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COMMENTS

PERSONAL INJURY ACTIONS AND IMMUNITIES UNDER THE WORKMEN'S COMPENSATION ACT

HUGH McGOUGH

As industrial society grew more complex, the common law system governing the remedies of workmen against employers became obsolete. In 1911 the legislature destroyed this common law system as to injuries received in hazardous work. "All phases of the premises" were withdrawn from private controversy. Civil actions for industrial injuries, and the jurisdiction of the courts over such actions, were abolished. In substitution, a system of sure and certain relief, workmen's compensation, was created.¹

The purpose of this article is to examine the extent to which the personal injury action can now be utilized to recover damages for injuries connected with employment in the State of Washington.² The first inquiry will be into the scope of the Workmen's Compensation Act; the second into actions reserved or created by the act.

Introductory language indicates that the act affects only "... the remedy of workmen against employers for injuries received in hazardous work..." To appreciate the true impact, each element of the italicized phrase must be analyzed separately.

WORKMEN. The statute defines a workman as any "... person in this state who is engaged in the employment of any employer coming under this act by way of manual labor or otherwise."³ If there is no employer, there can be no workman. Hence, joint venturers⁴ or self-

¹ L. 1911, c. 74; RCW 51.
² The specialized problems of employers in interstate commerce or maritime employment are not discussed. As to the latter, see Comment, 19 WASH. L. REV. 32 (1944). The election of remedies problem is not discussed. For a general discussion of tort immunity and workmen's compensation acts, see Comment, 39 VA. L. REV. 951 (1953).
³ RCW 51.04.010. All italics have been added.
⁴ L. 1939, c. 41, § 2; Cf. RCW 51.08.180 which is a redundant amalgamation of this section and L. 1937, c. 211, § 2.
⁵ Peterson v. Dept., 160 Wash. 454, 295 Pac. 172 (1932). Owner of ¾ interest in land and plaintiff, owner of ¾ interest, were making improvements when plaintiff was injured. Held: Though he received pay for his work, plaintiff was a joint venturer, not a workman.
employed partners" are not workmen, regardless of the nature of their work.

"'Employer' means any person . . . engaged in this state in any extrahazardous work, by way of trade or business, or who contracts with one or more workmen, the essence of which is the personal labor of such workman or workmen, in extrahazardous work." If any part of his activity is classified as extrahazardous, a master is an "employer" under the act. But, if no such activity is within a hazardous category, a master's employees are not "workmen" regardless of whether the work in which they are engaged is categorized as extrahazardous.

To be an "employer," also, a person must be engaged in hazardous work as a business. This requirement is the creation of the court. The second half of the definition of employer, as added in 1929, included "... any person . . . who contracts with another to engage in extrahazardous work." In *Carsten v. Department,* a home owner contracted with the plaintiff carpenter to build a chicken house, admittedly extrahazardous work. When injured, the carpenter was denied compensation because the homeowner, not being engaged in building as a business, was not an employer. The reason for the holding was the difficulty in collecting premiums on such work. Two later cases, following the *Carsten* approach, reached results which eight of nine judges

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6 Johnson v. Dept., 33 Wn.2d 399, 205 P.2d 896 (1949); Purdy & Whitfield v. Dept., 12 Wn.2d 131, 120 P.2d 858 (1942). One partner may be a workman for the other, however. Swalley v. Dept., 154 Wash. 432, 282 Pac. 905 (1929). There seems to be no reason why partners cannot be workmen when the partnership contracts to do work for a third party. See Hubbard v. Dept., 198 Wash. 354, 85 P.2d 423 (1939). Partners were held to be independent contractors rather than workmen, but only because they failed to show that the "employer" had substantial control over the manner in which they performed their work. Arguably, on these facts, control is no longer essential. Note 23 infra. In *Lane v. Dept.*, 34 Wn.2d 692, 209 P.2d 380 (1949), a member of a partnership was held to be a workman for the lumber company with which the partnership had contracted. Self-employed partners are "employers" under the act even though they have no employees. Latimer v. Western Machinery Exchange, 40 Wn.2d 155, 241 P.2d 923 (1952), reversed on rehearing, 42 Wn.2d 755, 259 P.2d 623 (1953).

7 RCW 51.08.070.

8 Wendt v. Ind. Ins. Comm., 80 Wash. 111, 141 Pac. 311 (1914) (repair shop operated in connection with his department store made the owner an employer in extrahazardous industry); State v. Business Property Security Co., 87 Wash. 627, 152 Pac. 334 (1915); Monroe Calculating Machine Co. v. Dept., 11 Wn.2d 636, 120 P.2d 466 (1941). *See* Lunday v. Dept., 200 Wash. 620, 94 P.2d 744 (1939) where, by leasing part of its building to a butcher shop, a grocery became an employer in an extrahazardous business.

9 Edwards v. Dept., 146 Wash. 266, 262 Pac. 973 (1928). An employer was held not engaged in "transfer, drayage and hauling" because he carried no one's goods but his own. The employee, therefore, was not a workman, though it certainly made no difference to him whose goods he was hauling. *See also* Berry v. Dept., 11 Wn.2d 154, 118 P.2d 785 (1941) where the master was held to be an employer.

10 L. 1929, c. 132, § 1.

11 172 Wash. 51, 19 P.2d 133 (1933), noted 8 WASH. L. REV. 49 (1933).
were on record as opposing. Faced with this situation, the legislature amended the definition of employer to include “... any person ... who contracts with one or more workmen, the essence of which is the personal labor of such workman or workmen in extrahazardous work.” The court has found no reason to depart from the view that an “employer” must be engaged in hazardous work as a business.

