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The Washington Workmen's Compensation Act From the Employers' Viewpoint

LOWELL P. MICKELWAIT*

Although this state has had a workmen's compensation act since 1911, the employers generally have, until recently, paid but slight attention to the administration of the act. They have proceeded on the theory that the accident experience of the particular employer had little or no relation to the amount of contributions required to be made by that employer under the act. The situation is very different today. Every well-advised employer now realizes that, in the long run, his industrial insurance premiums will tend to approximate the cost of the accidents occurring in his own plant. By the maintenance of high safety standards or other accident prevention measures the employer may reduce substantially his accident cost experience, thereby receiving a material reduction in his premiums payable to the Department of Labor & Industries. This so-called "merit-rating" plan constitutes the outstanding feature of the present law.

The Merit-Rating Plan

The original workmen's compensation act contained the germ of the idea that the rates should conform to the accident experience.¹ Industries were divided into 47 classes with different rates applicable thereto, the division being on the basis of "equitable distribution of burden in proportion to relative hazard". The rates and classifications were fixed and inflexible but subject to future adjustment by the legislature. The classifications of industry were made subject "to rearrangement following *any relative increase or decrease of hazard shown by experience*". The legislatures of 1915² and 1917³ gave the department rather broad powers as to readjustment of rates and rearrangement of classes on the basis of accident experience.

It remained, however, for the 1931 legislature to adopt the "merit-rating" system. The 1931 amendment⁴ established the method to be followed by the department in determining the amounts to be contributed by each employer into the accident fund and the medical aid fund. In this respect the present law⁵ is substantially the same as the 1931 law, and under it the amounts to be paid by the employer are determined in the following manner:

(1) The "basic premium rate" is fixed upon the basis of the cost experience of the entire class over the preceding two-year period.

(2) The individual employer's "cost rate" is determined upon the basis of the cost experience of that employer over the preceding five-year period.

(3) The actual premium rate to be paid by the employer is ascertained by taking 40 per cent of the basic rate of the class plus 60 per cent of the employer's cost rate, with the ceiling fixed at 160 per cent of the basic rate.

*Of the Seattle Bar. XV WASH. LAW REVIEW 62 (Jan. 1940).

¹Laws of 1911, p. 349, ch. 74, § 4.

²Laws of 1915, p. 874, ch. 188, § 1.

³Laws of 1917, p. 477, ch. 120, § 2.

⁴Laws of 1931, p. 297, ch. 104, § 1.

⁵REM. REV. STAT. § 7876.

It is thus observed that the employer's rates are the result of (1) the experience of his industrial class, and (2) his own experience. Consequently, the law not only acts as an incentive to the individual employer to reduce his accident experience, but it also tends to induce him to cooperate with the other employers in his class so as to decrease the basic rate. There are in the various classes of industry a number of examples of the results that can be obtained through accident prevention measures and careful supervision of claims. In some classes the cost experience has been gradually reduced over the last five years with the result that successive reductions have been obtained in the applicable rates, and substantial reserves have been accumulated. There are a few classes, however, where due to various reasons the collections from employers have been insufficient to pay the allowed claims and deficits have been permitted to accrue. By a five-to-four decision the Supreme Court has recently held, with respect to such insolvent classes, that regardless of the financial condition of the particular class in which the claim arises, the claim must be paid so long as the accident fund, considered as a whole, remains solvent.⁶ As a result of this holding a situation has been created whereby the reserves built up in well-managed classes may be depleted through withdrawals made for the benefit of insolvent classifications, thus undermining to a considerable extent the merit-rating plan.

Employers' Right of Appeal

With the advent of the merit-rating system and the consequent realization that the awards paid claimants materially affected the employers' rates, the employers commenced to assert their rights. The claimants, however, objected to any participation by the employers in the proceedings involving claims filed with the department. A bitter fight has been waged in the courts over the employer's right of participation and appeal.

In the earlier cases, it seems to have been assumed that the employer had the right of appeal from a decision of the department upon a claim filed by an injured workman or other claimant.⁷ After the objection was raised, however, it required several *en banc* decisions to settle the matter. *State ex rel. Crabb v. Olinger*⁸ approved the right of the employer to appeal from a departmental decision to the joint board. The employer's right of appeal from the decision of the joint board to the courts was then upheld in the *Mud Bay Logging Co.* case and cases following it.⁹ However, the right of appeal was still being contested as late as in *Cole v. Department of Labor & Industries*,¹⁰ decided August 24, 1939, where the Supreme Court apparently divided six to

⁶*Campbell v. Department of Labor & Industries*, 102 Wash. Dec. 146, 97 P. (2d) 642 (1940); see also *Lassiter v. Department of Labor & Industries*, 102 Wash. Dec. 153, 97 P. (2d) 645 (1940).

