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Procedure to Secure Benefits Under the Workmen's Compensation Act

JOHN GEISNESS*

This article is one of a series of two which will be published on procedure under the Washington Workmen's Compensation Act. The second article, to be written by Lowell P. Mickelwait, will deal with the subject from the viewpoint of the employer.

The Workmen's Compensation Act establishes funds for the payment of benefits to workmen injured in certain industries, and to their widows and children in the event of death. It also defines a procedure for the assertion of the right to such benefits. Under that procedure, the Department of Labor and Industries is vested with original jurisdiction over all claims. The courts are strictly limited to review of questions already passed upon by the Department¹ unless the Department is acting outside of the jurisdiction conferred upon it.² The legislature itself may not override the statutory procedure and appropriate money from one of the funds to a workman.³

Original Application for Compensation

A. *Limitations.*

Proceedings to secure compensation are instituted by filing an application with the Department of Labor and Industries.⁴ The application must be filed within one year "after the date upon which the injury occurred or the rights of dependents or beneficiaries accrued."⁵ The Department provides a form of application and requires that such form be used. However, an application to reopen a closed claim, under a provision of the statute which we will mention later, evidently has been allowed by the courts to operate as an original application, where filed within the one-year period of limitation.⁶

The one-year limitation has occasioned a few interesting problems. Formerly, the statute required claims to be filed within one year after "the injury occurred or the right thereto accrued". Applying that language, the court held that where the injury did not immediately manifest itself in any substantial disability, the application was timely if filed within one year after the commencement of disability entitling the workman to compensation.⁷ And, again, an application was held not to be barred by reason of the fact that there may have been some compensable damage more than one year prior to the application, where the claimant hoped on good medical authority for recovery, and

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¹State *ex rel.* *Winningham v. Olinger*, 190 Wash. 697, 70 P. (2d) 317.

²*Polson Logging Co. v. Kelly*, 195 Wash. 167, 80 P. (2d) 412.

³State *ex rel.* *Trenholm v. Yelle*, 174 Wash. 547, 25 P. (2d) 569.

⁴REM. REV. STAT. § 7686.

⁵*Id.*

⁶*Matson v. Dept. of Labor & Industries*, 198 Wash. 507, 88 P. (2d) 825.

⁷*Stolp v. Dept. of Labor & Industries*, 138 Wash. 685, 245 Pac. 20.

filed his claim within a year after discovery of permanent disability. At the next session of the legislature after the *Stolp* decision the provision in question was amended to its present form. This amendment was held to require the filing of a claim within one year after the *accident*, in view of the statutory definition of "injury" as a "sudden and tangible happening of a traumatic nature, producing an immediate or prompt result, and occurring from without".⁸

Another decision affords some relief from stringencies suggested by the one-year period of limitation. In *Crabb v. Department of Labor and Industries*,⁹ a workman sustained an injury to an ankle and made proper application for compensation, which was allowed. The claim was soon closed and more than a year after the accident occurred, application was made to reopen the claim under a provision of the statute hereinafter discussed, and it was alleged that the claimant's neck had been injured in the accident which had been the subject of the original application, but that no substantial disability had resulted from the neck injury within the one-year period. The court held that the original application was sufficient to require consideration upon the merits of the application to reopen the claim.

If a workman dies as the result of accidental injury in the course of his employment in extra-hazardous industry, or if he dies while permanently and totally disabled as a result of such injury, his widow is entitled to benefits. The claim of a widow is held to be an original claim arising at the time of death, when the statute commences to run.¹⁰ The fact that the husband's claim was barred by passage of time prior to his death does not impair the widow's right under the last-mentioned decision, although a right of action for damages for wrongful death is, of course, so qualified.¹¹

There are some decisions relating to the *Beels* case which, at first glance, are rather confusing. They are all cases in which the husband made an application for compensation and secured some decision concerning it prior to his death.¹² For example, where a workman's claim was closed by an order terminating compensation for temporary total disability and fixing compensation for permanent partial disability, and within one year of his death the widow filed an original claim asserting that he died while totally disabled as a result of the injury in question.¹³ The rationale of those cases is that a widow's claim filed within one year of her husband's death is never barred merely by passage of time prior to the death, nor by any disposition of the husband's claim during his lifetime, unless that disposition constitutes an adverse adjudication of a fact essential to the claim of the widow. Although closure of the husband's claim with an award for permanent partial disability apparently might constitute such an adjudication, a

⁸*Sandahl v. Dept. of Labor & Industries*, 170 Wash. 380, 16 P. (2d) 623.