A business need not be aimed at earning profits to make its operator an employer, though charitable institutions are excluded by judicial interpretation.

Only those in the employment of an employer are workmen. Until there is a binding contract of employment, no injury incurred is within the scope of the act. The fact that a contract exists is of itself sufficient to raise a man to the status of “workman.” The fact that a man has not begun performance of his contractual duties, or that he is not performing such duties at the time of an injury, does not alter his status as a workman. The type of work being performed is not relevant in de-

12 In Dalmasso v. Dept., 181 Wash. 294, 43 P.2d 32 (1935), plaintiff and four other men undertook to demolish a house. An estimated payroll was filed with the department, the men apparently claiming as employers under RCW 51.32.030. Compensation for an injury was denied because housewrecking was not the regular business of the injured man; he was a painter by trade. In Jannak v. Dept., 181 Wash. 396, 43 P.2d 34 (1935), claimant was hired to do building work for a ski lodge. Compensation for an injury was denied because the employer was not engaged in construction work as a business. The Carsten, Dalmasso and Jannak cases were all 5-4 decisions. Three of the five man majority in the Carsten case dissented in the Dalmasso and Jannak cases, claiming the rule they had announced did not apply. The four dissenting judges in the Carsten case, still disagreeing with the rule, felt it did apply, and since the majority would not overrule it, did apply it. Judge Geraghty, who had come to the bench in the interim, dissented in the Dalmasso and Jannak cases. Only Judge Steinert agreed with all three cases.

13 L. 1939, c. 41, § 2. Use of the term “workman” here results in a vicious circle. A “workman” is anyone in the employment of an “employer.” The literal meaning of the amendment, therefore, is: “An employer is any person who contracts with any person in his employment, the essence of which is personal labor.”


16 Thurston County Chapter, American National Red Cross v. Dept., 166 Wash. 488, 7 P.2d 577 (1932).

17 Brewer v. Dept., 143 Wash. 49, 254 Pac. 831 (1927). Claimant was injured while on a logging train on the way to camp to take a job. If a workman, he could have recovered. Compensation was denied on the ground that the logging company had not yet bound itself to accept or pay for claimant’s services. In American Products Co. v. Villwock, 7 Wn.2d 246, 109 P.2d 570 (1941), an eighteen year old boy, driving a truck for his father, was held not a workman since, being unemancipated, he could not enter an enforceable employment contract with his father. For other cases, see Note, 18 WASH. L. REV. 107 (1943).

18 E.g., Wabnec v. Clemmons Logging Co., 146 Wash. 470, 263 Pac. 592 (1928). A valid employment contract had been executed prior to the workman’s boarding a logging train to go to work. His personal injury action arising out of a train wreck was held barred, though no labor had yet been performed by the workman. In White v. Shafer Bros. Lumber Co., 165 Wash. 299, 5 P. 2d 520 (1931), a night worker was
terminating whether a man is a workman. The effect of illegality of the employment contract is an open question. The contract requirement, sensibly, has not been pushed to extremes.

Further, employment requires that a right of control be vested in the employer to distinguish the relationship from joint venturers or independent contractors. A limited departure from this rule has been made. An employer includes one "... who contracts with one or more workmen, the essence of which is the personal labor of such workman or workmen. ..." This phrase has been construed as bringing an individual independent contractor under the definition of workman, but only if such individual contractor need not hire additional help. Otherwise, the personal labor of the contractor is not the essence of the contract. The phrase "workman or workmen" is broad enough to include

injured when he visited the plant during the day to inquire about extra work. His tort action was held barred.

The mere fact that a man is a "workman" does not mean that all injuries to him are within the scope of the act. The injury must be received by a workman "in the course of his employment." The distinction between the question of whether the employment relationship exists and whether an injury occurs in the course of employment is often blurred. E.g., in D'Amico v. Conguista, 24 Wn. 2d 674, 167 P.2d 157 (1946), the court said a workman was "not in the employ" of his employer during the lunch period; in Bristow v. Dept., 139 Wash. 247, 246 Pac. 543 (1926), the court, holding that a man who arrived at work thirty-five minutes early was a workman, indicated that if he arrived much earlier, he would not have been a workman.

The statutory definition of workman includes all persons in the employment of an employer "by way of manual labor or otherwise." But see Koreski v. Seattle Hardware Co., 17 Wn. 2d 421, 435, 135 P.2d 860, 866 (1943). "... an officer of a corporate employer may ... also have the position or status of a 'workman.' His status is determined, as aptly observed by counsel for appellant, by what he does and not by the office he holds."

A workman, however, must be employed in extrahazardous duties when injured in order to be covered, note 59 infra.

In Hillestad v. Ind. Ins. Comm., 80 Wash. 426, 141 Pac. 913 (1914), a father was denied compensation for an industrial injury to his thirteen year old son partially because he failed to show that the employment was lawful. A contrary result was reached in Rasi v. Howard Mfg. Co., 109 Wash. 524, 187 Pac. 327 (1920), holding that the personal injury action of an illegally employed minor was barred, but the primary basis of the decision was that the workmen's compensation act recognized such illegal employment be providing penalties for it.

In Perry v. Beverage, 121 Wash. 652, 209 Pac. 1102 (1922), a workman announced during the day that he was quitting at the end of the day. The employer obtained another man to take his place. After quitting time, while closing out his affairs, the workman was injured. The court held that his employment had not yet terminated, hence his tort action was barred. See also Hinds v. Dept., 150 Wash. 230, 272 Pac. 734 (1928), where the workman, an airplane pilot, had no regular hours and was free to come and go as he pleased.

