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PRACTICE AND PROCEDURE UNDER THE WORKMEN'S COMPENSATION ACT OF COLORADO

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TO the average practicing lawyer in this state, procedure under the Workmen's Compensation Act is rather vague and hazy; he has some general ideas upon the subject which may or may not be correct. When he is consulted by his client and attempts to look up the law, he learns little unless a close study is made of our decisions interpreting the Act, and if he has occasion to appeal to the courts from a decision of the Commission, he is very likely to omit some of the essential steps necessary to be taken before our courts will have jurisdiction. He is apt to reason from common law principles and find, too late, that the principles do not apply, for the ideas worked out by the various Workmen's Compensation Acts are foreign to the common law and depend entirely upon statutes.

Workmen's Compensation Acts were originally passed in response to the public demand for a system whereby the employers and employes might escape from personal injury litigation and to afford to injured workmen an inexpensive and speedy method of obtaining some compensation when injured in the course of their employment, irrespective of negligence or assumption of risk by the injured workman. The uncertainty of an action at law is thereby obviated and the compensation received by the injured workman is standardized.

Courts have been almost unanimous in according to such acts a broad and liberal construction in order to effectuate their evident intent and purpose, and our own Supreme Court, in a very late case, has said:

"The Workmen's Compensation Act is highly remedial, beneficent in purpose, and should be given a liberal construction, so as to accomplish the evident intent and purpose of the act. Karely v. Industrial Commission, 65 Colo. 239, 243. In Corpus Juris, title "Workmen's Compensation Acts", sec. 24, it is said that the courts have been practically unanimous in so construing such statutes. In the case of In re Petrie, 215 N. Y. 335, the court said:

" 'The statute was the expression of what was regarded by the legislature as a wise public policy concerning injured employes. Under such circumstances, we think that it is to be interpreted with fair liberality, to the end of securing the benefits which it was intended to accomplish.' "—*Central Surety & Ins. Corp. vs. Ind. Comm. 271 Pac.*—

With this in mind, we shall now consider some of the provisions of our law.

Our Act defines the persons who are included within its scope, and all of the following are employers:

(a) The State, and each county, city, town, irrigation, drainage and school district thereof, and all public institutions and administrative boards thereof. These public employers are made subject to the Act irrespective of the number of persons they employ.

(b) Private employers *who employ four or more persons engaged in the same business or employment.* Employers of domestic servants or farm and ranch labor, and employers of less than four persons in the same business, are expressly excepted from the operation of the Act, but they may elect to become subject thereto by filing a statement to that effect with the Industrial Commission. Common carriers engaged in interstate commerce and their employes do not come under the Act.

Private employers may withdraw from the provisions of the Act if they so desire, by giving notice to the Industrial Commission and by posting notices in their places of employment. Unless such election is made pursuant to statute, employers are conclusively presumed to have accepted the provisions of the Act.

(c) We have also two classes of constructive employers created purely by statute, the first of which includes persons or corporations operating or engaged in conducting any business by leasing or contracting out any part or all of the work to any lessee, sub-lessee, contractor or sub-contractor. Such persons are considered to be employers and are subject to the Act *irrespective of the number of employes engaged in the work.* The second class of constructive employers includes every person, company or corporation that owns property or improvements thereon and that contracts out any work done on said property to any contractor, sub-contractor or other person who shall hire or use four or more workmen (including himself if working on the job).

Employes coming within the definitions in the Act may be roughly classed as persons in the service of employers who are within the scope of the Act, but not including any persons whose employment is but casual *and* not in the usual course of trade, business, profession or occupation of his employer.

An employe may also elect not to come under the provisions of the Workmen's Compensation Act by giving notice to his employer and the Industrial Commission to that effect. Unless such notice is given, employes of persons subject to the provisions of the Act who have complied with its requirements, including insurance, are conclusively presumed to have accepted the provisions of the Act.

Election and compliance with the Workmen's Compensation Act are considered to be a surrender by the employer and employe of their rights to any other method or amount of compensation or determination thereof, and to any cause of action at law or in equity or any remedy or proceeding whatever on account of personal injuries or death.

One of the most radical changes made in the old system by the Workmen's Compensation Act is the abrogation of defenses which under the common law could be urged by employers. In an action against an employer for personal injuries or death of an employe, assumption of risk, want of care of a fellow servant and contributory negligence of the injured employe, where such negligence was not willful, are no longer a defense, unless the employer has complied with the provisions of the Act (including the insurance provisions)

and the action is brought for personal injuries or death sustained by an employe who has elected not to come under the Act.

