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A NEW TRIBUNAL OF THE STATE OF WASHINGTON

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AN IMPORTANT part of the business of the state of Washington is the insurance of employees against industrial accident and disease. The premiums paid by employers covered by the industrial insurance laws now support awards for disability and death amounting to some eleven million dollars a year. The attorney general employs ten or twelve attorneys full time to represent the state in cases involving the Department of Labor and Industries. Not counting the expense borne by the courts, the 1951 legislature appropriated approximately $868,000 for litigation costs for the biennium. A new state agency has been created to review the decisions of the Department of Labor and Industries in the hope of remedying some of the difficulties that had arisen under prior regimes.

The Board of Industrial Insurance Appeals was created in 1949[1] as an independent tribunal, appointed by the governor and consisting of three members selected from labor, industry, and the public respectively. Before the creation of this board, the Department of Labor and Industries, which is in effect the insurance company, adjusted its own claims, subject to review by the superior courts. This system reflected the policy established in 1911[2] of giving the workman "sure and certain relief," in place of his "uncertain, slow, and inadequate" common law remedy in the courts, based on the fault of the employer.

In the history of administration *by the department* there were two periods, divided by the year 1927. The act of 1911 created an Industrial Insurance Department, consisting of three commissioners. The injured workman could appeal from their decision to the courts.[3] The Administrative Code of 1921 replaced the commissioners with the Department of Labor and Industries and established within it a committee called the "joint board."[4] In 1927 this committee, consisting of the Director of Labor and Industries and two of his subordinates, was given the exclusive original jurisdiction to hear cases arising within the department.[5] Thus all industrial insurance matters were channeled

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[1] Wash. Laws 1949, c. 219; REM. SUPP. § 10837-1.
[2] Wash. Laws 1911, c. 74; REM. REV. STAT. § 7673.
[3] Parker v. Ind. Ins. Dept., 102 Wash. 54, 172 Pac. 830 (1918).
[4] Wash. Laws 1921, c. 7, § 79.
[5] Wash. Laws 1927, c. 310, § 8.

through this committee on the way to the courts. The new independent board created by the 1949 legislation takes the place of this departmental committee as the screen through which cases pass from the department to the superior court.

To see the reasons for abolishing the departmental hearing (or "rehearing," as it was called) and establishing an independent tribunal, it is useful to outline briefly the departmental procedure that existed from 1927 to 1949. The Supervisor of Industrial Insurance made *ex parte* determinations of claims, based on reports to him from physicians and other investigators. The beneficiary or workman could then obtain a hearing before the "joint board" on which the supervisor sat, along with the departmental supervisor of safety and the director, who is the administrative superior of the other two. This committee had been given the responsibility of deciding by majority vote "all matters arising in" the divisions of industrial insurance and safety that any of the three should "deem to be of sufficient importance to require their joint action."[6] At the hearing the testimony had to be sworn and the joint board had to act upon evidence properly made a part of the record before it.[7] Thus it may be seen that although this committee was an administrative council of the department, its procedure was quasi-judicial. It will also be observed that this system produced an example of a "defendant-judge" combination, rather than the prosecutor-judge combination that has been under criticism by the courts and legislatures in recent years. The dissatisfied workman, before going to the court, had to submit his contentions to a tribunal consisting of an officer who had just passed on his claim adversely, the administrative chief of that officer, and another of the subordinates of that chief.

The conduct of the hearing could be committed to a departmental employee after 1929, but the three departmental officers had to consider the record of the hearing and make the decision.[8] Thus the workman might not have an opportunity to appear in person before either the Supervisor of Industrial Insurance or the committee who made the decision. Furthermore, after 1927 the workman could not testify in the superior court because the review was confined to the departmental hearing record.[9] In such cases the only adjudicator before whom he

[6] *Supra*, note 4.
[7] Sweitzer v. Department of Labor and Industries, 177 Wash. 28, 36, 30 P.(2d) 50 (1934).
[8] Wash. Laws 1929, c. 132, § 6.
[9] *Supra*, note 5.

would testify would be the departmental employee appointed to hold the hearing. No special qualifications were prescribed for the persons so designated.