⁷*Brewer v. Department of Labor & Industries*, 143 Wash. 49, 254 Pac. 831 (1927); *Seattle Can Co. v. Department of Labor & Industries*, 147 Wash. 303, 265 Pac. 739 (1928); *Hama Hama Logging Co. v. Department of Labor & Industries*, 157 Wash. 96, 288 Pac. 655 (1930).

⁸191 Wash. 534, 71 P. (2d) 545 (1937).

⁹*Mud Bay Logging Co. v. Department of Labor & Industries*, 193 Wash. 275, 75 P. (2d) 579 (1938); *State ex rel. Crabb v. Olinger*, 196 Wash. 308, 82 P. (2d) 865 (1938); *Hoff v. Department of Labor & Industries*, 198 Wash. 257, 88 P. (2d) 419 (1939).

¹⁰200 Wash. 286, 93 P. (2d) 413.

three on the question, but continued to approve the employer's right of appeal. It would seem that the issue has been definitely and finally settled by the Supreme Court.

There is no doubt that an employer has a right to be heard in any departmental proceedings involving his classification or rates, and that he may appeal from the department's determination.¹¹

Procedure

After the occurrence of an accident the injured workman must file his claim with the department within the specified period of one year.¹² Although the workman is not required to serve a copy of his claim on the employer, the workman does have the duty of reporting the accident to the employer.¹³ The department first acts upon the claim *ex parte*, then notifies the employer and the claimant of his order respecting the claim. Such order is not binding upon the employer unless and until a copy of it is communicated to him.¹⁴

Where an award is made to the claimant, it is the practice of the department to withhold payment for seven days after communication of the order to the employer. If the employer protests, the payment usually is withheld pending the appeal, but no protest is necessary to protect the employer's right of appeal. In any event, the employer has sixty days from the time of receipt of notice of the order of the department within which to apply for a rehearing before the joint board.¹⁵

Unless appealed from, any final order of the department with respect to a claim becomes *res judicata* as to all interested parties.¹⁶ For example, if the department rejects a claim upon the ground that the accident did not occur in the course of employment and neither party appeals therefrom, then, in a subsequent common law action by the claimant against the employer, the departmental decision is binding on the employer and the correctness of the ruling cannot be questioned. This is upon the basis that the employer has the right of appeal from an order *denying* compensation to a claimant as well as from an order *granting* compensation.¹⁷ Consequently, employers should be on the alert to make certain that all decisions of the department respecting claims made by their employees are correct, whether the claim is allowed or rejected.

Before any appeal is taken to the courts, resort must first be had to the joint board by filing an application for rehearing.¹⁸ Such an

¹¹REM. REV. STAT. § 7676; and see *Mud Bay Logging Co. v. Department of Labor & Industries*, 193 Wash. 275, 75 P. (2d) 579 (1938).

¹²REM. REV. STAT. § 7686.

¹³REM. REV. STAT. § 7689.

¹⁴REM. REV. STAT. § 7697; *Mud Bay Logging Co. v. Department of Labor & Industries*, 189 Wash. 285, 64 P. (2d) 1054 (1937); *affirmed on rehearing*, 193 Wash. 275, 75 P. (2d) 579 (1938).

¹⁵REM. REV. STAT. § 7697.

¹⁶*Abraham v. Department of Labor & Industries*, 178 Wash. 160, 34 P. (2d) 457 (1934); *Luton v. Department of Labor & Industries*, 183 Wash. 105, 48 P. (2d) 199 (1935); *Ek v. Department of Labor & Industries*, 181 Wash. 91, 41 P. (2d) 1097 (1935).

¹⁷*Prince v. Saginaw Logging Co.*, 197 Wash. 4, 84 P. (2d) 397 (1938); *Hama Hama Logging Co. v. Department of Labor & Industries*, 157 Wash. 96, 288 Pac. 655 (1930), *supra*.

¹⁸*State ex rel. Winningham v. Olinger*, 190 Wash. 697, 70 P. (2d) 317 (1937); *Woodard v. Department of Labor & Industries*, 188 Wash. 93, 61 P. (2d) 1003 (1936).

application of the employer operates as a stay of proceedings and suspends the right of the claimant to receive payment of his award pending a decision by the joint board.¹⁹ The employer has a right to appear and be represented at hearings before the joint board.²⁰ It is important that the employer introduce before the joint board whatever evidence is available. Under a 1939 amendment to the Act neither party is permitted to introduce evidence in court in addition to that contained in the departmental record.²¹

The jurisdiction of the joint board is appellate only and the scope of the issues involved in the rehearing is limited by the department's order which is under review.²² Only one rehearing before the joint board is contemplated by the Act, no matter whether it is held on the application of the employer or of the claimant. From the ruling of the joint board on such rehearing the employer must appeal or be bound thereby.²³ Within thirty days after the final order of the joint board has been communicated to the employer, he may appeal to the superior court of the county of his residence.²⁴ Such an appeal apparently does not act as a supersedeas but the claimant is entitled to receive payment of the award made by the joint board pending disposition of the appeal.²⁵ However, if the employer is successful on his appeal, he is entitled to have the cost of the accident stricken from his cost experience,²⁶ leaving for future determination the knotty problem as to the source from which the department is to obtain funds for payment of such a claim in the event that it is subsequently reversed by the courts.