In Rector v. Cherry Valley Timber Co., 115 Wash. 31, 196 Pac. 653 (1921) a soldier was held to be a workman though he performed the work under military orders.

See Domandich v. Doratich, 165 Wash. 315, 5 P. 2d 310 (1931) (Captain of fishing boat had sufficient right of control to nullify the joint venture argument.); Burchett v. Dept., 146 Wash. 85, 261 Pac. 802 (1927) (A finding that claimant was an independent contractor was overturned because the employer exercised sufficient control).

Haller v. Dept., 13 Wn. 2d 164, 124 P.2d 559 (1942). Claimant, as an individual, contracted to clean out a well, a two man job. Held: No recovery for the injury. since
joint venturers or partners who are working under an independent contract if only the personal labor of the contractors is required.

A workman is any person working for an employer "by way of manual labor or otherwise." This would seem to include corporate officials. RCW 51.32.030 provides that "Any individual employer and any officer of any corporate employer . . . shall be entitled to the benefit of this title . . . as a workman: Provided, That no such employer . . . shall be entitled to benefits" under this title unless the director . . . has received notice in writing. . . ." The special mention of the corporate official here offers some support for the argument that such an official is not a workman. Since the proviso withholds benefits from the employer only, and not from the corporate official, when the salary of the individual is not reported, it can also be argued that this section merely affirms that a corporate official is a workman. Though an employer is required to notify the department of each workman carried on his payroll, lack of such notification, generally, does not destroy a workman's right to compensation. The court has held that a corporate official whose salary has not been reported to the department can collect no compensation, but that he is, nevertheless, a workman whose tort actions are destroyed by the statute. 27

INJURIES. An injury is defined as ". . . a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result, and occurring from without; an occupational disease; and such physical injury as results from either." Prior to 1937, occupational

his personal labor was not the essence of the contract. See Norman v. Dept., 10 Wn.2d 180, 116 P.2d 360 (1941). An independent contractor is specifically a "workman" in L. 1937, c. 211, § 2; but not in L. 1939, c. 41, § 2. Literally read, the latter law requires employment, note 13 supra.


25 The original act provided a common law suit against defaulting employers, and if the amount collected by the workman in the tort action was less than the compensation provided, the accident fund would contribute the amount of the deficiency. L. 1911, c. 74, § 8. Later, an injured workman was given the option of either suing an employer who failed to comply with the act or of collecting compensation. L. 1927, c. 310, § 3. This provision was omitted from L. 1947, c. 247, § 4d.

26 Farr v. Dept., 125 Wash. 349, 216 Pac. 20 (1923).

27 Koreski v. Seattle Hardware Co., note 19 supra. The chief factor motivating the court seems to have been that plaintiff, president of a corporation, was performing manual labor when injured. Compare Bristow v. Dept., 139 Wash. 247, 246 Pac. 543 (1926) where a millworker who was fishing in a pond when killed was considered a workman, and Farr v. Dept., note 26 supra, where compensation was denied a foreman killed while throwing a switch for a logging train, apparently because he was not a workman in the opinion of the court, but rather a corporate official.

28 RCW 51.08.100. Is a heart attack resulting from exertion at work a sudden happening occurring from without? For general discussion of what constitutes an
diseases were not included within the scope of the act, and workmen could maintain common law actions to recover damages for diseases resulting from their employment. Whether all such actions have been abolished is not entirely clear, but in the light of *Simpson Logging Co. v. Department* it is probably safe to state that they have.

Earlier cases had developed two partially overlapping requisites of an "occupational disease": (1) The conditions which cause the disease must be peculiar to the occupation in which the workman is engaged; i.e., they must not be inherent in all industry. (2) The conditions which cause the disease must be peculiar to the occupation as a whole; i.e., they must inhere in the nature of the occupation. The 1941 statute defines an occupational disease as "... such disease or infection as arises naturally and proximately out of extrahazardous employment," which on its face seems to negate the above limitations. The *Simpson* case, though not squarely rejecting the earlier cases, laid down the rule that any impairment of health, proximately caused by conditions of employment, is an occupational disease. This rule, which has the
virtue of certainty, seems to rule out any possibility that there remains a tort action against the employer for any illness caused by his negligence.

Injuries RECEIVED IN . . . WORK. The act originally provided that a workman injured on the premises of his employer, or, being away from the premises, in the course of his employment, received an injury within the scope of the act.\(^3\) In 1926, the widow of a millworker who drowned while fishing in a pond on the premises of his employer recovered compensation.\(^6\) The next year, the legislature made whether the injury occurred in the course of employment the exclusive test.\(^6\)

Cases in this area are in complete confusion. The general rule under which the court says it is operating is thoroughly inconsistent with the purposes of workmen’s compensation and with the general approach of the court itself. The rule is: If the workman is not engaged in the performance of duties required by his contract of employment or specifically directed by his employer, he is not in the course of his employment.\(^5\)

Literally applied, the rule means that a workman is not within the scope of the act if injured while going toward the toilet,\(^4\) while on the premises but outside working hours,\(^4\) while awaiting orders but performing no duties,\(^4\) while riding home on a company bus\(^8\) or riding to work on a company train,\(^4\) while preparing to resume interrupted contractual duties,\(^4\) while picking up food for his own consumption on a twenty-four hour a day job,\(^4\) while driving his private car toward a job in his home town,\(^7\) arguably while performing any duties for which

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\(^3\) L. 1911, c. 74, § 5.
\(^5\) L. 1927, c. 310, § 4; RCW 51.32.010.
\(^6\) The rule first appears as dictum in McGrail v. Dept., 190 Wash. 272, 67 P.2d 851 (1937); was first given weight in D’Amico v. Conguista, 24 Wn.2d 674, 167 P.2d 157 (1946); was, for the first time, the sole basis of a decision in Purinton v. Dept., 25 Wn.2d 364, 170 P.2d 656 (1946); and was carried to a “drily logical extreme” in Muck v. Snohomish County PUD, 41 Wn.2d 81, 247 P.2d 233 (1952).


