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## Washington Workmen's Compensation: The Duplicate Task of Commission and Courts in Hearing Appeals Upon the Facts

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## COMMENT

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### WASHINGTON WORKMEN'S COMPENSATION: THE DUPLICATE TASK OF COMMISSION AND COURTS IN HEARING APPEALS UPON THE FACTS

There are few instances in the law when a litigant can appeal to three successive tribunals upon findings of fact alone, and obtain a complete rehearing in each of them. Such is the anomalous procedure permitted in cases arising under our Industrial Insurance Act. That,

and the provision for a jury sitting on the second appeal, may help to explain the frequency with which "Blank v Department of Labor and Industries" appears in our advance sheets

## I

Washington has a compulsory industrial insurance law,<sup>1</sup> protecting workmen engaged in "extrahazardous work." Unlike almost all other compensation statutes, it provides specific sums for certain disabilities and degrees of partial disability.<sup>2</sup> The workman or his dependent makes application directly to the Department of Labor and Industries, appending a physician's certificate, or proof of death.<sup>3</sup> The department renders a decision and notifies the interested persons, including the employer, whose premium rate is affected.<sup>4</sup> The award, if any, is paid from the state's accident fund.<sup>5</sup>

As originally drawn, this pioneer statute did not provide for any formal administrative rehearing.<sup>6</sup> Instead, a proceeding in superior court was established, for review of the department's decisions on questions of fact, and its interpretation of the statute, "it being the intent that matters resting in the discretion of the department shall not be subject to review. The proceedings in every such appeal shall be informal and summary." The calling of a jury rested in the discretion of the court, except in cases where penalties were sought against the employer for failure to provide mandatory safeguards, or for his refusal to submit for inspection pertinent records. Its verdict was advisory only.<sup>7</sup> "In all court proceedings under or pursuant to this act, the decision of the department shall be *prima facie* correct, and the burden of proof shall be upon the party attacking the same."<sup>8</sup>

The intention of these provisions was clearly discernible from the first section of the act

"all phases of the premises are withdrawn from private controversy and sure and certain relief for workmen and their families and dependents is hereby provided; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdictions of the courts of the state over such causes are hereby abolished, except as in this act provided."<sup>9</sup>

This then-novel concept was at once challenged. It was said to fly in the face of our state constitution, which provides that the right of

<sup>1</sup> WASH. REM. REV. STAT. (1932) § 7673 *et seq.*, conveniently compiled in "Industrial Insurance and Medical Aid Acts as Amended by Session Laws of 1945" Division of Industrial Insurance Olympia.

<sup>2</sup> REM. REV. STAT. § 7679, as amended.

<sup>3</sup> REM. REV. STAT. § 7686.

<sup>4</sup> REM. REV. STAT. § 7697; *cf.* *Cole v. Dept.*, 200 Wash. 297, 93 P. (2d) 413 (1939); Mickelwait, *The Washington Workmen's Compensation Act from the Employers' Viewpoint* (1940) 15 WASH. L. REV. 132.

<sup>5</sup> REM. REV. STAT. §§ 7676, 7705.

<sup>6</sup> Washington was among the ten states which adopted workmen's compensation acts in 1911. I SCHNEIDER, *WORKMEN'S COMPENSATION* (3d ed. 1941) 11.

<sup>7</sup> *McLaren v. Dept.*, 6 Wn. (2d) 164, 167, 107 P. (2d) 230, 231 (1940); Larson, *Administrative Determinations and the Extraordinary Writs in the State of Washington* (1945) 20 WASH. L. REV. 22, 27.

<sup>8</sup> WASH. REM. COMP. STAT. (1922) § 7697; WASH. REM. CODE (1915) § 6604-20.

<sup>9</sup> REM. REV. STAT. § 7673.

trial by jury shall remain inviolate Our court, through Judge Fullerton, gave an answer which must be respected for its fresh insight upon the question:<sup>10</sup>

"The common law system of making awards for personal injuries has no such inherent merit as to make a change undesirable No one knows better than judges of courts of *nisi prius* and of review that the common law method of making such awards, even in those instances to which it is applicable, proves in practice most unsatisfactory All judges have been witnesses to extravagant award made for most trivial injuries and trivial awards made for injuries ruinous in the(ir) nature; and perhaps no verdicts of juries are interfered with so often by the courts as verdicts making awards in such cases There is no standard of measurement that the court can submit to the jury by which they can determine the amount of the award The test of reasonableness means but little to the ordinary juror Unused as he is generally to witnessing the results of injuries, he is inclined to measure his verdict by the amount of disorder he observes, rather than by the actual amount of disablement the injury has caused Nor is he aided in this respect by the testimony of medical experts Conflicting as such testimony usually is, it tends rather to confuse than to enlighten him Perhaps the whole difficulty lies in the fact that the question is too much one of opinion and not enough one of fact<sup>11</sup> The desirability of this substitution is unquestioned, and we believe that the legislature had the power to make it without violating any principle of the fundamental law<sup>12</sup>