Two years have elapsed since that hearing was abolished and a new agency created to hold such hearings. In its first report[10] to the legislature the Board of Industrial Insurance Appeals described the kind of problems presented by its inheritance of most of the statutory provisions, personnel, and habits of the people accustomed to deal with the department. That report is the primary occasion for this study and has supplied practically all of the information upon which it is based.[11] The report is an exceptional document for students of administrative law, and can almost be described as required reading for an attorney who desires to initiate himself into a familiarity with the administration of workmen's compensation in Washington.

The most conspicuous problem was that of litigious delay. The board says that although the department could act judicially, in fact from 23 to 56 per cent of its cases were settled by compromise, and the committee or "joint board" was thus acting administratively. This figure does not take into account the settlements made within the division of industrial insurance, before quasi-judicial procedure was initiated or after it was discontinued. The board further records that between 1942 and 1950 the number of cases to be heard by the department carried over from the previous year rose from 274 in 1942 to 1382 in 1950 in a steady progression (with a negligible exception in 1949). The process of administrative settlement was inadequate to stem the flood of contested cases.

"It was the practice of the old joint board to try cases piecemeal. Separate hearings were set for the claimant's case, the employer's case and the department's case. Considerable time elapsed between the trial of the various phases of the cases. More often than not the various phases of the cases were heard by different examiners. Each phase, accordingly, was often tried under different legal and factual theories. Because of this confusion, cases were often incomplete in material respects and the records were unduly complicated and confusing. . . ." This practice was inherited by the new board and natural resistance to change resulted in a continuation of this practice. The board now noti-

[10] First Biennial Report of the Board of Industrial Insurance Appeals of the State of Washington, 1951.

[11] The report is twenty-nine pages long. No specific reference will be made to the page at which the information is found. Where not otherwise indicated, reference should be made to the report for the source of material used here.

fies the parties to the hearing with a form which bears the statement "Each party hereto should be prepared to present his entire case at the above time and place. Continuance will not be granted except for good cause and upon application made prior to time of hearing. . . ." Before this substantial change in the old procedure was accomplished, however, the Whatcom County Bar Association passed a resolution of November 16, 1950, which reads in part: "Whereas the members of the Bar Association of Whatcom County have found, in the handling of cases under the Workmen's Compensation Act, that extensive delays and so-called 'split hearings' are frequently causing substantial injustices and inconvenience to their clients, IT IS HEREWITH RESOLVED that this Association does herewith go on record as urging that all reasonable and necessary steps be taken by the Department . . . and the Board . . . to lessen the delays in the handling of Workmen's Compensation claims, although it is recognized that the Board of Industrial Insurance Appeals is still a relatively newly created agency and has a present case load of approximately 1700 appeals. IT IS FURTHER RESOLVED that this Association condemns the use of 'split' or adjourned hearings, and urges the board . . . to promulgate a rule requiring that, except for due and sufficient cause shown, to prevent unreasonable hardship, all interested parties . . . shall be required to prepare and put on their evidence at a single hearing and in consecutive order in the same manner as in trials in the Superior Court. . . ." Whatever the reasons that lay behind the practice of holding a number of sessions to conduct a hearing under the departmental procedure, it is readily inferable that this practice must bear some of the responsibility for the increasing overhang of cases to be decided by hearing before the department.