\(^7\) Contra, Welden v. Skinner & Eddy Corp., 103 Wash. 243, 174 Pac. 452 (1918).

\(^9\) Contra, Morris v. Dept., 179 Wash. 423, 38 P.2d 395 (1934) (a case cited as authority for the original statement of the rule).


\(^12\) Contra, MacKay v. Dept., 181 Wash. 702, 44 P.2d 793 (1935).

\(^13\) Contra, Hobson v. Dept., 176 Wash. 23, 27 P.2d 1091 (1934) (a case cited as authority for the original statement of the rule).

\(^14\) Contra, Burchfield v. Dept., 165 Wash. 106, 4 P.2d 858 (1931).
he is to receive no pay, and even when he turns aside from his prescribed duties to aid a fellow workman.

It is to be hoped that the court will retreat from its present extreme position and return to its earlier standard for determining whether a workman was injured in the course of his employment, viz., was the workman either (1) engaged in acts incidental to the proper performance of his work or (2) furthering the interests of his employer when injured? Under this rule, for example, a workman using private transportation as an incident to and in furtherance of his employer's business would be in the course of his employment, as would a workman on the premises of his employer in furtherance of his employer's interest outside of working hours. A workman during his lunch hour would be in the course of employment if he had not embarked on an independent venture of his own.

A rule so well entrenched as to deserve special mention is that a workman is in the course of his employment while riding company-provided transportation. Such conveyance, however, must be provided as part of the normal operation of the business and use of it must further the employer's interest.

48 Contra, e.g., cases in notes 41 and 45 supra.
49 So held in Muck v. Snohomish County PUD, 41 Wn. 2d 81, 247 P.2d 233 (1952).
50 For cases within this rule, see notes 40 through 47 supra. Examples of cases without are Hill v. Dept., 173 Wash. 575, 24 P.2d 95 (1933) (streetcar operator not covered when dashing across street to mail letter); Blankenship v. Dept., 180 Wash. 108, 39 P.2d 981 (1934) (workman who walked away from place of employment to talk to friend who murdered him not covered).
51 Thus resolving a conflict between Scobba v. Seattle, 31 Wn.2d 685, 198 P.2d 805 (1948) (workman riding bus to call on customers not in the course of employment) and Burchfield v. Dept., 165 Wash. 106, 4 P.2d 888 (1931) (workman driving private car from one place of employment to another held in the course of employment).
52 Thus resolving a conflict between Cugini v. Dept., 31 Wn.2d 852, 199 P.2d 593 (1948) (day workman on premises at night in furtherance of his employer's interest held not covered) and White v. Shafer Bros. Lumber & Door Co., 165 Wash. 298, 5 P.2d 520 (1931) (night worker on premises during the day held covered).
53 Three noon hour cases have been decided. In Young v. Dept., 200 Wash. 138, 93 P.2d 337 (1939), the workman was hurt while exploring the construction of a dam after he finished his lunch. The court pointed out that the rest period alone did not put the workman outside the course of his employment, but held that the independent venture did. Noted, 15 Wash. L. Rev. 120 (1940). In D'Amico v. Conguista, 24 Wn.2d 674, 167 P.2d 157 (1946), the workman was held to be outside the course of employment during his lunch hour though he had embarked on no independent venture. The only reason seems to be that he was not under the supervision of his employer. In Mutti v. Boeing Aircraft Co., 25 Wn.2d 871, 172 P.2d 249 (1946), a Boeing plane crashed into the Frye meat plant at 12:28. Having gone to the main office to pick up a war bond, the plaintiff workman had embarked on a venture of his own. Because his lunch hour did not end until 12:30, the workman's action against Boeing was not barred. Apparently, if he had not moved around after finishing his lunch, his suit would have been barred.
54 E.g., cases cited in notes 43 and 44 supra.
56 Hama Hama Logging Co. v. Dept., 157 Wash. 596, 288 Pac. 655 (1930).
workman is in the course of his employment while on roads immediately adjacent to the plant of the employer if there is an additional risk in travelling such roads, even though the workman is not using a company conveyance.\(^5\)

\textbf{For Injuries Received in HAZARDOUS Work.} Since, if any part of a business is classified as extrahazardous, all employees are "workmen,"\(^5\) it necessarily follows that many "workmen" either perform no extrahazardous duties, or perform such duties only part of the time. If workmen were given an unqualified right to receive compensation for any injury received while in the course of employment, the extrahazardous-ordinarily hazardous distinction on which the act is based would in large measure be destroyed. To preserve the distinction, it is required that the workman himself, at the time of the injury, must be engaged in work classified as extrahazardous.\(^6\) With the recent suggestion that this requirement, and the whole extrahazardous-ordinarily hazardous distinction, be abandoned in favor of a rule which promotes certainty and bears some reasonable relation to the purposes of the act, this author heartily concurs.\(^6\)

Recognizing that there is a hazard in all employment, the statute lists some seventy five works and occupations which are included within the term "extrahazardous."\(^9\) An intent is expressed that if there be

\(^{57}\) See Brown v. Dept., 135 Wash. 327, 237 Pac. 733 (1925); but see Purinton v. Dept., 25 Wn.2d 364, 170 P.2d 656 (1946).

\(^{58}\) Notes 8 and 18 supra.