"The objection may be answered also in another way

The right to trial by jury accorded by the constitution, as applicable to civil cases, is incident only to causes of action recognized by law The act here in question takes away the cause of action, on the one hand, and the ground of defense, on the other; and merges both in a statutory indemnity, fixed and certain the right of trial by jury is thereafter no longer involved in such cases The right of jury trial being incidental to the right of action, to destroy the one is to leave the other nothing upon which to operate"<sup>13</sup>

<sup>10</sup> State *ex rel* Davis-Smith Co. v. Clausen, 65 Wash 156, at 209, 117 Pac 1101, at 1119 (1911) The court discussed at length three other objections to the act—that it violated due process clauses of the state and national constitutions, that it violated the privileges and immunities clause of the state constitution, and the equal protection clause of the Federal Constitution, and that it violated tax provisions of the state constitution

<sup>11</sup> See 2 WIGMORE, EVIDENCE (3d ed 1940) § 663

<sup>12</sup> *Accord*, Borgnis v Falk Co, 147 Wis 327, 133 N W 209, 215 (1911) "To speak of the common-law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for bread The terrible economic waste, the overwhelming temptation to the commission of perjury and the relatively small proportion of the sums recovered which comes to the injured parties in such actions, condemn them as wholly inadequate to meet the difficulty"

<sup>13</sup> Judge Chadwick dissented from this portion of the opinion; he doubted that the legislature could take from the worker his right to have the amount of compensation "fixed by an authority less than the very people, who have said 'the right of trial by jury shall remain inviolate'" 65 Wash at 214, 117 Pac at 1121

This last reason was approved by the United States Supreme Court in 1917, in *Mountain Timber Company v State of Washington*, which sustained the constitutionality of our act<sup>14</sup>

In this stage of the law our court adopted the attitude that the decision of the department upon the amount of an award would be disturbed only "where the discretion of the department in that regard has been exercised in a capricious and arbitrary manner"<sup>15</sup>

In 1927 the Washington Legislature completely altered the character of appeals in workmen's compensation cases<sup>16</sup> It provided that any party aggrieved by the decision of the department should have sixty days in which to apply<sup>17</sup> for a hearing before a joint board of three officials of the department The application sets forth the party's objections and must contain a detailed statement of facts upon which he relies in support thereof The joint board may amend the order without further hearing, but otherwise is directed to hold a hearing on the issues raised, either in the county where the applicant resides, or in the county where the injury occurred Such rehearing is *de novo* and summary In practice it is conducted by examiners,<sup>18</sup> as permitted by the act, but the record is considered by the joint board, and the decision is that of a majority thereof

This administrative rehearing accords with general practice in the United States—at least thirty-two of the states, territories and possessions provide discretionary or mandatory rehearing before the commission or an independent board, before appeal can be taken to the courts<sup>19</sup>

In this same 1927 amendment the legislature greatly enhanced the scope of court review It repealed the provision that matter within the discretion of the department should not be subject to review, and instead provided:

"On such appeal the hearing shall be *de novo* (but confined to the department's record) If the court shall determine that the Department has acted within its power and has correctly construed the law and found the facts, the decision of the Department shall be confirmed; otherwise, it shall be reversed or modified"

Our court, as late as 1930, interpreted this amendment, in its entirety, as implementing the administrative procedure, rather than vesting a greater degree of responsibility in the courts *Babic v Department of Labor and Industries* emphasized the creation of a special agency to rehear the case

<sup>14</sup> 243 U S 219 (1917), decided together with *New York Cent Ry v White*, 243 U S 188, sustaining the New York act

<sup>15</sup> *McMullin v Dept*, 120 Wash 525, 526, 207 Pac 956, 957 (1922)

<sup>16</sup> WASH LAWS 1927, c 310, § 8, substantially the same as REM REV STAT § 7697

<sup>17</sup> This extended the time limit from an original 30 days

<sup>18</sup> Interview with Asst Atty-Gen Gallagher

<sup>19</sup> Eight jurisdictions have court administration of workmen's compensation, and are therefore not comparable

References to foreign jurisdictions, in this comment, are based upon the writer's analysis of appeal provisions in the various acts as set out in SCHNEIDER, WORKMEN'S COMPENSATION STATUTES (1940), and pamphlet supplements to 1943

Alaska, Hawaii, Philippine Islands and Puerto Rico are included District of Columbia under protection of the Longshoremen's Act is not considered here

Only Mississippi, of the states has no act The Nevada statute makes no apparent provision for appeals

"The manifest theory and plan of the workmen's compensation law is to commit its enforcement to the officers of the department, who, by training and experience, become acquainted with and give their time and attention to the solution of its peculiar problems, with as little appeal to the courts as necessary"<sup>20</sup>

The court, in another case in the same year, applied the traditional administrative law formula: "since the amount of the award was discretionary and no arbitrary or capricious action was shown, the court was not at liberty to disturb it"<sup>21</sup>

But such was not the intention of the lawmakers. In 1939 the legislature added the right of "trial" by jury to the trial court review, by enacting a new section:

"In all appeals to the superior court 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"<sup>22</sup> Evidence is limited to the departmental record<sup>23</sup>

It is interesting to note in passing what a rare bird this is, in traditional law practice: a jury hearing an appeal. Somewhat similar cases are a suit initiated in justice court, where there is a right to retrial before a jury in a court of record,<sup>24</sup> and a probate matter initiated in county court, where statute provides a jury hearing on appeal in circuit court<sup>25</sup>. But in both these cases the juries hear the witnesses. In our superior court, they hear only the reading of the transcript.