The following quotation from the report speaks for itself: "For example in 1941 the joint board entered 339 appealable orders of which eighty-six were appealed to the superior court. In 1948, the joint board entered 455 appealable orders of which 328 were so appealed. The percentage of appeals thus increased from 25 per cent of 1941 orders to 72 per cent of 1948 orders. The percentage of reversals was keeping pace with the appeals. Numerically, fifty of the cases decided by the board in 1941 were reversed, whereas 251 of those decided in 1948 were reversed. Percentagewise, of the cases decided in 1941 which were appealed to the superior court, 58 per cent were reversed; of the cases decided in 1947 which were so appealed, 87 per cent were reversed. The marked success with which the orders of

the board were reversed in superior court, of course, encouraged appeals from the supervisor's orders. This situation together with a rapidly growing working force within industry caused an ever accelerating increase in the number of such appeals. In 1941, 521 supervisor's orders were appealed to the joint board, whereas in 1950, 879 orders were so appealed, an increase of approximately 69 per cent. While the case load was accelerating during the period from 1941 to 1950, the numerical fluctuation of examiners was downward. In 1941, the board had four examiners; in 1944, it had two only. During the calendar year 1950, the board had 4.3 examiners. In every year except 1948, the new cases filed exceeded old cases completed. The case load per examiner increased from 221 in 1942 to 574 in 1949." It should be possible to conclude that the increasing working force in the state of Washington, the practice of holding several sessions of a hearing to decide a case, the decrease in the proportion of examiners to case load, and the well-founded hope of obtaining a more favorable determination from the superior court, all combined to place the department in a very difficult position so far as affording the workman an expeditious remedy was concerned.

In 1939 the appeals to the superior court were altered in several respects. In most instances prior to that time the judge conducted a *de novo* review of issues of fact, but the legislature decided to commit these issues to the jury as a matter of right upon demand.[12] The report of the board continues the story thus: "It was only natural that in presenting their cases, attorneys appearing before the joint board took the pragmatic, if somewhat cynical view, that ultimately the case would be decided by a superior court jury and the cases were tried with that in mind. Examinations and cross-examinations of medical witnesses were carried on at length, not primarily to demonstrate to the board how and to what extent a workman was pathologically and physiologically disabled, facts which obviously must be ascertained by the board to establish the compensable statutory percentage of disability, but rather to establish the *legal conclusion* of compensable disability under the *guise* of medical testimony. To a large extent the technique was to pit one doctor's legal conclusion of statutory disability against another doctor's legal conclusion of statutory disability. Needless to say the board's hearings became games of wit and the board's examiners were active participants therein."

[12] Wash. Laws 1939, c. 184.

The reference in the last sentence to the participation of the examiner is thus explained: "Ostensibly these examiners were impartial hearings officers whose sole legal purpose was to gather facts and make recommendations to the joint board, based upon the record made before them. At the hearings claimants were usually represented by attorneys—in present proceedings before the board, claimants are represented by lawyers in 90 per cent of the cases and employers are represented by lawyers in 15 per cent of the cases—who were making a case not primarily to persuade the board, but to persuade a jury if the case were appealed to the superior court. Since, as a practical matter, however, no representative of the department other than the examiner appeared at the hearings, it became necessary for the board's examiners to present such evidence as the supervisor might have to sustain his order; otherwise the case, if appealed to the superior court, would go by default. Based upon the record, it was clear that approximately 70 per cent of the cases would be so appealed. The examiners were thus in a dilemma. As a practical matter they became at once impartial hearings officers *and* advocates for the department, by whom they were hired and by whom they could be discharged. In order to preserve the form of impartiality the examiners were unable to vigorously represent the department. On the other hand, to the extent they did represent the department as advocates they ceased to be impartial."

The foregoing gives some clue to the dissatisfaction of workmen and their beneficiaries with decisions of the joint board. The only adjudicator they saw was a person who was in practical effect charged with responsibility to the department for resisting the claim. Attending this appearance of injustice was the difficulty of understanding the decision. "After the testimony was completed, the case was forwarded to the joint board for decision. When the decision was made, the board entered its order. The order, itself, was a printed, stereotyped form with blank space left for the conclusion of the board. It simply stated that the order of the supervisor was sustained or reversed. In the latter case the order was remanded, either for adjustment of the award or for further administrative action, as the case might be. The order, itself, contained no recital of facts found by the board; nor did it contain a statement of the basis upon which the board reached its conclusion. It was impossible for a person who was not a member of the board or its staff to ascertain what *facts* were found by the board and what portion of the record persuaded the board to reach its conclusion. In view of the confusion that existed in most

records, as well as the nature of the board's order, it is difficult to comprehend how superior court judges and juries were able to intelligently review the board's orders on appeal. In a large measure this accounts for the high percentage of cases appealed to the superior court in 1947 and 1948, as well as the high percentage of reversals in the cases so appealed."