\(^{59}\) Ambaugh v. Dept., 128 Wash. 692, 224 Pac. 18 (1924). A delivery boy in employ of newspaper, an employer in extrahazardous activity, was denied compensation for an injury received in the course of employment. Parker v. Pantages Theater Co., 143 Wash. 176, 254 Pac. 1083 (1927). An injury to a sign washer, not in extrahazardous work, in the employ of a theatre, an employer in extrahazardous activity, was held outside the scope of the act.

If part of a workman's duties are ordinarily hazardous and part are extrahazardous, only injuries incurred while he is performing extrahazardous duties are covered. Replogle v. Seattle School Dist., 84 Wash. 381, 147 Pac. 196 (1916) (storekeeper injured while installing an electric motor in the course of employment had no tort action against his employer); Gowey v. Seattle Lighting Co., 108 Wash. 479, 184 Pac. 339 (1919) (tort action of a stenographer injured while operating a stencil machine held barred); Denny v. Dept., 172 Wash. 631, 21 P.2d 275 (1933) (workman in both extrahazardous and ordinarily hazardous activities denied compensation for injury incurred outside of the extrahazardous part of employment).

\textit{See also} Sheldon v. Dept., 186 Wash. 571, 12 P. 2d 751 (1932) (workman with dual duties—operating repair shop (hazardous) and selling cars (nonhazardous) held not covered while performing the latter). Apparently, the rule will not be extended beyond its reason for existence. \textit{See} Bristow v. Dept., note 37 supra.

\(^{60}\) Crandall, \textit{Employees in Dual Activity}, 28 WASH. L. REV. 223 (1953). Especially p. 228 and pp. 232 ff. The article is an excellent discussion of results in cases which emphasize variously the "course of employment" requirement, the requirement that an employer must be in an extrahazardous business to give employees the status of workmen, and the requirement that workmen must be engaged in extrahazardous work when injured.

\(^{61}\) RCW 51.12.010. No attempt is made to discuss the many cases which turn on
extrahazardous occupations other than those enumerated, they should be protected by the act and the rate of premium payments fixed by the Department.\(^2\) This opportunity to mitigate the inequities which arise from the necessarily arbitrary classification by the legislature has been nullified by the now well settled rule, not required by the statute, that, until an occupation has been classified as extrahazardous by the department or legislature, an employee in such occupation is not covered regardless of the actual danger involved.\(^3\)

Solely for the administrative purpose of collecting premiums, approximately four hundred specific works and occupations are classified in RCW 51.20. The court has narrowed the scope of the act to make it coincide with these administrative provisions.\(^4\)

**REMEDY OF WORKMEN.** Compensation is paid to a workman’s dependents on his death, and added compensation is paid to a disabled workman according to the number and character of his dependents.\(^5\) Payments are to be received “... in lieu of any and all rights of action whatsoever against any person whomsoever ...”\(^6\) Does the right to receive compensation destroy personal injury actions in the workman only, in all who actually receive compensation, or in all whose existence or status means that additional compensation will be paid to another?

Survival statutes, \(^6\) preserving existing causes of action, offer no problem because the workman had no cause of action which could survive. The wrongful death act, \(^6\) however, and the statute creating a parental right of action for injuries to children, \(^6\) in theory, raise a new cause of action.\(^7\) The court, without much discussion, has held that wrongful death actions are barred by the workmen’s compensation act.\(^7\) Such wrongful death actions generally are barred by the fact whether a particular activity comes within the meaning of this section; e.g., Everett v. Dept., 167 Wash. 619, 9 P.2d 1107 (1932), where a man killed in a cardroom where he went to collect a water bill was held to be engaged in the operation of waterworks.\(^8\)

\(^2\) RCW 51.12.030.
\(^4\) E.g., RCW 51.12.010 lists “breweries, elevators, wharves” as within the scope of the act. In the classification for premium allocation, elevators were listed only under “Construction Work.” Held: An elevator operator is not engaged in extrahazardous activity. Guerrieri v. Ind. Ins. Comm., 84 Wash. 266, 146 Pac. 608 (1915).
\(^5\) RCW 51.32.050 (death); RCW 51.32.060 (total disability); RCW 51.32.090 (partial disability).
\(^6\) RCW 51.32.010.
\(^7\) E.g., RCW 4.20.060.
\(^8\) RCW 4.20.010 et seq.
\(^9\) RCW 4.24.010.

\(^0\) See Upchurch v. Hubbard, 29 Wn.2d 559, 188 P.2d 82 (1947).
\(^1\) E.g., Anthony v. National Fruit Canning Co., 185 Wash. 637, 56 P.2d 688 (1936). On the death of a “workman” wife, the statute provides compensation for the widower only if he is an invalid. RCW 51.32.050 (2). In the Anthony case, it was not shown
that decedent, prior to his death, recovered judgment.\textsuperscript{22} A parental action, however, is not barred by the fact that the child has recovered a tort judgment.\textsuperscript{23} Parental actions, nevertheless, probably have been destroyed if the child is a workman who received an injury within the scope of the act. The husband of a wife injured by a third party has a similar cause of action at common law, entirely independent of that of the wife, for loss of consortium;\textsuperscript{24} and this action apparently has been destroyed if the wife is a "workman."\textsuperscript{25}

Common law actions of an employer apparently have not been impaired unless he has elected to qualify for compensation as an individual.\textsuperscript{26} This is contrary to what seems to be the general understanding of the act.