After determining that the employer comes within the provisions of the Act and that he does not wish to withdraw therefrom, the next provision affecting him is compulsory insurance for the benefit of his employes. The Act provides that the employer shall secure compensation for his employes in one of the following ways: (a) by insuring with the State Compensation Insurance Fund, (b) by insuring with an insurance corporation authorized to write workmen's compensation insurance in this State, or (c) self-insurance. The latter is a method used by employers of a large number of men and, as the term implies, it makes the employer his own insurance carrier. The State Compensation Insurance Fund is in practical effect an insurance company created by statute and operated at cost by the State under the control of the Industrial Commission. Public employers are required to insure with the State Fund; private employers may or may not insure therein at their option. All workmen's compensation policies must contain, among other things, a clause to the effect that the insurance carrier shall be directly and primarily liable for any compensation for which the employer is liable.

Where the employer comes within the provisions of the Act, and has failed to insure or keep insured his liability, the employe or his dependents may nevertheless claim compensation, and in such case our statutes provide that the amount of compensation *shall* be increased fifty per cent. and the Commission must determine the present value of the unpaid compensation benefits, computed at the rate of four per cent. per annum. The employer must then deposit such amount with a trustee designated by the Commission, or file a surety company bond or a bond signed by two or more responsible sureties to be approved by the Commission, to guarantee the payment of the benefits. Where the employer fails to do this, a certified copy of the Commission's award may be filed with the Clerk of any District Court in the State and the Commission's award then has all the effect of a judgment of the District Court.

Let us assume that the employer has taken out insurance

and a workman is injured. Unless the employer or some person in charge shall have actual notice of the injury, the workman is required to notify the employer within two days of the injury. If he fails so to do, he loses one day's compensation for each day's failure to report. The injured workman is relieved from giving notice where someone reports the accident for him.

The employer then makes a report of the accident upon a blank provided for his use by the insurance carrier or the Commission, giving the details of the accident, etc. This report must be filed with the Industrial Commission within ten days after the accident. The injured workman also files a notice of claim for compensation if he claims any; notice is in writing upon the forms prescribed by the Commission and the notice is served upon the Commission in duplicate. The Commission then mails one copy to the employer or insurance carrier.

The right to compensation benefits is barred unless such notice is filed with the Commission within six months after the injury or within one year after death results therefrom. This statute does not apply where the workman has received some compensation for his injury within the six month period before his claim is filed, and it has been held that the employer or insurance carrier may under certain circumstances be estopped to set up this defense.

If the insurance carrier intends to contest the claim for compensation, a notice to that effect, setting forth the grounds of contest, must be filed with the Commission within fifteen days after the injury. This time may be extended by the Commission for cause, not exceeding ten days at a time. If such notice of contest is not filed, the Industrial Commission has adopted a rule (pursuant to the statute giving the Commission power to make reasonable and proper rules and regulations relative to the exercise of its powers and to govern its proceedings, etc.) that the employer and insurance carrier will not be permitted to introduce any evidence at the hearing held pursuant to the claim for compensation.

If the employer or insurance carrier admits liability, his admission specifies the amount and how payable, and the pe-

riod and disability for which compensation will be paid, and payments are made on account as due.

After the reports have been filed with the Commission, the claim is set for hearing, usually before a referee. Notice is given to all parties interested at least ten days before the hearing. These parties have a right to be present in person, by an attorney or any other agent and may introduce evidence as may be pertinent, and also have the right to cross-examine.

The burden of proving the right to compensation is upon the claimant, but the procedure is not technical and the legal rules of evidence are not strictly followed. The witnesses are sworn and hearsay testimony is ordinarily admitted if it throws any light on the matters in dispute. In addition to the sworn testimony, reports of physicians, reports of investigators of the Commission, reports of employers, books and other records, hospital records, etc., are admitted. *Ex parte* evidence may also be taken by the Commission. This evidence is reduced to writing and an opportunity is given to the parties in interest to inspect it and then, if they wish, another hearing is had and the parties may introduce evidence in rebuttal, or may cross-examine the witnesses so examined in their absence.

It must not be assumed from this informal procedure, however, that a claimant can establish his right to compensation without evidence which would be competent according to the rules established by law, for our Supreme Court has said that there must be some legal and competent evidence to sustain the claim, otherwise it must be denied. The impression is not infrequent that a workman who is injured is entitled to compensation irrespective of how he was injured or what he was doing when so injured which, if correct, would make workman compensation merely a health, accident, and life insurance scheme. Such is not the case, however, for in order to entitle a workman or his dependents to compensation, there must have been an accident, and at the time of the accident the employe must have been performing a service arising out of *and* in the course of his employment, and the injury or death must have been proximately caused by an accident arising out of *and* in the course of his employment and not intentionally inflicted. Thus, if a man is killed or injured while doing something not in the course of his employment (as going

outside his employment to do something for himself) or if the accident does not arise out of his employment (as an injury due to some common hazard not increased by his work) or if there is no accident (such as contracting an occupational disease) no compensation is payable. From this, it will be seen that after showing the claimant's employment, evidence must be introduced at the outset to establish (1) that he was injured in an accident, (2) arising out of, and (3) in the course of his employment.