Whatever the reasons for the accelerating trend of appeals to the superior court and the staggering backlog of undecided cases upon which a workman or a beneficiary or employer had requested a departmental hearing, the transfer of the quasi-judicial function to the new independent agency drastically altered the nature of the problems that had previously faced the department and now had to be handled by the new board. No longer were the triers of fact, or any one of them, familiar with the facts in the case, either personally or through their administrative subordinates and employees, prior to the hearing. The case came to them through an initiating document, called a notice of appeal, which set forth the grounds upon which the person appealing considered the decision of the department to be wrong. Only that complaint and the order of the department was before the board, and the decision of the board was to be based upon a subsequent hearing at which the proceedings started anew.

The departmental technique of administrative settlement was of doubtful validity in the minds of the board. Quoting from the report: "The legislation creating the board required it to hold hearings and decide cases on the basis of sworn testimony, stenographically transcribed. The old joint board, on the other hand, was able to dispose of from 23 per cent to 56 per cent of its final orders by compromise. This, of course, had the result of reducing the number of hearings. Since the creation of this board, however, virtually no cases have been disposed of administratively by compromise. It is true that during 1950, 164 cases were disposed of by stipulation of all interested parties, including the claimant, the employer and the department. These stipulations, however, were not initiated by the board since it lacks the power to do so." In the meantime the legislature has clarified the powers of the Board of Industrial Insurance appeals on this score. The board may dispose of the case upon agreement of the parties if it finds such agreement to be "in conformity with the law and the facts."[13] The same act provides for the board to initiate such disposi-

[13] Wash. Laws 1951, c. 225, § 10.

tion by calling conferences to reach such agreements, or to simplify the course of the hearing in case agreement cannot be obtained.

The new agency had difficulty eliminating the dual function of the hearing officer as examiner and as representative of the department. The board asked the department to furnish representatives to appear in the board's proceedings and to present such facts as it deemed necessary to support the supervisor's order. "Quite understandably, perhaps, this request was not readily accepted by the department. Its practical experience had been with the old joint board. The department felt that, since the law creating the industrial insurance appeals board provided that it succeeded to the powers of the old joint board, the new board automatically would carry out the procedures of the old board, which acted administratively, as well as quasi-judicially. In addition the department took the position that the board was obligated to pay the witness fees of medical witnesses who appeared to support the supervisor's order and in opposition to appellants at the board level. Since the board could not reconcile this position with the concept of an impartial quasi-judicial board, it took the position that it would be unlawful for it to pay such fees. Numerous conferences were scheduled with the department at which the entire law was re-examined. Finally . . . the board unequivocally refused to pay the witness fees of medical experts who appeared on behalf of the department. . . . After a conference with the governor, a meeting was arranged between the governor's administrative assistant, members of the board, representatives of the Department of Labor and Industries and the attorney general. As the result of this conference and an opinion of the attorney general,[14] it was decided that the board of industrial insurance appeals was purely a quasi-judicial body and that the Department of Labor and Industries would be represented in hearings before the board by members of the attorney general's staff. Thus the board's examiners were relieved of the obligation of being advocates for the department and they were able to assume a purely impartial role. This change, however, was not accomplished in practice until approximately February 1, 1950."

