.

ployees. The evidence in the case indicated that the employer involved, during the months of December, 1952, and January, 1953, had 14 employees working in the mine. In a report to the government, the employer had reported his yearly average of employees was 6.7. The State Coal Mine Inspection Report for the vear 1952 showed that the company had an average of 9.4 men working during that year.

The Court held that to determine whether employees are "regularly engaged", the test is to determine whether the employment was casual or whether these were regular employees engaged in the business. It was held that the employees involved were regular employees and not casual laborers and that therefore the Industrial Commission had jurisdiction to hear the dispute.

In the case of *Pension Fund Trustees v. Starasinich,*[18] the plaintiff was a police officer on the Pueblo Police Department for 23 years up to July 30, 1949, when he was discharged for misconduct. After his discharge, he applied for a pension, claiming that he had incurred physical disabilities while he was a police officer in good standing. The question to be determined was whether after discharge an officer could apply for and receive a pension. The argument of the trustees was that under the statutes and ordinances applicable, an officer must be in good standing at the time of the application to be entitled to a pension. The Court held that in order to be entitled to a pension, an officer must be in good standing at the time of death or injury and that the fact that he has been discharged since his injury will not bar him from a pension if he was in good standing at the time of the injury.

From its title, the case of *Shore v. Denver Bldg. & Construction Trades Council,*[19] would appear to be a case involving labor law. An examination of the case will reveal that basically it is a labor case but although the case has been twice tried in the District Court and twice appealed to the Supreme Court no question of labor law has yet been raised in a form calling for a decision by the Supreme Court. There will be a third trial in the District Court and probably a third appeal, and perhaps some later reviewer will have occasion to review the labor questions involved.

FAMILY LAW, PROBATE LAW, AND CONSTITUTIONAL LAW

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FAMILY LAW

I. *Lawson v. Lawson,* 1953-54 C.B.A. Adv. Sheet No. 1.

Facts: Plaintiff, the wife, was a resident of Denver throughout her entire life. She went to Fortville, Indiana, for the sole purpose of marrying the defendant who was then stationed there in

[18] 264 P. 2d 1033, 1953-54 C. B. A. Adv. Sh. No. 7.
[19] 263 P. 2d 315, 1953-54 C. B. A. Adv. Sh. No. 5.