Having thus shown the right to some compensation, the *quantum* thereof must also be established. The evidence should show what medical, surgical, nursing and hospital treatments were rendered to the injured workman and what hospital supplies, etc., were furnished to him, during the first sixty days from the date of the accident as a result of his injuries. This is compensable to the extent of $200. If the injury results in death, the sum of $125 is also allowed as funeral expenses.

The benefits to which the claimant is entitled must be proved. In injury cases the time when the workman left work and the time when he was able to return to work must be shown so that the period of his disability may be computed. For the first ten days the workman receives nothing but his expenses mentioned in the last paragraph. Starting with the eleventh day, he is entitled to 50% of his average weekly wages, so long as his disability is total, not to exceed $12 per week and not less than $5 per week unless the workman's average weekly wages are less than $5, in which event he is entitled to compensation equal to his average weekly wages. If the disability is only partial the employe receives 50% of the impairment of his earning capacity, not exceeding $12 per week or an aggregate of $1560. These benefits are what is known as "temporary" disability, which ordinarily means the healing or convalescing period.

The "average weekly wages" upon which compensation is ordinarily based are usually computed by taking the total amount earned by the injured or killed employe in the six months preceding the accident, and dividing that sum by twenty-six. There are times when this method is obviously unjust, as where the workman has not worked for a good part

of the six month period preceding the accident, or has been in business for himself, or where for some other reason this method does not fairly represent the workman's average weekly wages. In such event, the Industrial Commission has power to use such other method as will, in its opinion, and based upon facts, fairly determine such average weekly wage.

When the injury becomes fixed, i.e., when the healing stops and there is still a disability which will remain permanent, the disability is known as "permanent" and additional compensation is payable for that. If the disability is permanent and total, this should be proved; if permanent and partial, the extent of the partial disability should be established in terms of percentage. The statute contains a schedule of compensation to be paid to employes for permanent disability on a weekly basis, and when the disability is proved, the Referee or Commission computes the amount of compensation due to the claimant.

In claims for death, only persons who were dependents at the date of the accident are entitled to compensation. A wife living with her husband, and minor children under the age of eighteen years are conclusively presumed to be wholly dependent. Other claimants must prove that they were dependent and the extent of such dependency. Partial dependents are entitled to receive only that percentage of the benefits provided for those wholly dependent which the average amount of the wages regularly contributed by the deceased bore to the total income of the dependents. Thus, it will be seen, even though a workman had relatives living at the time of his death, unless they were dependent upon him for support, no compensation is payable.

When the claimant has presented his evidence and made a *prima facie* case, the employer and insurance carrier also have the right to introduce evidence to contest the claim in its entirety or to reduce the amount by showing that the injury was caused by the willful failure of the employe to use safety devices provided by the employer, or the willful failure to obey a reasonable safety rule adopted by the employer, or that the injury resulted from the intoxication of the employe. The hearings are sometimes shortened by certain admissions, such as admissions by the insurance carrier that the injured man

was an employe and that he was injured in an accident arising out of and in the course of his employment, and the like. In such cases, it is only necessary to prove the remaining facts in dispute.

After both sides have presented their case, the referee makes a finding of fact and enters an order upon such finding, either denying or awarding compensation and fixing the amount thereof. Any party in interest dissatisfied with such award has ten days after notice of the order (unless further time is granted) within which to file a petition for review, which is similar to a motion for a new trial in an action at law. The petition must be in writing and specify in detail the errors assigned. Unless such petition for review is filed, the referee's award is the final award of the Commission and may not be reopened by any of the parties.

The referee has the power to re-open the case and amend or modify his order, and from such amended or modified order dissatisfied parties must again file their petitions for review within the ten days as in the first instance. If the referee does not amend or modify his order upon the filing of a petition for review, the case is referred to the Industrial Commission, which reviews the entire record and may take additional testimony. The Commission then makes findings and enters an order thereon as did the referee. This order is then the final order unless a petition for review is filed within the ten days after notice thereof allowed by statute or the additional time allowed by the Commission. Where a petition for review is filed, the Commission again reviews the record and files and enters what it terms a "supplemental award" either changing the former order or denying the petition. It is essential that petitions for review be filed to both the orders of the referee and of the Industrial Commission, in order to vest the courts with jurisdiction to review the action of the Commission. This step is one which is very often overlooked by attorneys unfamiliar with the practice.