To return to the subject, it appears that the appeal provisions of our workmen's compensation act, as they have emerged in the form just indicated, accord with the general legislative policy in this state. Appeals from administrative determinations in Washington, generally, allow for a retrial of the facts<sup>26</sup>. Most of the Washington statutes relating to appeals from decisions of administrative bodies attach no presumption of correctness to their determinations<sup>27</sup>.

<sup>20</sup> 156 Wash 537, 539, 287 Pac 32, 33 (1930)

<sup>21</sup> Van Bellinger v Dept, 157 Wash 70, 75, 285 Pac 1115, 1116 (1930)

<sup>22</sup> WASH. LAWS 1939, c 184, § 1, appearing as REM. REV. STAT. § 7697-2. No legislative history is available, but apparently the measure was favored by the Washington State Bar Association. See Ott, *Bar Representation Before Legislature Proves Effective* (1939) 14 WASH. L. REV. 346.

<sup>23</sup> The peculiar theory previous to this amendment was that the workman made his case before the joint board, and the department presented fresh evidence in rebuttal upon the "appeal" in superior court; e.g., Pavlinovich v Dept, 158 Wash 374, 290 Pac 876 (1930).

<sup>24</sup> Capital Traction Co v Hof, 174 U.S. 1 (1898)

<sup>25</sup> McKenney v Minaghan, 119 Wis 651, 97 N.W. 489 (1903) is an example.

<sup>26</sup> Larson, *Administrative Determinations and the Extraordinary Writs in the State of Washington* (1945) 20 WASH. L. REV., at 24.

<sup>27</sup> *Ibid.* Evidence that these amendments were calculated to encourage appeals is the provision extending the time for making them, REM. REV. STAT. § 7697. The usual period is much shorter; Vermont, providing initial appeal to superior court, allows ten days, and five days thereafter within which to appeal to the supreme court on matters of law. Other acts penalize unnecessary appeals, by assessing costs, or altering the amount of the award.

The matter of practice under our Industrial Insurance Act is concisely covered in an article appearing in the WASHINGTON LAW REVIEW,<sup>28</sup> but a brief outline here is desirable for the purpose of this comment

After the case is called in superior court, and a jury settled, if one is demanded, the lawyers read aloud through that part of the department's record which is pertinent to the issue, and admissible by law court standards<sup>29</sup> One reads the questions, and another the answers Instructions are read to the jury After argument it retires with exhibits, instructions and interrogatories<sup>30</sup> Technically, it must first determine whether there is any evidence to refute the finding of the joint board At any rate, it answers the interrogatories, and that decides the questions If for claimant, the verdict may find a different degree of disability, or aggravation where the department found none, or, in rare cases, the actual sum due him, and the court remands the case to the department with instructions, and if the verdict is for the department, the court affirms its decision<sup>31</sup>

There are of course certain limits upon the jury's power The case may be dismissed at conclusion of claimant's evidence<sup>32</sup> The jury's verdict will be set aside if there is no substantial evidence to support it<sup>33</sup> A new trial can be granted<sup>34</sup> And, where the jury has been permitted to give a verdict in terms of money rather than percentage of disability, such amount may be reduced to the statutory maximum<sup>35</sup> On the other hand, consider *Peterson v Department of Labor and Industries*, where *P* was awarded permanent total disability by the department and appealed because he was employed and desired a lesser classification The jury found that he was entitled to \$7,540 permanent partial disability compensation The court reduced this to \$4,940 in lieu of new trial, and the department appealed relying upon the ground that *P* was not an "aggrieved person" entitled to a hearing in superior court The supreme court rejected this argument, and held furthermore that *P* was not bound by the *statutory maximum* of \$2,400 because the department had not made sufficient and timely objection, and *P*'s instruction was the law of the case<sup>36</sup>

The statutory provision that the decision of the department shall be *prima facie* correct and the burden of proof shall be upon the party attacking the same has been interpreted to mean that if, *in the opinion*

<sup>28</sup> Geisness, *Procedure to Secure Benefits Under the Workmen's Compensation Act* (1940) 15 WASH. L. REV. 62; see also MARK H. WIGHT and JUDSON T. KLINGBERG, WASHINGTON STATE WORKMEN'S COMPENSATION (1942)