⁹186 Wash. 505, 58 P. (2d) 1025, 105 A. L. R. 964.

¹⁰*Beels v. Dept. of Labor & Industries*, 178 Wash. 301, 34 P. (2d) 917.

¹¹*Grant v. Fisher Flouring Mills Co.*, 181 Wash. 576, 44 P. (2d) 193.

¹²*Wintermute v. Dept. of Labor & Industries*, 183 Wash. 169, 48 P. (2d)

627; *McFarland v. Dept. of Labor & Industries*, 188 Wash. 357, 62 P. (2d) 714;

Ek v. Dept. of Labor & Industries, 181 Wash. 91, 41 P. (2d) 1097.

¹³*McFarland v. Dept. of Labor & Industries*, 188 Wash. 357, 62 P. (2d) 714.

closure of this character is deemed to be not inconsistent either with the conclusion that the husband died as a result of the injury or while permanently and totally disabled as a result thereof, the two circumstances under which the widow is entitled to compensation.¹⁴ On the other hand, it would appear that an adjudication that the husband was not in the course of his employment at the time of the injury in question would be necessarily inconsistent with any claim on behalf of the widow, and it would constitute a bar, if allowed to become final, although made during the lifetime of the husband.

The original claim is acted upon *ex parte* by the Supervisor of Industrial Insurance; no hearings are held unless proceedings for review are instituted.

B. *Effect of Change in Workman's Condition.*

After final action has been taken upon a claim, the degree of disability suffered by the claimant may change. The statute makes specific provision for such a contingency:¹⁵ "If aggravation, diminution or termination of disability takes place or be discovered after the rate of disability shall have been established or compensation terminated," the Director of Labor and Industries may, upon "the application of the beneficiary, made within three years after the establishment or termination of such compensation, or upon his own motion," readjust or terminate compensation. An application by a beneficiary under this provision is commonly an application to reopen a closed claim. The three-year period of limitation runs from the final decision, whether of Department or Court, establishing or terminating compensation, so that if the claimant unsuccessfully appealed from the original order of the Department terminating compensation, the three-year period does not commence to run until entry of the adverse judgment upon his appeal, and does not run from the date that compensation payment did, in fact, stop.¹⁶

Whether the three-year period of limitation applies to action taken by the Director upon his own motion has been reserved for future consideration.¹⁷

The Act provides,¹⁸ that where change in circumstances warrants readjustment of compensation "like application shall be made therefor" as for compensation in the first instance. Evidently giving the statutory language quite a literal application, the Department provides and insists upon the use of a form of application for the reopening of a closed claim which is very similar to the form provided for original claims.

Review

A. *Rehearing Within the Department.*

The procedure for review of industrial insurance cases was radically altered in 1927. Prior to that time decisions of the Department were reviewed by direct appeal to the superior court. Now, a claimant must first apply to the Director of Labor and Industries for a rehearing

¹⁴*Id.*

¹⁵REM. REV. STAT. § 7679 (h).

¹⁶*Hunter v. Dept. of Labor & Industries*, 190 Wash. 380, 68 P. (2d) 224.

¹⁷*Botica v. Dept. of Labor & Industries*, 184 Wash. 573, 52 P. (2d) 332.

¹⁸REM. REV. STAT. § 7686 (c).

before a board, designated the Joint Board of the Department of Labor and Industries.¹⁹ Such application must be made within sixty days after the order, decision or award in question is communicated to the claimant.²⁰ Within thirty days of the decision of the Joint Board upon such application, or within thirty days after the application is deemed denied for non-action, as provided in the statute,²¹ appeal may be taken to the superior court and thence to the supreme court as in other civil cases.