This policy of pursuing the very appearance of impartiality, as well as conforming with the policy of the statute creating an independent agency, is illustrated by these further observations concerning the procedure of the board: "To assure that the board would consider only

[14] Text, *infra*, pp. 13-14.

the record made before the board's examiner, the departmental files in cases on appeal were turned over to members of the attorney general's staff and the board in making its decisions does not consider any part of the departmental record unless some portion thereof is properly offered in evidence and made a part of the record before the board. Hearings before the board are *de novo*. The board is not concerned with why the supervisor entered his order. It considers the case as if no order, in fact, had been entered by the supervisor and the board decides, solely on the basis of the record made before it, what the disability award should be."

Growing out of the controversy between the board and the department was an opinion of the attorney general of November 30, 1949, that essentially confirms the position of the board. It reads in part as follows:

While chapter 219, Laws of 1949, transferred the review and appeal powers of the Joint Board to the Board of Industrial Insurance Appeals and conferred upon it the appellate jurisdiction formerly vested in the Joint Board, at that point all similarity ends. The new board was created to act entirely independent of the Department of Labor & Industries.

It was the intent of the legislature to establish an impartial quasi-judicial tribunal to hear appeals from orders entered by the Department with respect to industrial insurance. Unlike regulatory bodies, the Board of Industrial Insurance Appeals is not a party to its own proceedings; nor may it initiate proceedings on its own motion, hence it is in no sense a party litigant either in its own forum or in the superior and Supreme Courts on appeal, as in the case of many regulatory bodies. The parties litigant before the Board of Industrial Insurance Appeals are the claimant, the employer, and the Department of Labor and Industries.

An independent tribunal in its own right, it is clear that the Board of Industrial Insurance Appeals cannot be made responsible for costs or expenses upon appeal nor for witness fees, as these items are throughout our judicial system borne by the litigants. It is therefore our opinion that the appropriation contained in chapter 219, Laws of 1949, was designed and intended to meet the expenses which would be incurred in the administration and operation of an intermediate trial board.

On the other hand, the Department of Labor and Industries is a party litigant. The 1949 enactment . . . specifically provides that "the department shall be entitled to appear in all proceedings before the Board and introduce testimony in support of its order." . . . The act further provides . . . that upon any appeal being taken from an order of the Department of Labor and Industries or from an order of the Board the appellant must serve upon the Director of Labor and Industries a notice of appeal. The department by statute, is thus entitled to notice of appeal as is any other party litigant.

If the opinion of the attorney general may be regarded as an accurate description of the effect of the 1949 legislation, there are four levels of decision-makers in the process of administering claims of injured workmen, and at the top three levels the determination is judicial. These levels are successively the department, board, superior court, and supreme court. First the department acts administratively, either *ex parte* or in contested cases by negotiation and settlement. Then the board may receive the case by appeal, but the proceeding is not a review; the matter comes on for hearing completely *de novo*. Then the superior court may receive the case by appeal. In the superior court the trial, as under the former procedure, is held on the basis of a transcript of testimony. No witnesses appear before the jury.[15] The current provisions are: "Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board. The hearing in the superior court shall be *de novo,* but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board. . . . In all court proceedings . . . the findings and decisions of the board shall be *prima facie* correct and the burden of proof shall be upon the party attacking the same."[16] The verdict of the jury has the same force and effect as in actions at law.[17] Thus the legislature has made the traditional common law allocation of decisional functions as between judge and jury, both in the superior court and the supreme court.

In sum, the department makes the final decision unless contested,[18] but this order may be contested before the board, where the proceedings are completely *de novo*. The determination of the board is subject to review in the superior court, where the attacking party has the burden of proof, but the trial is *de novo* on the record and may be submitted to the jury. The supreme court review is conditioned by the effect of a valid verdict as at common law. The "expeditious remedy" in place of the common law tort liability of an employer may involve two trials of the facts instead of one. One of them is by witnesses, the other by the record of the first hearing. There are three stages at which issues of law may be joined, the board, the superior

[15] The language of the statute remained the same in the 1949 amendment: "On such appeal the hearing shall be *de novo* but . . . the court shall not receive . . . evidence . . . in addition to that offered before . . . the board (or the old 'joint board')." Wash. Laws 1943, c. 280, § 1; Wash. Laws 1949, c. 219, § 6; REM. SUPP. § 7697.