<sup>29</sup> *Hutchings v Dept.*, 167 P (2d) 444 (1946), *Brown v Dept.*, 161 P (2d) 533 (1945) The supervisor's record contains much matter to be weeded out before presentation in court *Hutchings* case at 448

<sup>30</sup> Sample instructions and interrogatories are found in *Champagne v Dept.*, 22 Wn (2d) 412, 156 P (2d) 422 (1945), and *Husa v Dept.*, 20 Wn (2d) 114, 146 P (2d) 191 (1944)

<sup>31</sup> That this procedure in superior court is truly appellate, see *Boeing Aircraft Co v Dept.*, 22 Wn (2d) 423, 427, 156 P (2d) 640, 642 (1945) (rule against new evidence absolute); *Merchant v Dept.*, 165 P (2d) 661 (1946) (court may not go beyond particular issue raised by order appealed from); WIGHT and KLINGBERG, WASHINGTON STATE WORKMEN'S COMPENSATION 494.

<sup>32</sup> *E.g.*, *Larson v Dept.*, 166 P (2d) 159 (1946)

<sup>33</sup> *Kravelich v Dept.*, 161 P (2d) 661 (1945).

<sup>34</sup> *Yokum v Dept.*, 22 Wn (2d) 72, 154 P (2d) 306 (1944)

<sup>35</sup> *Yockey v Dept.*, 21 Wn (2d) 171, 150 P (2d) 680 (1944)

<sup>36</sup> 22 Wn (2d) 647, 157 P (2d) 298 (1945)

of the reviewing court, the evidence as to a factual issue is evenly balanced, the finding of the department as to that issue must stand<sup>37</sup> But even this doubtful restraint disappears in jury cases "We hold that the presumption accorded to the findings of the joint board lost its force and effect when the jury decided the questions of fact which were presented to it The verdict of the jury in such cases, when based upon substantial evidence, forecloses a further consideration of the presumption accorded to the order of the joint board"<sup>38</sup>

The department, the claimant or the employer may then appeal to the supreme court, which, if the case was heard without a jury in superior court, is obliged to review the record once again<sup>39</sup>

## II

What I have sought to point out is an evolution in the local procedure for securing industrial accident compensation, a trend to facilitate appeals, and minimize the force of administrative determinations This trend is such that some judges in effect deny even the *prima facie* correctness of the joint board's determinations, on the ground that it has access only to the transcripts of testimony, and is no better qualified to judge of its credibility than are the judges<sup>40</sup> It may well be that this trend is the result of certain basic features of our present Industrial Insurance Act, which are here mentioned briefly

First and foremost is the fixed-sum schedule for awards, having no relation to the workman's income, or to the cost of living<sup>41</sup> Some judges have balked at enforcing this provision, or, as they express it, the court's interpretation of the statute They believe that even with the statute as it is presently drawn, the primary consideration in each case should be *loss of earning power*<sup>42</sup> But this view does not prevail, and it is small wonder that injured workmen (and the courts) have turned to sympathetic juries for relief

Again, there is a basic conflict of opinion between those judges who consider the act one for the insurance of the risks of extrahazardous industry only, and those who deem that it embraces virtually any

<sup>37</sup> McLaren v Dept, 6 Wn (2d) 164, 107 P.(2d) 230 (1940), Judge Millard dissenting upon the ground that more weight should be accorded the department's findings

<sup>38</sup> Alfredson v Dept, 5 Wn. (2d) 648, 652, 105 P (2d) 37, 39 (1940) (rejecting argument that presumption should be considered and applied by supreme court to facts as presented to jury) This case was approved in specifically rejecting the finding of the joint board, based upon substantial medical evidence, in Sumerlin v Dept, 8 Wn (2d) 43, 111 P.(2d) 603 (1941)

<sup>39</sup> E g, McLaren v Dept, *supra* note 37; see Wight and Klingberg, *loc cit supra* note 31

<sup>40</sup> See Ferguson v Dept, 197 Wash 524, 85 P (2d) 1072 (1938), Judge Steinert dissenting to this proposition. In McLaren v Dept., cited above, the court said, "neither the joint board nor the trial judge saw or heard the witnesses They merely read a transcript of the testimony, and were in no better position to judge of its weight than we are" (referring to testimony of widow) See also Dick v Dept, 165 P (2d) 853 (1946) (dissent), LaLone v Dept, 3 Wn (2d) 191, 100 P (2d) 26 (1940) (dissent), Ames v Dept., 193 Wash 215, 74 P (2d) 1027 (1938) (dissent)

<sup>41</sup> Legis (1941) 16 WASH. L. REV 153 Only Wyoming has a like scheme of compensation

Perhaps our adoption of this system, in 1911, can be traced to the doubtful constitutionality of such acts at that time See Mountain Timber Company v State of Washington

<sup>42</sup> Dissent by Judge Grady, Champagne v Dept, 22 Wn. (2d) at 420, 156 P (2d) at 425, and cases therein cited

affliction sustained during working hours. The conflict arises, normally, over the interpretation of "injury", and is well defined in *McCormick Lumber Co v Department of Labor and Industries*<sup>43</sup> and *Bergagna v Department of Labor and Industries*, two so-called "heart cases" in the *Bergagna* case the minority stoutly dissented:

"To hold that relatives of a deceased employee may secure the benefits of the law when that employee dies on the job because of ordinary exertion and without the happening of an accident, makes for extra-hazardous occupations a mecca for all ailing workmen who, by securing employment in occupations covered by the act, may obtain life insurance without the payment of premiums"<sup>44</sup>

It would seem that a renewed expression of legislative policy would assist the department in settling such cases without recourse to the courts.