In all court proceedings the matter is heard *de novo*, the decision of the department is presumed to be *prima facie* correct, and the burden of proof is on the party attacking the same.²⁷ The employer has the right to participate in the superior court proceedings and to appeal from any adverse judgment of the court, even though no formal attempt to intervene has been made and no order permitting intervention has been entered.²⁸ The right of participation is of somewhat doubtful value since the enactment of the 1939 amendment stating that either party (meaning the claimant) shall be entitled to a trial by jury upon

¹⁹State *ex rel.* Crabb v. Olinger, 191 Wash. 534, 71 P. (2d) 545 (1937), *supra*.

²⁰Mud Bay Logging Co. v. Department of Labor & Industries, 189 Wash. 285, 64 P. (2d) 1054 (1937); *affirmed on rehearing*, 193 Wash. 275, 75 P. (2d) 579 (1938).

²¹REM. REV. STAT. § 7697-2.

²²Woodard v. Department of Labor & Industries, 188 Wash. 93, 61 P. (2d) 1003 (1936).

²³Albrecht v. Department of Labor & Industries, 192 Wash. 520, 74 P. (2d) 22 (1937).

²⁴REM. REV. STAT. § 7697.

²⁵State *ex rel.* Crabb v. Olinger, 196 Wash. 308, 82 P. (2d) 865 (1938) *supra*.

²⁶Mud Bay Logging Co. v. Department of Labor & Industries, 189 Wash. 285, 64 P. (2d) 1054 (1937), *supra*; *affirmed on rehearing*, 193 Wash. 275, 75 P. (2d) 579 (1938).

²⁷REM. REV. STAT. § 7697; Eyer v. Department of Labor & Industries, 101 Wash. Dec. 473, 96 P. (2d) 1115 (1939); Hoff v. Department of Labor & Industries, 198 Wash. 257, 88 P. (2d) 419 (1939), *supra*.

²⁸Hoff v. Department of Labor & Industries, 198 Wash. 257, 88 P. (2d) 419 (1939), *supra*; Cole v. Department of Labor & Industries, 200 Wash. 296, 93 P. (2d) 413 (1939), *supra*.

demand,²⁹ whereas before the amendment the calling of a jury was discretionary in the trial court.³⁰ At the time this is being written the supreme court has not interpreted the 1939 amendment with respect to whether it changes the effect of the jury's verdict. However, a reasonable interpretation of it is that the verdict is still merely advisory and that it is the function of the court to determine in the final analysis whether the department's decision is correct.³¹

Conclusion

The foregoing represents a sincere effort to state the law as it exists today and no attempt has been made to state what the law should be. It is generally agreed among the members of the bar of this state that the Workmen's Compensation Act needs a thoroughgoing revision, at least to the extent of clarification and simplification of the procedural provisions. One-half day of the coming Legal Institute, to be held in conjunction with the State Bar Association convention at Olympia next August, will be devoted to the subject of workmen's compensation. It is hoped that the representative committee in charge of his portion of the program will have some constructive suggestions to offer respecting a revision of the law.

²⁹REM. REV. STAT. § 7697-2.

³⁰Hodgen v. Department of Labor & Industries, 194 Wash. 541, 78 P. (2d) 949 (1938), and cases following it.

³¹See Hodgen v. Department of Labor & Industries, 194 Wash. 541, 78 P. (2d) 949 (1938), *supra*; REM. REV. STAT. § 7697.

New Federal District Court Rules

The following rules have been announced by Judges John C. Bowen and Lloyd L. Black for the United States District Court, Western District of Washington, effective April 24, 1940:

"In all civil actions tried by jury, including those to which the Federal Rules of Civil Procedure are not made applicable as well as those to which such Rules are applicable, the Court may direct that one or two jurors in addition to the regular panel be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict. If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed by law. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates. * * *

"When any action or proceeding on the calendar of a judge of this court is to be dismissed upon stipulation of the parties or upon plaintiff's motion before defendant's appearance, the order for such dismissal may in the absence of the judge on whose calendar the matter is pending be signed and entered by any other judge of this court who is present and consents to hear the matter. * * *"