\textbf{Remedy . . . AGAINST EMPLOYERS.} The act destroys remedies not only against employers, but against \textit{any one} who injures a workman who is in the course of extrahazardous employment.\textsuperscript{27} This includes that the widower was an invalid. His wrongful death action, nevertheless, was held barred. Later, in Epley v. Dept., 191 Wash. 162, 70 P.2d 1032 (1937), a widower who was not an invalid was allowed to recover compensation. The judicial modification of the statute was based on "the maxim that there can be no wrong without a remedy" and "the spirit of the workmen's compensation act."

Any person over the age of eighteen is not a "child" within the meaning of the act. RCW 51.32.005. \textit{Cf.} RCW 51.08.030. His existence or status, therefore, will ordinarily have no effect on the amount of compensation received on the death of his "workman" father. Arguably, such a son, if a dependent, has a cause of action against the employer negligently causing the death of his father entirely separate from the widow's right to compensation for herself and her "children"; such cause of action, therefore, being unaffected by the act. \textit{See} State v. Vinther, 183 Wash. 350, 48 P.2d 915 (1935).


\textsuperscript{23} Harris v. Puget Sound Electric Ry., 52 Wash. 299, 100 Pac. 841 (1909).

\textsuperscript{24} \textit{E.g.,} Lansburgh & Bro. v. Clark, 127 F.2d 331 (C.A. D.C. 1942). The husband and wife joined their actions for an injury to the wife. The wife lost; the husband won.

\textsuperscript{25} \textit{Cf.} Ash v. S.S. Mullen Co., 143 Wash. Dec. 319, 261 P.2d 118 (1953). A wife was denied an action for loss of consortium with her workman husband on two grounds: (1) The wife has no such common law action. (2) If she had, it would have been destroyed by the workmen's compensation act.

\textsuperscript{26} In Latimer v. Western Machinery Exchange, note 6 \textit{supra}, the plaintiff was held to be an employer in extrahazardous activity. His tort action was held not to be destroyed because he had not elected to qualify for compensation as an individual. The employer in this case had no employees, but there is no basis for a distinction between an employer with employees and without employees in the act. \textit{See also} Pink v. Rayonier, 40 Wn.2d 188, 242 P.2d 174 (1952), reversed on rehearing, 42 Wash. 2d 768, 259 P.2d 629 (1953); Calvin v. West Coast Power Co., 44 F. Supp. 783 (Ore. 1942).

\textsuperscript{27} In Peet v. Mills, 76 Wash. 437, 440, 136 Pac. 685,686 (1913), the court said: "To say with appellant that the intent of the act is limited to the abolishment of negligence as a ground of action against an employer only is to overlook and read out of the act and its declaration of principles the economic thought sought to be crystallized into law—that the industry itself was the primal cause of such injury and, as such, should be made to bear its burdens." In holding that a personal injury action against the president of a corporation for his personal negligence was barred, the court also relied on RCW 51.32.010 providing that compensation was to be in lieu of all other actions.
reckless drivers and murderers. There has been some judicial head scratching over these results, but the only case in which a contrary result was reached was immediately reversed on rehearing. The only right of action a workman has for an injury, therefore, is that specifically reserved or created by the statute.

A problem which does not seem settled is whether a workman has a cause of action against a third person who aggravates an industrial injury; e.g., a doctor whose negligent treatment causes further harm. The statute provides that: "If aggravation . . . of disability takes place . . . the director . . . may, upon the application of the beneficiary . . . or upon his own motion readjust . . . the rate of compensation. . . ." The section does not make it mandatory that recovery for aggravation of an industrial injury be confined to the statutory remedy. The court has held, however, that if the additional harm is "proximately traceable to the original hurt" it is within the scope of the statute.

Assuming the doubtful proposition that a doctor who aggravates an industrial injury has the same immunity as if he had caused the original injury, it seems beyond argument that, under the statutory reservation of actions discussed below, such doctor is subject to suit as a third party unless he is a workman or an employer in extra-hazardous employment himself.

There is a point at which an additional injury becomes so serious that it constitutes a full fledged injury of itself. How far beyond the

78 E.g., Murphy v. Schwartz, 142 Wash. 68, 252 Pac. 152 (1927).
80 In Scott v. Pacific Warehouse Co., 143 Wash. 245, 249, 255 Pac. 138, 139 (1927), the court commented on "... the somewhat peculiar feature of our own act—the feature which permits a stranger to the act, who neither contributes to the fund out of which compensation is made, nor for whose benefit the fund is created, to take advantage of it."
81 Perry v. Beverage, 121 Wash. 652, 209 Pac. 1102 (1923) (action against foreman held not destroyed by statute), reversed on rehearing, 121 Wash. 664, 214 Pac. 146 (1923).
82 RCW 51.32.160.
83 This section does not provide that the workman "shall receive" compensation in lieu of all other remedies, as does RCW 51.32.010 which deals with the primary injury. This section merely provides that compensation may be adjusted upward. Further, there is no indication that, even if offered and accepted, compensation for an aggravation by an intervening tort feasor would bar the workman's action against such tortfeasor.
84 Ross v. Erickson Construction Co., 89 Wash. 634, 648, 155 Pac. 153, 158 (1916). Held: A workman who has recovered compensation for the aggravation of his injuries cannot maintain an action for malpractice against his employer or the doctor who is in the employ of the company.
85 Doctors under the medical aid contracts authorized by RCW 51.40 would seem to be independent contractors rather than workmen. In Carmichael v. Kirkpatrick, 185 Wash. 609, 56 P.2d 686 (1936), it was held that a workman's action for malpractice will not lie against such doctors. The arguments presented in the text were not raised.
86 An independent cause, that in no way proximates the act out of which the right to compensation flows, might afford a ground of recovery, and might not be considered
point at which a separate tort action ordinarily arises this point is can only be the subject of speculation. If a doctor causes such a separate injury, the workman could sue not only the doctor, but also his own employer if he hired the doctor.\footnote{Statements that a workman has no cause of action against a doctor who adds to his injury, therefore, seem to be erroneous.}