The Department of Labor and Industries has adopted simple rules governing form and contents of applications for rehearing, but has not yet strictly enforced them. The supreme court has held that the application may be directed to the Department, and not to the Director, himself, as the statute literally requires, but that it must expressly or impliedly request a rehearing.²²

The sixty-day period of limitation is ordinarily a strict limitation upon the right of review,²³ but it is qualified in at least two situations. By statute, if, within that period, the Department orders "the submission of further evidence", or "the investigation of any further fact", the time for appeal is extended until the applicant is advised in writing of the Department's final order.²⁴ This means that the time within which applications for rehearing must be made does not, under such circumstances, commence to run until notice of the final order.²⁵ By court decision, insanity of the applicant may extend the time, where the circumstances are such as to invoke equitable considerations, although the general statute pertaining to insanity and limitation of actions²⁶ does not apply.²⁷

Upon rehearing, testimony is customarily taken before an examiner employed by the Department. The statute provides that the rehearings shall be *de novo* and summary, but also requires that witnesses be sworn or that their testimony be taken by deposition as in cases before the superior court. The extent to which the rules of evidence are relaxed in proceedings before the Joint Board has not been defined with any particularity. The court has held that a widow and a doctor were properly permitted to testify as to statements made by the decedent several days after the injury, describing the injury and the reaction it caused.²⁸ The court remarked that the statements "may not have been admissible under the strict rules observed in court proceedings", but held them admissible in view of the informality of proceedings under the Workmen's Compensation Act. If otherwise ad-

¹⁹REM. REV. STAT. § 7697. *State ex rel. Winningham v. Olinger*, 190 Wash. 697, 70 P. (2d) 317.

²⁰The decisions concerning proof of such communication are a little confusing. *Cox v. Dept. of Labor & Industries*, 177 Wash. 529, 32 P. (2d) 570; *Farrow v. Dept. of Labor & Industries*, 179 Wash. 453, 38 P. (2d) 240.

²¹REM. REV. STAT. § 7697.

²²*Royse v. Dept. of Labor & Industries*, 193 Wash. 488, 76 P. (2d) 318.

²³*Boley v. Dept. of Labor & Industries*, 177 Wash. 178, 31 P. (2d) 501; *Smith v. Dept. of Labor & Industries*, 101 Wash. Dec. 264.

²⁴REM. REV. STAT. § 7679 (h).

²⁵*Taylor v. Dept. of Labor & Industries*, 175 Wash. 1, 26 P. (2d) 391.

²⁶REM. REV. STAT. § 169.

²⁷*Ames v. Dept. of Labor & Industries*, 176 Wash. 509, 30 P. (2d) 239.

²⁸*McKinnie v. Dept. of Labor & Industries*, 179 Wash. 245, 37 P. (2d) 218.

missible, a widow's testimony concerning statements made by her deceased husband is not barred by REMINGTON'S REVISED STATUTES, § 1211.²⁹ Whether or not unsworn statements in the claim file, such as medical reports, have evidentiary value is hereinafter discussed.

The statute³⁰ requires that the application for rehearing set forth in detail the grounds relied upon, include every issue to be considered and set forth a detailed statement of facts. Nevertheless, an application for rehearing will be deemed amended to conform to the proof.³¹

It frequently happens that after application for rehearing is made, the questions raised are by agreement submitted to a commission of doctors for decision. Such agreements are called agreements for arbitration, but the arbitration, such as it is, is purely voluntary at all stages, and the commission decision is not binding upon the claimant, notwithstanding language to the contrary in the agreement.³²

B. *Review by the Superior Court.*

Appeal from the Joint Board decision is taken, by notice, to the superior court of the county of the claimant's residence. No other superior court has jurisdiction and the cause cannot be transferred to another county for convenience of witnesses.³³ No bond is required.³⁴ The Department files a certified copy of its record and delivers another copy to counsel. This file was formerly full of irrelevant matter, such as bills for medical expense, and general correspondence. A good deal of effort and expense is now frequently saved by stipulations eliminating at least a substantial part of the papers not material to the review.

Upon appeal the case is at issue when the Department files its appearance, which it is required to do within twenty days. The record may be filed at any time before the trial.