Another feature of the Washington law should be considered. The officers of the department are charged with two functions—administration of the accident funds, and decision of disputed claims against them. Claims may press, and even exceed, the particular fund set aside to meet them.<sup>45</sup> In this situation the officers may be driven, perhaps unconsciously, to adopt the attitude of insurance adjusters, resolving close cases against the claimants. In this view, it is understandable that claimants should seek disinterested review by the courts.

By contrast, West Virginia, which likewise maintains a workmen's compensation fund, has made scrupulous provision for an independent review board, "to be composed of three members, none of whom shall be a contributor to the compensation fund or in any way connected with a contributor thereto and none of whom shall be a beneficiary of the compensation fund or in any way connected with a beneficiary thereof. Two members of such board shall be of opposite politics to the third. All members of said board shall be appointed by the Governor for a term of six years"<sup>46</sup>. Appeal from its decision is to the supreme court of appeals, at the court's discretion.<sup>47</sup>

### III

If it is desirable to withdraw industrial accident cases from the law courts, as appears from our original act, and from the experience of almost all other jurisdictions in the United States,<sup>48</sup> then, I submit, these recent changes in jurisdiction and procedure are a backward step. There is evidence to confirm this conclusion.

<sup>43</sup> 7 Wn (2d) 40, 108 P (2d) 807 (1941) (workman died while sawing tree, found to have had acute preexisting disease). A late heart case is *Long-Bell Lumber Co. v Parry*, 22 Wn (2d) 309, 156 P (2d) 225 (1945) (workman, elderly, suffering from advanced coronary sclerosis, died while sweeping floor).

<sup>44</sup> 199 Wash. 273, 285, 91 P (2d) 551, 560 (1939), 14 WASH L REV 329; cf. *Boeing Aircraft Co v Dept.*, 22 Wn (2d) 423, 156 P (2d) 649 (1945); *Ames v Dept.*, 193 Wash 215, 74 P (2d) 1027 (1938).

<sup>45</sup> See *Campbell v Dept.*, 2 Wn (2d) 173, 97 P (2d) 642, and *Lassiter v Dept.*, 2 Wn (2d) 182, 97 P (2d) 645 (1940), companion cases dealing with insufficient "class fund" to pay warrants of claimants.

<sup>46</sup> WEST VIRGINIA OFFICIAL CODE (1931), c 23; LAWS 1935, c 78; LAWS 1937, c 104; LAWS 1939, c 137.

<sup>47</sup> *Ibid.* In most states, of course, the commission is independent, being concerned only with determining the employers' liability.

<sup>48</sup> "The purpose of the Workmen's Compensation Act is to avoid litiga-

First, a random sampling of our state reports shows an amazing increase in litigation of such cases before the supreme court. In 1924 there were about 5 cases involving the Department of Labor and Industries before the supreme court, an average of  $1\frac{1}{4}$  per volume, 1 page for about 117 pages of opinions. In 1930 there were about 2 cases per volume, 1 page for every 63 or so pages. In the past 3 reports<sup>49</sup> there have been 6 cases per volume, taking 1 page for every 14 in the reports.

Second, there is abundant indication in the reports themselves to confirm the observation of Judge Fullerton in 1911 that the subject matter of such cases is unsuited to court litigation, especially before a jury.

The question most often before the court is a medical one—sometimes comparatively simple,<sup>50</sup> but often-times exceedingly complex.<sup>51</sup> The case turns, in almost every instance, upon the testimony of physicians<sup>52</sup>—testimony which is, just as in 1911, inevitably in conflict. Confusion multiplies when, as in the *Nilson* case, nine eye-ear-throat specialists appear.<sup>53</sup> The expert testimony must ordinarily be phrased in hypothetical questions,<sup>54</sup> “misused by the clumsy and abused by the clever, (which) has in practice led to intolerable obstruction of truth”<sup>55</sup>. The triers of fact must keep in mind the necessary distinction between “objective” and “subjective” evidence,<sup>56</sup> although the distinction is sometimes exceeding fine.<sup>57</sup>

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tion, as far as possible” *Nega v. Chicago Ry*, 317 Ill 482, 148 N E 250, 254 (1925); cf note, *Court Review Limited to Questions of Law*, STASON, CASES AND OTHER MATERIALS ON ADMINISTRATIVE TRIBUNALS (1937) 607

The most extreme position is taken in a special amendment to the United States Employees Compensation Act, 56 STAT 1034 (1942), 42 U S C A § 1715 (1943): Action of the Commissioner shall be final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise.