From 1911 to 1927, the act gave a workman injured through the negligence of another not in the same employ the election between taking under the act or bringing a personal injury action against the third party, but only if such injury occurred \textit{away from the plant of his employer}.\footnote{The away-from-the-plant test led to untenable results, and in 1927 was stricken from the statute. The workman was given a right of action against any third party who injured him.} The away-from-the-plant test led to untenable results, and in 1927 was stricken from the statute. The workman was given a right of action against any third party who injured him.\footnote{In 1929, this proviso was added: "... no action may be brought against any employer or any workman under this act as a third person if at the time of the accident such employer or such workman was in the course of any extrahazardous employment under the act." Illustrating the purely statutory nature of a workman's actions, causes of action which had arisen against third party employers prior to the effective date of the 1929 amendment and had not been filed until after the date were held destroyed. This sweeping immunity granted employers and workmen as third parties is a feature peculiar to Washington law. No other state has gone so far.}

In 1929, this proviso was added: ". . . no action may be brought against any employer or any workman under this act as a third person if at the time of the accident such employer or such workman was in the course of any extrahazardous employment under the act." Illustrating the purely statutory nature of a workman's actions, causes of action which had arisen against third party employers prior to the effective date of the 1929 amendment and had not been filed until after the date were held destroyed. This sweeping immunity granted employers and workmen as third parties is a feature peculiar to Washington law. No other state has gone so far.\footnote{E.g., Murphy v. Schwartz, 142 Wash. 68, 252 Pac. 152 (1927). A negligent driver ran down a workman who was oiling street car tracks. Held: The workman was at the plant, and no tort action can be maintained against the driver. Noted, 2 WASH. L. REV. 203 (1927).}

\footnotetext{87}{For a suit by a workman against his employer for a breach of duty by the company physician which led to harm which was not an "injury" within the workmen's compensation act, see Pate v. General Electric Co., 143 Wash. Dec. 171, 260 P.2d 901 (1955). The workman lost, but only because he failed to show a breach of duty.}

\footnotetext{88}{In Anderson v. Allison, 12 Wn.2d 487, 490, 122 P.2d 484, 485 (1942), the court said: "... under the workmen's compensation act of this state, an injured workman receiving compensation thereunder for an injury cannot maintain an action for malpractice against the physician who treated him for his injury. . . ." The case applied a provision in the Federal Longshoremen's and Harbor Workers' Compensation Act which made acceptance of compensation an absolute bar to recovery of damages from third persons. See also Notes, 7 WASH. L. REV. 363 (1932), 11 WASH. L. REV. 272 (1936).}

\footnotetext{89}{L. 1911, c. 74, § 3.}

\footnotetext{90}{E.g., Murphy v. Schwartz, 142 Wash. 68, 252 Pac. 152 (1927). A negligent driver ran down a workman who was oiling street car tracks. Held: The workman was at the plant, and no tort action can be maintained against the driver. Noted, 2 WASH. L. REV. 203 (1927).}

\footnotetext{91}{L. 1927, c. 310, § 2.}

\footnotetext{92}{L. 1929, c. 132, § 1; RCW 51.24.010.}

\footnotetext{93}{Robinson v. McHugh, 158 Wash. 157, 291 Pac. 330 (1930); Denning v. Quist, 160 Wash. 681, 296 Pac. 145 (1931). Later, the legislature restored these actions. L. 1931, c. 90, § 6. See Denning v. Quist, 172 Wash. 83, 19 P.2d 656 (1933).}

\footnotetext{94}{2 LARSON'S WORKMEN'S COMPENSATION LAW § 72.40 (1952).}
As to a third party employer, the test of immunity, viz., was he "... at the time of the accident ... in the course of extrahazardous employment ...," is not an adequate one. An employer can be driving home for an afternoon nap and at the same time be employing men in extrahazardous activity. Is he in the course of his employment if an accident happens at that time? A truck driver delivering goods to the employer's factory might then be injured through the negligence of the employer's agent. A truck driver might also then be injured in a collision caused by the employer's own negligence. The immunity provision makes no distinction. The court has read one in, viz., the injury must arise from the extrahazardous business.

Immunity arguably does not extend to areas of a business no longer vitalized by the presence of employees, e.g., an abandoned mine, because there is no connection with "employment." Immunity may not extend to a dangerous condition over which the employer no longer exercises control, e.g., containers of corrosive acid sold to a junkman, because the connection with the hazardous business is too remote.

A nice problem is raised by the recent decision in Latimer v. Western Machinery Exchange. The court held that self-employed loggers, with no employees, were "employers." Apparently, therefore, such self-employers are immune from suit by any workman under the act, regardless of whether premiums are paid, since third party immunity of an employer is not made to turn on premium payments. The only

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92 Gephart v. Stout, 11 Wn.2d 184, 118 P.2d 801 (1941). While driving his private car, defendant third party employer ran into plaintiff workman. In holding that the immunity provision could not be interposed, the court said: "... the negligent act or which is the basis of the workman's cause of action must arise out of, or be in some way connected with, an extrahazardous employment or business then being carried on by the employer. We do not think the legislature intended ... to grant every individual who may happen to own an extrahazardous business ... a blanket immunity from suit." Id. at 192, 118 P.2d at 805.