The testimony must be presented to court or jury in the same manner as are depositions in other civil cases.

Until 1939, the Department of Labor and Industries was permitted to introduced evidence in the superior court, whereas the claimant was required to introduce all of his evidence before the Joint Board of the Department and in court was limited to evidence rebutting that adduced by the Department.³⁵ Furthermore, the statute was construed to permit a jury trial only in the discretion of the court, and the jury's verdict was declared to be advisory only.³⁶ These procedural rules were changed by an Act of the 1939 Legislature³⁷ which reads as follows:

"In all appeals to the Superior Court from any order, decision or award of the Joint Board of the Department of Labor

²⁹Devlin v. Dept. of Labor & Industries, 194 Wash. 549, 78 P. (2d) 952.

³⁰REM. REV. STAT. § 7697.

³¹Brittain v. Dept. of Labor & Industries, 178 Wash. 499, 503, 35 P. (2d) 49; Cogdal v. Dept. of Labor & Industries, 170 Wash. 639, 17 P. (2d) 55.

³²Smith v. Dept. of Labor & Industries, 176 Wash. 569, 30 P. (2d) 656.

³³Tenneyson v. Dept. of Labor & Industries, 189 Wash. 616, 66 P. (2d) 314.

³⁴REM. REV. STAT. § 7697.

³⁵See Murray v. Dept. of Labor & Industries, 151 Wash. 95, 275 Pac. 66.

³⁶Hodgen v. Dept. of Labor & Industries, 194 Wash. 541, 78 P. (2d) 949, and cases following it.

³⁷Ch. 184, § 1, p. 579, Laws 1939; REM. REV. STAT. SUPP. § 7697-2.

and Industries either party shall be entitled to a trial by jury upon demand. The jury's verdict in every such appeal shall have the same force and effect as in actions at law. In any such appeal the trial shall be *de novo* and no party to the appeal shall be permitted to introduce evidence in court in addition to that contained in the departmental record."

No part of this statute has as yet been discussed by the supreme court. It is so explicit as to the matters with which it is concerned as to leave little room for construction.³⁸

The certified departmental file always contains various papers, in addition to the transcript of testimony, such as medical reports and reports of officials and employees of the Department. It was first declared³⁹ that unsworn statements in the claim file, such as medical reports, have no evidentiary value whatsoever and should be disregarded by both the Joint Board and the courts. Without mentioning the *Sweitzer* case, subsequent decisions either announce or strongly imply a contrary rule.⁴⁰ These opinions obviously have raised serious doubt as to the method of procedure in cases tried to a jury. If the explicit decision upon the question in the *Sweitzer* case were followed, it would seem that a more workable method of procedure would result. The formal statements of position, such as applications and orders, would serve to outline the issues, but only the sworn testimony would be given evidentiary value by the trier of the facts. Such a method of procedure would be consonant with the general practice in civil cases, would accord the fundamental right to cross-examine witnesses and would give full effect to the statutory requirement that the testimony upon rehearing be under oath. While unquestionably it would be inconsistent with the expressions of the court in the *McKinnie*, *Nagel* and *Devlin* cases, it is significant that in none of these cases was the *Sweitzer* case expressly overruled, or even mentioned.

C. Scope of Issues Before the Superior Court.

The rule that the courts have no original jurisdiction in industrial insurance cases must be considered in determining the issues presented by an appeal. It necessarily follows from that limitation on the courts' jurisdiction that where the Department has made no decision on the merits of a claim, the court has no power to pass upon the merits,⁴¹ and in other cases where the Department has rejected a claim without

³⁸But see: *Bradbury v. Dept. of Labor & Industries*, 177 Wash. 162, 31 P. (2d) 87, and *DeStoop v. Dept. of Labor & Industries*, 101 Wash. Dec. 294, as to the right of the claimant to introduce evidence in the superior court, where rehearing has been denied.