<sup>49</sup> 22 Wn (2d) —, 123 Wash Dec —, 124 Wash Dec —. But note that the proportionate number of appeals is very small. In the past three years the supervisor has treated just over a quarter of a million claims, of which only 0.72 per cent were appealed to the joint board. Of those, 409, or about one-quarter, were appealed to the superior court.

<sup>50</sup> Eg, whether trauma can be a contributing cause to appendicitis, *Clark v Dept*, 131 Wash 256, 230 Pac 133 (1924), citing *American Medical Association Journal*.

<sup>51</sup> Eg *Cole v Dept*, 200 Wash. 296, 93 P (2d) 413 (1939) (whether aneurism of aorta preexisted the accident); *Ferguson v Dept*, 197 Wash 524, 85 P (2d) 1072 (1938) (whether aggravation is attributable to preexisting osteo-arthritis or effects of accident); *Nilson v Dept*, 194 Wash 97, 77 P (2d) 593 (1938) (whether falling sight in one eye is due to tension resulting from diabetes, or loss of sight and removal of other eye due to accident).

<sup>52</sup> *Kravelich v Dept*, 161 P (2d) 661, 669 (1945) (“testimony of expert medical witnesses is essential.”); *Weinheimer v Dept*, 8 Wn.(2d) 14, 17, 111 P (2d) 221, 222 (1941) (“actual facts must be determined from the testimony of the medical witnesses.”); *LaLone v Dept*, 3 Wn (2d) 191, 196, 100 P (2d) 26, 29 (1940) (“triers of fact must depend to a large extent upon the testimony and conclusions of the physicians, testifying as experts, who have made examinations of the workman’s physical condition.”)

<sup>53</sup> 194 Wash 97, 77 P (2d) 593 (1938). There were seven doctors in the *Ferguson* case, nine in the *Sumerlin* case, six in *Boyer v Dept* 160 Wash 557, 295 Pac 737 (1931), to cite a few.

<sup>54</sup> For example of misleading statements induced by hypothetical questions based upon claimant’s statement of his case history, see *Ferguson v Dept*, 197 Wash 524, 85 P (2d) 1072 (1938), reversed on hearing en banc.

<sup>55</sup> 2 WIGMORE, EVIDENCE 812.

<sup>56</sup> Eg, *Kravelich v Dept*, 161 P (2d) 661 (1945).

<sup>57</sup> *Anderson v Dept*, 159 P (2d) 397 (1945) (existence of functional complaints, possible traumatic neurasthenia).

The extent of these problems can only be appreciated in the light of practice. The original investigation of the department is necessarily informal. Thereafter, in contested cases, the board's examiners, who are not lawyers, take the evidence which is to be considered by the joint board. But the testimony of the doctors, if it is to be admitted to the jury, must come somewhere close to meeting the requirements of evidence in law trials.<sup>68</sup> Hence, if a doctor's report is not properly sworn, it is not admissible although it was part of the supervisor's record.<sup>69</sup> And it has been held that testimony of the department's medical witness is not available for use as claimant's evidence at the court hearing, unless he makes the witness his own.<sup>60</sup> Illustrating this impasse between summary administrative procedure and court rules of evidence<sup>61</sup> is *Cady v Department of Labor and Industries*, wherein the superior court excluded a photograph of claimant's injured hand, on the objection that claimant himself could not appear before the jury and show his injury (disapproved on appeal).<sup>62</sup>

In this respect our act is deficient. As has been pointed out, common law rules of evidence affect the department's proceedings, because its record must be open to review by a jury. The only statutory guides are that:

"Such rehearing (before the joint board) shall be *de novo* and summary, but no witness' testimony shall be received unless he shall first have been (sworn), or unless his testimony shall have been taken by deposition."<sup>63</sup>

"The Director of Labor and Industries shall, in accordance with the provisions of this act:

1. Establish and promulgate rules governing the administration of this act."<sup>64</sup>

Wigmore has stated his opinion that *at common law* the body of jury-trial rules of evidence do not control the inquiry of administrative bodies. He considered that power vested in a commission to make its own rules of procedure is an implied sanction of its independence of jury-trial rules.<sup>65</sup> Needless to say, such a theory does not obtain in Washington, nor well could, in view of our peculiar appellate machinery.<sup>66</sup>

Third, to continue the enumeration of reasons for believing this alteration in the method of appeal a backward step, it is unrealistic to

<sup>68</sup> *Hutchings v Dept*, 167 P (2d) 444 (1946)

<sup>69</sup> *Ibid*

<sup>60</sup> *Larson v Dept*, 16 P (2d) 159, 160 (1946) (ruling of superior court; judgment of dismissal sustained on other grounds)

<sup>61</sup> That there is a necessary and essential distinction, see Wigmore, *Administrative Boards and Commissions: Are the Jury-Trial Rules of Evidence in Force for Their Inquiries?* (1922) 17 ILL L REV 263; Ross, *The Applicability of Common Law Rules of Evidence in Proceedings Before Workmen's Compensation Commissions* (1923) 36 HARV L REV 263; Pound, J., dissenting in *Matter of Carroll v Knickerbocker Ice Co*, 218 N Y 435, 113 N E 507 (1916)

<sup>62</sup> 162 P (2d) 813 (1945).