[16] Wash. Laws 1951, c. 225, § 15.

[17] *Id.* This provision has remained the same since 1939. REM. SUPP. § 7697-2.

[18] Kuhnle v. Dept., 15 Wn.(2d) 427, 130 P.(2d) 1047 (1942).

court, and the supreme court.

Another classification in the decisional process in these cases besides the distinction between issues of law and fact is of great importance. That is the difference between facts adducible by lay testimony and medical opinion. "I grant that if Matters arise in our Law which concern other Sciences or Faculties, we commonly apply for the Aid of that Science or Faculty which it concerns. Which is an honorable and commendable thing in our Law. For thereby it appears that we do not despise all other Sciences but our own, but we approve of them and encourage them as Things worthy of Commendation."[19] As was said in *Hamilton v. R. Co.*,[20] "When the consequences of actions or of combinations of circumstances may only be known by those familiar with the subject, and cannot be understood by those not possessing skill or peculiar knowledge thereof, opinions of experts are competent evidence." And our court has said, "It is quite true that courts must necessarily depend upon the evidence of experts in cases of this nature, because . . . courts are not experts in medicine, lumbering, agriculture, mining, electricity. . . . It is also true that questions of whether a given physical defect is . . . caused by an impaired physical condition must be determined from medical experts."[21]

However, there may be pitfalls in the use of expert opinion. The report of the board certainly indicates that it has discovered difficulties in managing it. "But the testimony elicited from the medical witnesses, both on direct and cross examination, tended to emphasize the legal conclusion of disability rather than the functional disability based on pathological and physiological findings. Moreover, the same medical witnesses appeared before the board repeatedly. They became trained in expressing the legal conclusion of disability in the language of the statute, notwithstanding the fact that they lacked legal training for an actual understanding of the substance of the statute itself or the supreme court decisions interpreting it. . . . The trial technique was largely to pit one doctor's legal conclusion of statutory disability against another doctor's legal conclusion of disability. . . . It is the thinking of the present board that the testimony of medical experts should be limited to the facts of injury as to the pathological and physiological disability resulting therefrom. Rather naively, perhaps, this board is of the opinion that the medical witnesses should confine

[19] Saunders, J., in Buckley v. Rice Thomas, 1 Plowd. 124 (1554).
[20] 36 Iowa 37 (1872).
[21] See Tonkovich v. Dept., 31 Wn.(2d) 220, 195 P.(2d) 638 (1948). In this case, however, the court rejected the expert opinion.

their opinion testimony to medical rather than to legal and vocational matters. The purpose of medical testimony is to enlighten the board concerning the nature and extent of the workman's pathological, physiological and functional disability. These are the only matters that fall within the medical witnesses' field of expertness and their testimony should be limited thereto. . . . When the workman's pathological and functional disability has been determined, that disability, logically, must be translated into vocational disability. Until that is done, the board believes it is not possible to determine the legal disability provided by statute. Now medical experts, as such, generally are not experts within the field of vocational disability. In enacting chap. 219, Laws of 1949, the legislature foresaw the necessity of considering the question of vocational disability. It accordingly provided for the appointment of a labor and an industry representative on the Board of Industrial Insurance Appeals. In ascertaining vocational disability these two members occupy a unique position and perform a necessary function. The labor representative, having as his interest the welfare of workmen generally, gives careful consideration to the question of how the traumatic disability testified to by medical witnesses affects the workmen within the workshop. The industry representative, with his background in personnel management, considers the same problem from the industry standpoint. Thus the board considers the practical effect of the pathological disability as it affects the workman in his every day work. It is believed that the lay members of the board are better qualified to pass judgment upon vocational disability, once the pathological and functional disability is ascertained, than are medical witnesses or untrained juries.