³⁹*Sweitzer v. Dept. of Labor & Industries*, 177 Wash. 28, 30 P. (2d) 980.
⁴⁰*McKinnie v. Dept. of Labor & Industries*, 179 Wash. 245, 37 P. (2d) 218; *Wintermute v. Dept. of Labor & Industries*, 183 Wash. 169, 48 P. (2d) 627; *Nagel v. Dept. of Labor & Industries*, 189 Wash. 631, 66 P. (2d) 318; *Devlin v. Dept. of Labor & Industries*, 194 Wash. 549, 78 P. (2d) 952.

⁴¹*Taylor v. Dept. of Labor & Industries*, 175 Wash. 1, 26 P. (2d) 391; *Baker v. Dept. of Labor & Industries*, 181 Wash. 85, 42 P. (2d) 13; *Puliz v. Dept. of Labor & Industries*, 184 Wash. 585, 52 P. (2d) 347; *DeStoop v. Dept. of Labor & Industries*, 101 Wash. Dec. 294.

considering the extent of disability, as where it has found a lack of proof that the injury in question was sustained in the course of employment, the court's jurisdiction is limited to that single issue, and it cannot fix the amount of compensation in the event of reversal.⁴² On the other hand, where the Department has erroneously concluded that no permanent disability was sustained, the superior court, if it reverses that decision, should fix the extent of disability; and similarly, where a claimant has petitioned to reopen his claim upon the ground that his condition has become aggravated, the superior court, upon reversing a decision of the Department that no aggravation occurred, may fix the degree of disability.⁴³

Where the Department has made a final determination on an issue, the court cannot simply send the case back to the Department for further consideration of that issue.⁴⁴ It must dispose of the issue presented and confirm, reverse or modify the decision of the Department.⁴⁵

Despite the court's lack of original jurisdiction, where the Department accepted as true the facts essential to the claim but rejected the claim upon the sole ground that it was not filed within the time allowed by law, the court, upon reversing the departmental decision, properly ordered allowance of the claim upon the merits.⁴⁶

If not reviewed, a decision either of the Supervisor of Industrial Insurance or of the Joint Board of the Department may become *res adjudicata*, either against the claimant,⁴⁷ an employer,⁴⁸ or the Department.⁴⁹ On the other hand, the Department sends out much informal correspondence and what might be called interlocutory orders, expressing unfavorable rulings, but not requiring review. Several cases deal with such communications.⁵⁰ In particular cases doubts must remain as to the right to or necessity for review, but in the *Puliz* case there is a very helpful statement of the general rule:

"To constitute a final order from which a claimant must appeal, it must clearly appear that the order is of such a nature. A claimant must be advised that all of his claims, or certain specified claims as the case may be, are thereby finally determined."

Of course, a prior decision forecloses a later contention only if necessarily inconsistent with it. As already mentioned, a decision fixing the extent of permanent partial disability during the lifetime of a workman does not preclude a contention on the part of his widow that

⁴²DuFraine v. Dept. of Labor & Industries, 180 Wash. 504, 40 P. (2d) 987.

⁴³Noll v. Dept. of Labor & Industries, 179 Wash. 213, 36 P. (2d) 809.

⁴⁴Boone v. Dept. of Labor & Industries, 174 Wash. 123, 24 P. (2d) 454.

⁴⁵*Id.*

⁴⁶Beels v. Dept. of Labor & Industries, 178 Wash. 301, 34 P. (2d) 917.

⁴⁷Ek v. Dept. of Labor & Industries, 181 Wash. 91, 41 P. (2d) 1097.

⁴⁸Prince v. Saginaw Logging Co., 197 Wash. 4, 84 P. (2d) 397.

⁴⁹Abraham v. Dept. of Labor & Industries, 178 Wash. 160, 34 P. (2d) 457; Luton v. Dept. of Labor & Industries, 183 Wash. 105, 48 P. (2d) 199.

⁵⁰Goenen v. Dept. of Labor & Industries, 182 Wash. 469, 47 P. (2d) 991; Haugen v. Dept. of Labor & Industries, 183 Wash. 398, 48 P. (2d) 565; Smith v. Dept. of Labor & Industries, 185 Wash. 443, 55 P. (2d) 603; Puliz v. Dept. of Labor & Industries, 184 Wash. 585, 52 P. (2d) 347.

he died while totally disabled as a result of his injury. And in the *Goenen* case⁵¹ the court held that an unappealed decision of the Department adverse to the claimant's contention that his condition had become aggravated from a cataract on his right eye was not *res adjudicata* as against a later contention that a detached retina which was not discoverable until the removal of the cataract, resulted from the injury in question and was a more important cause of his progressive blindness than the cataract.