<sup>63</sup> REM REV STAT § 7697

<sup>64</sup> REM REV STAT § 7703

<sup>65</sup> *Supra* note 61, *passim*. But cf.: Ross, *supra* note 61, who disagrees with the generalization that rule-making authority is sufficient. He recommends legislation specifically broadening the scope of evidence before such commissions

<sup>66</sup> Cf. Geisness *supra* note 28 at 64 *et seq*

try such cases to a jury. The jurors are drawn from an industrial area, almost necessarily.<sup>67</sup> They know at the outset that it is an insurance case.<sup>68</sup> Evidence of the claimant's dependents, his earnings, and other matters inducing sympathy somehow get into the record.<sup>69</sup> Whereas the department generally employs three non-partisan doctors who are expert in their field (and generally adopts the finding most favorable to the claimant),<sup>70</sup> the claimant is represented by his own physician, or another whose testimony is almost necessarily partisan.<sup>71</sup> The jury, which neither sees any of these doctors, nor has any special knowledge of their professional reputations, can make any finding within the range of the evidence, and be sustained.<sup>72</sup> Another feature of trial to a jury which results in prejudice is argument in terms of money, rather than in terms of degrees of partial disability,<sup>73</sup> the true question in the case

Fourth, this extended process is expensive to all parties concerned. For example, a "reasonable fee" for preparation and a day in superior court may be \$350.<sup>74</sup> This, plus the costs of court and fees of medical and other witnesses, is paid out of the insurance fund if the claimant

<sup>67</sup> It is said that the department *cannot* win a case in some localities.

<sup>68</sup> Four judges at least believe that *suggestion* of insurance behind the defendant inflames the jury, and is prejudicial error. *Popoff v Mott*, 14 Wn.(2d) 1, 126 P (2d) 597 (1942) (dissent).

Instructions seeking to inflame this prejudice, rejected, are found in very recent cases: *Hastings v Dept*, 163 P (2d) 142 (1945) and *Hutchings v Dept*, 167 P (2d) 444 (1946).

<sup>69</sup> Attorneys with experience in these cases suggest that it is easy to prepare a record favorable to a jury in view of the informal preliminary hearings. That this is a difficult problem for the department, in practice, see *Hutchings* case, above.

<sup>70</sup> Interview, Miss Lomen. *But see: Ames v Dept*, 193 Wash 215 221, 74 P (2d) 1027, 1029 (1938), Judge Blake dissenting in these words, "I cannot agree that a departmental decision is *prima facie* correct, when it ignores facts and rests solely upon the opinion of medical experts. The experts will always disagree, and the department will always believe its own experts. The principle upon which this case is decided will make court review of departmental decisions an illusive formality, where there is conflict in medical testimony" (three judges concurring).

<sup>71</sup> If a doctor does not affirmatively testify in claimant's behalf there is no case. *See Zoff v. Dept*, 174 Wash 585, 25 P.(2d) 972 (1933).

Wigmore strongly condemns partisan expert testimony, 2 EVIDENCE § 563.

<sup>72</sup> *E.g.*, *Anderson v Dept*, 159 P (2d) 397 (1945). *But see: Ross, supra* note 61, at 264. "A workmen's compensation commission is essentially an administrative body. It is a business organization designed to handle in a business way a complicated technical or business matter. Commissioners are presumably experts in their field, handling a great number of cases all of which involve the same general questions. It is inevitable that with experience the commissioners become able to decide a question of fact correctly on much less or different evidence than would be required to convince a judge, let alone a motley jury unfamiliar with such issues."

<sup>73</sup> *Cf Champagne v Dept*, 22 Wn (2d) 412, 156 P (2d) 422 (1945) and dissent thereto.

Ohio, one of the few states with a system like ours, expressly forbids such arguments, by statute.

<sup>74</sup> "It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee, to be fixed by the court in the case." REM. REV STAT § 7697. Reduced fee of \$350 approved in *Peterson* case, "record read to jury was but seventy-five pages in extent and the trial lasted but one day." One thousand dollar fee reduced to \$400 in *Wintermute v Dept* 183 Wash 169, 48 P (2d) 627 (1935), in similar situation.

wins, and out of his pocket if he loses. By an amendment, the department's costs are paid out of the fund in any event.<sup>75</sup>

#### IV

Considering our industrial accident compensation procedure, we gain valuable perspective by looking to experience in other states.