Perhaps at some stage of the proceedings the claimant decides to employ an attorney. Here is where the attorney sometimes fails to protect himself, to his subsequent chagrin. The act provides that no lien shall be allowed and no contract is enforceable for attorneys' fees rendered in these cases un-

less previously authorized by the Commission. The Commission's rules provide that no fee will be allowed unless the attorney makes application for such allowance prior to or during the hearing of any claim or during the pendency of litigation.

We shall assume now that a final order has been entered by the Commission denying the petition for review and one of the parties is dissatisfied. Within twenty days after the final order of the Commission, denying review, an action must be commenced in the District Court in the County wherein the injury was sustained or in the District Court of Denver. The Commission and the adverse parties must be made defendants. If the Commission awarded compensation to the claimant and the employer brings the action, compensation must be paid weekly to the claimant while the action is pending in court for our Supreme Court has said:

> "It is to be noted in this connection that the judgment of the commission in favor of a claimant is *prima facie* evidence of his right to recover. Procedure under the act is summary in character in order to furnish immediate aid to injured employees, and a careful reading of the statute as a whole leads to the conclusion that it was the intention of the Legislature that payment of these weekly allowances should not be stayed. Indeed, to hold that such payments can be enjoined pending judicial review would in effect practically nullify one of the prime objects and purposes of the law."—*Employers' Co. v. Industrial Com., 65 Colo. 288.*

This rule has worked an injustice in several instances to the writer's knowledge, and the Supreme Court has lately ordered a stay of payments pending a review by that Court where there was a *bona fide* dispute as to the employer's liability and a showing was made that if the payments were continued and the Commission's order was later reversed, there would be no way to recover from the employe. It is doubtful, however, whether the District Court has power to make such order.

It is necessary that a copy of the complaint be served with the summons and that the complaint shall state the grounds

upon which a review of the Commission's award is sought. There must also be an allegation that the petition for review was filed with the Commission within the time allowed.

Within twenty days after service of the complaint, the Commission certifies its entire file, including a transcript of the testimony taken before it, to the District Court and this constitutes an answer and judgment roll of the Commission. The case is then ready for trial.

The trials of Industrial Commission cases are upon the record and no additional evidence is taken. They consist of oral arguments upon questions of law only; the findings of the Commission upon disputed facts are analogous to the verdict of a jury and will not be disturbed if there is any credible evidence to sustain them.

There are three grounds for setting aside an award of the Commission: (1) Where the Commission acted without authority or in excess of its powers, as where it has made its findings and award and there is no evidence in support thereof; (2) where the finding, order, or award was procured by fraud; or (3) where the findings of fact do not support the order or award; as, for example, if the findings should show that the workman's average weekly wages were $5, but an award is made for more than that sum.

The Court has no power to pass upon the admission or rejection of evidence before the Commission and must disregard any irregularity on error of the Commission unless it is made affirmatively to appear that the party complaining thereof was damaged thereby. As stated before, however, there must be some legal evidence to sustain an award of compensation.

After argument, the District Court may affirm the award of the Commission or may set it aside and remand the record to the Commission for further hearing or proceeding, or it may order the Commission to enter the proper award upon the findings. Within twenty days thereafter, the record is transmitted to the Commission unless in the meantime a writ of error is obtained from the Supreme Court. The District Court has no power to extend this time and even if it should attempt so to do such order is of no effect.—*(General Chemical Co. v. Thomas, 71 Colo. 28.)*

The judgment of the District Court may be reviewed by the Supreme Court on a writ of error as in other cases, but the procedure is slightly different. The writ of error must be obtained within twenty days; assignments of error and the record are filed as usual, but no bill of exceptions is necessary. Briefs in Industrial Commission cases are not required to be printed; they may be typewritten and only ten copies are filed with the Court. Within fifteen days after the issuance of the writ of error, the plaintiff in error must file his brief; within ten days the defendant in error must file his brief; and five days thereafter are allowed for filing the reply brief. For good cause shown, an extension of time for filing briefs is sometimes granted as in other cases. No abstract of record and no bond are required.

The foregoing will give a general idea of our Workmen's Compensation Act and the manner in which a simple claim is handled when no collateral issues crop up in the case, as they sometimes do. Many questions which might arise and other matters covered by the statute cannot, of course, be discussed in the space permitted here. But if this article proves to be of some benefit to those lawyers who are unfamiliar with the Act or causes them to avoid some of the pitfalls in the procedure thereunder, its purpose will be accomplished.