93 In Weifenbach v. Seattle, 193 Wash. 528, 76 P.2d 589 (1938), plaintiff was injured by a third party employer's negligently maintained electric wires. He contended that immunity extended only to active negligence which could be attributed to employees; not to passive negligence, as to which the question of whether an employment relationship exists is irrelevant. In rejecting the argument, the court relied on the fact that workmen were continually engaged in maintaining the system. "If the city had abandoned the use of the wire for the transmission of electricity so that it was no longer performing any function as a part of its operating system, then, of course, it would be then no longer a part of the industry or the extrahazardous employment in which the respondent was engaged." Id. at 534, 76 P.2d at 591.


95 Note 6 supra.

96 But see Jewett v. Kerwood, note 24 supra. A workman, injured by a third party employer, contended that the immunity provision could not be invoked because the employer had not qualified for personal benefits under RCW 51.32.030. though premiums had been paid for his workmen. The court rejected this contention, but assumed
route of escape seems to be that suggested by Weiffenbach v. Seattle:100 "Employment" limits immunity to businesses with employees. But if this approach is adopted, self-employers with no employees could not gain immunity even if they decided to pay premiums. Such self-employers are an anomaly in the act.101

A problem as yet unresolved is whether third party immunity extends to corporate officials. The answer turns on whether such officials come within the statutory phrase "any employer or any workman." The court has treated a corporate official as an employer for the purposes of denying compensation102 and as a workman for the purpose of denying a tort action.103 A holding that he is neither for the purpose of denying tort immunity would complete the cycle.

The immunity granted to the workman as a third party extends only to acts required by his contract of employment or done at the specific direction of his employer if the interpretation of a workman's course of employment last announced in Muck v. Snohomish County PUD104 is followed. Liability of the employer for acts of the workman extends not only to contractual duties or acts specifically directed, but to any act which is impliedly within the scope of employment, generally, any act which a servant does in furtherance of his master's business.105 Paradoxically, therefore, the immunity provision will often prevent an action against the employer, but leave an injured third party with a remedy against the workman. In the Muck case, for example, the workman was a sales manager. He was killed while helping raise a television antenna. Since he was not required to do so by his contract of employment, he was held not in the course of his employment. If he

that if no premiums had been paid, the action would not have been barred. Cases relied on are O'Brien v. Northern Pac. R. Co., 192 Wash. 55, 72 P.2d 602 (1937), which held that a workman could maintain a tort suit against a third party employer not within the scope of the act and Reeder v. Crewes, 199 Wash. 40, 90 P.2d 267 (1939) which was an action against a defaulting employer specifically allowed by the statute. The O'Brien case is inapplicable because Latimer, as an employer in extrahazardous activity is clearly within the scope of the act. The Reeder case is inapplicable for two reasons: (1) The statutory action against defaulting employers has since been omitted from the act, note 25 supra. (2) Since there is no payroll or workman hours to report, an employer without employees who makes no reports and pays no premiums would not be in default even if an action had been reserved against defaulting employers.

100 Note 96 supra.
101 E.g., premium payments are based primarily on man hours worked by the workmen in an employer's employ. RCW 51.16.101.
102 Farr v. Dept., note 26 supra. In effect, the court included a corporate official within the term "employer" in the proviso of RCW 51.32.030.
103 Koreski v. Seattle Hardware Co., notes 19 and 27 supra.
104 Notes 39 and 49 supra.
had injured a third party workman, he could not have interposed the
immunity provision. The employer would clearly be liable under the
rule of agency discussed above, but he could interpose the immunity
provision since the accident arose out of his extrahazardous business.
A result farther from the purpose of the statute, to shift the burden of
accidents from the workman to the industry which causes them, can
scarcely be imagined.108

Elective adoption of the act is permitted employers and workmen
in industries other than those enumerated as extrahazardous.107 An
election of coverage destroys the common law remedies of those who
make such election, but immunity as third parties cannot be gained in
return.108 Such immunity is limited to those in extrahazardous
industries.

A cause of action is also given the workman against his employer for
injuries intentionally caused by the employer.109 The utility of this
provision is minimized by the rule that the amount of compensation
receivable under the act is a material fact which must be alleged and
proved to sustain the action of the workman, and by the limitation of
the action to one against the employer.110 Though an injury inten-
tionally caused by a fellow employee gives rise to no action against
him, it may give rise to an action against the employer if the employee
was acting within the scope of his employment when he caused the
injury.111 Failure to correct a known hazard or failure to warn of an
imminent danger is not the "deliberate intention" required by the
statute.112

Reflection on the body of law which has grown up around the
Workmen's Compensation Act should convince the reader that merely
to state this law is to condemn the act as it now stands. Coverage is
based on a variety of distinctions clearly inconsistent with the broad
policy behind the act and scarcely calculated to reduce the workman's

108 Note 77 supra. But see Boeing Aircraft Co. v. Dept., 22 Wn.2d 423, 156 P.2d
640 (1945). The immunity provision was thought to evidence an intent that the burden
be shifted to the employer's industry rather than to the industry responsible for the
injury.
107 RCW 51.12.110.
109 RCW 51.24.020.
110 Perry v. Beverage, note 81 supra. (workman's action against foreman for in-
tentional injury by foreman held not saved).
111 Ibid., where it was the duty of the foreman to maintain discipline.
112 Biggs v. Donovan-Corkery Logging Co., 185 Wash. 284, 54 P.2d 235 (1936);
“horror of lawyers and judicial trials” which partially motivated passage of the act.\textsuperscript{113}

There is now a body of case law sufficient to make possible intelligent comprehensive redrafting and simplification of the act. The number of cases interpreting the act demonstrates that such a project is long overdue.

\textsuperscript{113} Stertz v. Ind. Ins. Comm., 91 Wash. 588, 606, 158 Pac. 256, 263 (1916).