First, we see that Washington stands almost alone in entrusting a jury with review of its commission's findings.<sup>76</sup> Washington is in a minority even in admitting appeal to a trial court upon questions of fact.<sup>77</sup> Ten of the states which provide for appeals to trial courts nevertheless provide that the administrative findings of fact shall be conclusive upon such courts,<sup>78</sup> or substantially so.<sup>79</sup> Fifteen states confine appeals from their commissions to an appellate court, and almost entirely to questions of law.<sup>80</sup>

There are good reasons for vesting the decision of such controversies in administrative tribunals (as has been done in thirty-nine of the states, including all of the great industrial areas). "In both its legislative and its judicial aspects, the tribunal can develop a technical familiarity with its problems to the end that, in the language of Mr. Justice Holmes, its decisions 'express an intuition of experience which outruns analysis and sum up many unnamed and tangled impressions, impressions which may lie beneath consciousness without losing their worth'."<sup>81</sup> Mr. Justice Brandeis commented, "Two decades of experience in the states testify to the appropriateness of the administrative process as applied to workmen's compensation controversies."<sup>82</sup>

<sup>75</sup> REM. REV. STAT. § 7697-1.

<sup>76</sup> Maryland, Ohio and Oregon have similar procedure. Vermont which allows retrial to a jury, has no administrative rehearing. Hawaii has no centralized commission to conduct its rehearing, and permits jury trial on appeal to the county circuit court. North Dakota permits jury retrial on jurisdictional facts. Iowa provides for jury trial in one unusual fact situation.

Most interesting is the fact that of the eight jurisdictions providing judicial administration of their acts only two, New Mexico and Alaska, permit unlimited right to trial by jury. Two others, Alabama and Wyoming permit jury trial in certain cases.

<sup>77</sup> Mr. Justice Brandeis exaggerated when he said that nearly all state courts have construed the state workmen's compensation laws as limiting judicial review to matters of law, in *Crowell v. Benson*, 285 U. S. 22, 65 (1932) (dissent). The following states provide a rehearing upon the facts in trial court but without a jury:

Connecticut, Delaware, Florida, Illinois, Kansas, Montana and Nebraska. New Jersey and Rhode Island substitute summary court proceedings for administrative hearings.

Texas provides a trial *de novo*.

<sup>78</sup> Arkansas, Georgia, Iowa, Maine, Massachusetts, North Carolina, Pennsylvania, South Carolina.

<sup>79</sup> Colorado, South Dakota.

<sup>80</sup> California, Idaho, Indiana, Kentucky, Michigan, Missouri, New York, North Dakota, Oklahoma, Virginia, West Virginia, Wisconsin and Utah. Arizona, Minnesota and Puerto Rico apparently leave some questions of fact open to their supreme courts.

As to the exact province of the court in such appeals, see *Comment Workmen's Compensation: Review of facts found by industrial commissions* (1929) 14 CORN. L. Q. 250.

<sup>81</sup> STASON, CASES AND OTHER MATERIALS ON ADMINISTRATIVE TRIBUNALS (1937) 104.

<sup>82</sup> *Crowell v. Benson*, 285 U. S. 22, 80 (1932) (dissent).

Surely the summary procedure<sup>83</sup> and liberal rules of evidence<sup>84</sup> of such commissions, added to this experience and fund of technical knowledge, can come closest to determining the difficult questions of fact which characterize these cases, "perhaps too much one of opinion, and not enough one of fact," as Judge Fullerton described it

One other argument for giving some finality to the decisions of our department is found in Mr Justice Brandeis' dissent in *Crowell v Benson*. Few cases, he remarked, had arisen under the Longshoremen's Act upon questions of law. If issues triable before the Commissioner might be contested in court, the prestige of the administrative tribunal would suffer, persistence in controversy would be encouraged, litigation of appeals would increase, and the purpose of the act would, in part, be defeated.<sup>85</sup> Surely the shoe fits

### V

Our Industrial Insurance Act was intended to effect a prompt, effective, extra-judicial remedy for injured workmen and their dependents. The necessity of this course had been dictated by experience in the courts, and its desirability has been proven by the phenomenal development of administrative agencies to deal with the problem. Yet we are witness to a remarkable contrary trend towards encouraging court litigation of such cases in this state.

One basic cause of this trend is the low scale of compensation available under the act. With the increased schedule which seems assured,<sup>86</sup> awards may become commensurate with present-day living costs, and one source of irritation will have been dealt with, temporarily. But certain weaknesses in the act will remain, and until these are dealt with our workmen's compensation law must fall short of its high purpose.

M BAYARD CRUTCHER

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<sup>83</sup> At least twenty-five jurisdictions, including all eight which retain court administration of workmen's compensation, provide for summary procedure.

<sup>84</sup> At least fourteen jurisdictions have statutes relaxing common law rules of evidence. Even so, the break with common law rules has not been easy; see Wigmore and Ross, *supra* note 61.

<sup>85</sup> *Cit* note 82 above.

<sup>86</sup> Two initiatives are pending, both substantially increasing the amounts of awards under the compensation schedule.