D. Summary Enforcement of Superior Court Judgment.

The superior courts may, by show cause proceedings, compel compliance with judgments upon appeal,⁵² but where the judgment in question remanded the claim to the Department with instructions to rate the disability of the claimant, and the Department made a rating unsatisfactory to the claimant, he was relegated to an appeal from the rating, the Department having complied with the judgment.⁵³

The supreme court has not yet decided whether a claimant may enforce a judgment of the superior court awarding compensation for permanent partial disability, during the pendency of an appeal from that judgment in which he seeks to be classified as permanently and totally disabled.⁵⁴

Compromise of Pension Claims

The statute⁵⁵ permits the beneficiary and the Department, by mutual agreement, to convert a pension, in whole or in part, into a lump sum settlement equal or proportionate to the value of the pension as certified by the Insurance Commissioner, but in no event to exceed \$4,000. It is clear that, after the right to a pension is established, no binding settlement can be made for a sum which is less than \$4,000 and also less than the amount so certified.⁵⁶ In the *Booth* case the right to a pension was disputed and while that dispute was pending before the Joint Board the claim was settled for \$2,600, without certification from the Insurance Commissioner. The actuarial value of the pension exceeded \$2,600, and the settlement was consummated by an order recognizing the right to a pension and awarding the lump sum settlement. The court held that the settlement was void and could be attacked at any time.

It was generally assumed that the *Booth* case rendered void any type of settlement in the consummation of which the Department declared the status of the claimant under the Act and then paid him less

⁵¹*Goenen v. Dept. of Labor & Industries*, 182 Wash. 469, 37 P. (2d) 991.

⁵²*DeStoop v. Dept. of Labor & Industries*, 197 Wash. 140, 84 P. (2d) 706.

⁵³*Powers v. Dept. of Labor & Industries*, 177 Wash. 21, 30 P. (2d) 983.

⁵⁴*Dept. of Labor & Industries v. Stone*, 190 Wash. 145, 67 P. (2d) 320, nullified in 192 Wash. 699, 72 P. (2d) 605.

⁵⁵REM. REV. STAT. § 7681.

⁵⁶*Booth v. Dept. of Labor & Industries*, 189 Wash. 201, 64 P. (2d) 505; *Hagen v. Dept. of Labor & Industries*, 193 Wash. 555, 76 P. (2d) 592; *Horton v. Dept. of Labor & Industries*, 199 Wash. 212, 90 P. (2d) 1009. Also, *Hicks v. Dept. of Labor & Industries*, 101 Wash. 586, involving the application of REM. REV. STAT. § 7679 (j), which relates to settlements with nonresident beneficiaries.

than the amount prescribed for such status. However, in *Godfrey v. Department of Labor and Industries*⁵⁷ the court sustained a settlement of a similar nature made during the pendency of an appeal to the supreme court, upon two grounds:

1. That the payment was not, strictly speaking, accepted in settlement of the pension reserve, but in settlement of a pending suit; and
2. That a judgment dismissing the appeal to the supreme court had been entered, based upon a stipulation of the parties that the controversy had been settled.

The first reason does not seem a valid basis for distinction between the *Booth* and *Godfrey* cases. In both cases the parties were, in the same sense, settling a pending controversy. However, the court plainly intended no modification of the *Booth* decision, and the result would appear to be that a settlement of a pension claim for less than the prescribed amount is valid only if the right to the pension is disputed and if that dispute is pending in the courts, where the settlement may be consummated by a judgment.

⁵⁷198 Wash. 71, 86 P. (2d) 1110.

Size of Bar Journal Reduced

In December, 1939, the Board of Governors voted to reduce the space allotment of the Bar Journal from 26 pages to 8 pages. The action was necessary because of the lack of sufficient funds to maintain the Journal in its former size.