"In any event, translating physical and pathological disability into vocational disability and ultimately into compensable disability is the administrative duty of the Department of Labor and Industries in the first instance and thereafter of this board if the case is appealed to the board. In the board's opinion, the determination thereof may not be delegated to members of the medical profession as such. It is, in fact, the issue before the department and before the board. Members of the medical profession are not vocational experts or experts in personnel management; nor are they public officials charged with administrative or judicial functions under the act. Their opinions are advisory only, and they invite searching analysis of the basis upon which they are made."

The question will occur, why, if the opinions of the doctors are

advisory only, permitting them to enter the record can work any harm. The answer contained in the report is: "It is obvious, of course, that in arguing to a jury it is easier for counsel to present a case in terms of a doctor's conclusion, rather than in terms of pathology and physiological disability." Suspicion that abuses may have occurred in the preparation and presentation of workmen's compensation cases is generated by the following comment of the board: "The workman's own physician, who generally knows his condition better than anyone else, seldom is called as a witness, either by the claimant or the department. . . ." My own belief is that the net effect of the various amendments to the workmen's compensation statutes is to deprive the jury of the demeanor evidence which is so useful to a trier of fact that there ought to be good reasons for eliminating it. What is the necessity for the procedure before the board as a prerequisite to superior court adjudication of these cases? One answer is that implicit in the excerpt from the report quoted above: The board is specially equipped to translate the facts both lay and medical into terms of statutory disability. Another is the reduction of business before the superior courts. However, relieving crowded superior court dockets is a vain hope if the incidence of board cases appealed to the court is not reduced. If the number of these appeals remains large, the only advantage is the reduction of delay incident to getting parties and witnesses before the superior court. If it is assumed that the reason for the existence of the board is its specialized ability to determine complicated issues of medical fact, the present system is topsy-turvy. It subjects the determination of a specialized tribunal to review by an unspecialized body, the jury, which by hypothesis requires extensive assistance from medical experts. The result is that the board may well complain that it is required to listen to opinion that does not assist it in the performance of its duties for the sake of making a record that will provide a foundation for an increased award of compensation regardless of the merits of the case. At the same time the system deprives the jury of the opportunity to judge by demeanor, both on direct and cross examination, the comparative reliability of the determination by the experts of the ultimate issue in the case, that is, the degree of disability. Reasonably enough, the jury is likely to select the estimate most favorable to the injured workman, thus setting at naught any special competency possessed by the members of the board or its examiners.

In this posture of affairs, the hope of reducing the amount of court

litigation lies in developing the persuasive effect of the determinations of the board. The following excerpt describes the efforts of the board along this line: "After the record is completed, it is examined by the board. In making its decision the board has adopted a rule of liberal construction in favor of workmen. This is in line with the declared purpose of the industrial insurance act itself as interpreted by the supreme court. Where there is substantial conflict in credible testimony, doubts are resolved in favor of the injured workman. This is not to say, however, that the decisions of the board are based upon emotional considerations. The board insists that there be credible testimony to support the claimed disability. It is believed, however, that by the time the board's decision has been made, the injured workman has received every consideration that the facts in the record and the statute permit. . . ." The board explains how it drafts its opinions and orders. In these orders are contained "carefully drawn findings of fact . . . set forth in much the same manner as findings of fact are made by superior courts in law cases. Following the findings of fact is the board's order. It is the board's theory that the findings of fact standing alone, if accepted as true, will support the legal conclusion contained in the order. The opinions and orders are drafted with as much care, both from a factual and legal standpoint, as the case load of the board permits. The board is attempting to pioneer its way in this field. Admittedly, it started from humble beginnings. The board believes, however, that the quality of the orders is constantly improving and that they will receive increasing respect from the courts. . . . The drafting of written orders compels clear thinking and analysis. Moreover, the practice of drafting orders and setting forth therein, not only the board's conclusion, but the facts and the law upon which it is based, assures to parties appearing before the board that the decisions are intellectually honest and based upon substantial considerations. Anything less would be a mere administrative fiat. Moreover, to the extent that the orders set forth the history of the case, and the conclusion arrived at by the board, together with the factual and legal reasons therefor, they should be of assistance to superior court judges upon review. . . . The procedures instituted by the present board are beginning to show their effects in reversing the trend of appeals to the superior courts. As previously pointed out 73 per cent of the appealable orders entered by the joint board in 1947 were appealed to the superior court. The percentage of such appeals had dropped to 47 per cent with respect to the appealable orders entered

in 1950."

The legislature in 1951 followed up the practice of the board with respect to its findings of fact and law by making two provisions. One is:

> Every final decision and order rendered by the board shall be in writing and shall contain findings and conclusions as to each contested issue of fact and law, as well as the board's order based thereon. In cases involving injured workmen the findings and conclusions shall contain a concise statement of the board's jurisdiction, the nature of the workman's injury, the pathological condition, if any, resulting therefrom, the physiological disability, if any, resulting from such pathological condition, and any other material facts pertinent to the case, as well as the relief, including the statutory percentage of disability, if any, to which the workman or beneficiary is entitled.[22]

The other new provision is very significant: "Where [upon appeal to the superior court] the court submits a case to the jury, the court shall by instruction advise the jury of the exact findings of the board on each material issue before the court."[23] These two provisions constitute a basis for developing a coherent body of compensation law in the state. If the findings as to law, made by the tribunal closest to the problem, win the respect of the supreme court, the interaction of court and agency in this field should produce a body of consistent and carefully thought out interpretations of the statute. If the findings as to fact are persuasive upon the juries called upon to review industrial insurance cases, the benefit of the demeanor evidence available to the board will be thus indirectly transmitted to the jury, and the provision that "the findings and decision of the board shall be *prima facie* correct and the burden of proof shall be upon the party attacking the same,"[24] will have real meaning.

One other problem, not touched upon at length by the biennial report, is the formality of the proceedings in workmen's compensation cases. The statutes provide for the new board, as they did for the old departmental board, that the proceedings shall be informal and summary, both in the superior court and below at the administrative level. Since 1939, when the parties were given the right to jury trial and the verdict was given the effect of a common law verdict, the superior

[22] Wash. Laws 1951, c. 225, § 13.

[23] Wash. Laws 1951, c. 225, § 15.

[24] *Id.* It will be recognized that the effect of the determination of the board as a matter of law is crucial in the administration of the act. This problem, as yet an open one in the interpretation of the new provisions, deserves considered study, which is not here undertaken.

court trial has of necessity been characterized by many of the formal incidents of a trial as at common law. Likewise, the necessity of making the administrative hearing the place at which the evidence is recorded for a jury in a subsequent trial comes close to requiring that hearing also to be managed by lawyers. Perhaps with this function of the board in mind, the legislature provided that the chairman of the board, who represents the public, must be a lawyer. Again, the possibility of jury review tends to pervert the administrative proceedings by injecting lawyers' squabbles over fine points of admissibility of evidence into a hearing for which the niceties of the rules of evidence at common law were not adapted. Were the chairman and the hearing officer not lawyers, it might well happen that the jury would not be permitted to hear much of the record on which the decision and findings of the board were made. The informal conference previously referred to, which the board is now empowered to initiate for the purpose of obtaining stipulations disposing of the case or simplifying the hearing of it, is a device that might be developed to minimize or make unnecessary expensive legal assistance in simple and meritorious cases.

The substantive law of the industrial insurance act needs clarification and its application made more consistent in case to case decision. The burden of litigation in this field needs to be reduced. The time spent disposing of contested cases needs to be minimized. If the board is able to justify its existence, the superior court review in these cases ought to be the exception rather than the rule. The extent to which such review is *de novo* is a factor that militates against this desirable result. However, if impartial and expeditious hearing before the board can be provided and if the decisions of the board are such as to persuade the parties in the case of the reasonableness of the results reached, it may be hoped that the amount of court litigation will be reduced. The report of the board after its first two years of existence strengthens this hope.