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# Workmen's Compensation

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# WORKMEN'S COMPENSATION

Judicial decisions reported in this area in 1961 clustered primarily around procedural issues. Unlike prior years substantive matters were less in number and importance.

## APPEAL PROCEDURES

The proper filing of an appeal notice is jurisdictional. The supreme court spoke twice on this rigid technicality last year. In *State ex rel. Howard v. Industrial Commission,*[1] involving a claim for a death award, a writ of procedendo was sought to command the Industrial Commission to order the Regional Board of Review to proceed with the hearing of an appeal from a decision of the Administrator of the Bureau of Workmen's Compensation. The petition for the writ was denied. The claimant's application for the Administrator's reconsideration of a death claim was filed eleven days after the denial of the claim by the Deputy Administrator. The court held that the Administrator was without jurisdiction to reconsider the application under Ohio Revised Code section 4123.515 which makes mandatory a ten day period as the limitation for such a filing, and that thus the merits of the claim were not before the Regional Board. The same court in a per curiam opinion[2] disallowed an amendment to an appeal from a decision of the Industrial Commission to the common pleas court. The court held that the appeal to the common pleas court must designate the name of the employer and contain a claim number, that such requisites were jurisdictional under Ohio Revised Code section 4123.519, and that they could not be added by amendment after the expiration of the statutory period for filing such an appeal.

Regarding appeals from the Industrial Commission to the common pleas court, a court of appeals[3] likewise emphasized the jurisdictional mandate of the workmen's compensation statute. Although upon refusal by the Commission to entertain an appeal from the Regional Hearing Board, a claimant may file his notice of appeal in the common pleas court, that notice is fatally defective when the date included in the notice of appeal is the date of the Commission's order rather than the date of the Regional Hearing Board's decision. Ohio Revised Code section 4123.519 requires that the notice of appeal must specify the date of the decision appealed from. Furthermore, the court held that the defective notice cannot be amended upon the expiration of the jurisdictional sixty-

1. 171 Ohio St. 447, 172 N.E.2d 1 (1961). See also discussion in *Administrative Law and Procedure* section, p. 431 *supra.*

2. Starr v. Young, 172 Ohio St. 317, 175 N.E.2d 514 (1961).

3. Gordon v. Young, 173 N.E.2d 373 (Ohio Ct. App. 1960).

day period after the date of the decision. The supreme court dismissed the appeal from this "restrictive court of appeals" decision.[4]

Under the statutes[5] appeal is permitted to the court of common pleas from the Regional Board of Review if the Commission refuses an appeal. Appeal to the court is precluded, however, until the Commission has acted upon the application for reconsideration of the Regional Board's decision.[6]

A compensation case appealed to the common pleas court can be dismissed for want of prosecution after being regularly assigned for trial and counsel notified.[7] Want of prosecution by the employee does not entitle the employer to a hearing and a dismissal on the merits. In another case[8] it was held that an employer could appeal a verdict of the common pleas court under authority of Ohio Revised Code section 4123.519, which instituted and defined such right to appeal, even though the claim arose out of the employee's death occurring prior to enactment of the statute, because the statute was procedural only and did not modify any substantive rights of the claimant.

Where the Commission found that the claimant was permanently and totally disabled and such disability was the result of advanced age rather than an injury, a jurisdictional issue was presented and was appealable to the common pleas court.[9] Prior to the 1955 amendment, the extent of dependency of the claimant in a death case, whether partial or total, in the event some dependency was recognized, was not appealable to the common pleas court.[10] Ohio Revised Code section 4123.519, enacted in 1955, has radically amended the appeals procedure. Parents of a decedent, granted partial dependency status, can now appeal to the court of common pleas the denial of their application for total dependency.[11]

## AUTHORITY OF THE INDUSTRIAL COMMISSION

Several cases last year dealt with issues involving the Commission's authority. One widow sought a writ of mandamus to compel the Commission to vacate an order denying an additional award for her husband's death based on the employer's violating a specific safety requirement of

4. Gordon v. Young, 171 Ohio St. 446, 173 N.E.2d 379 (1961). See also discussion in *Administrative Law and Procedure* section, p. 430 *supra.*

5. OHIO REV. CODE §§ 4123.516, 4123.519.

6. Bunch v. Scanlon, 172 N.E.2d 188 (Ohio C.P. 1959). See also discussion in *Administrative Law and Procedure* section, p. 429 *supra.*

7. Lopez v. Scanlon, 175 N.E.2d 118 (Ohio Ct. App. 1961).

8. Mace v. Scanlon, 111 Ohio App. 309, 171 N.E.2d 922 (1960).

9. Wentzell v. Columbus Bolt & Forging Co., 112 Ohio App. 552, 176 N.E.2d 866 (1961).

10. 125 Ohio Laws 903, 1016 (1953).

11. Very v. Young, 178 N.E.2d 112 (Ohio C.P. 1961).

the Commission's bulletin.[12] Decedent was killed by electrocution when his crane boom struck electric wires. Section 161 of Bulletin 202 had stated that when necessary to operate construction equipment near electric wires, "ample" clearance "should be provided." A recommendation that a ten foot clearance "should be maintained" was also included. The Ohio Supreme Court denied the writ on the ground that the Commission's bulletin was not a *specific* safety requirement imposed upon the employer because it did not affirmatively establish a standard which the employer could follow. One judge dissented. He contended that since the Commission had specifically determined the cause of death to be a violation of the safety requirement, the requirement was sufficiently certain in its nature to be interpreted and imposed against the employer.

Under the 1959 Amendments to the Ohio Revised Code, compensation for partial or permanent disability accrues and is payable to the employee from the date of last payment of compensation, or, in cases where no previous compensation has been paid, from the date of injury.[13] A claimant injured prior to the enactment of this accrual provision is likewise entitled to the accrual benefits, for, the matter being procedural and not substantive, its retroactive application is not invalid.[14] It was also held that if the Commission holds hearings at various times on the question of whether a claimant is a handicapped worker and fails to consider the handicapped worker provisions of Code section 4123.43, the employer may seek a writ of mandamus compelling the Commission to determine whether the employer is entitled to an apportionment of the costs between itself and the Surplus Fund provided for by the statute.[15]

## SUBSTANTIVE ELEMENTS

### *Course of Employment*

Three cases were reported in 1961. A police officer driving his own automobile from home to the police station to report for regular duty was injured. The police department rule required officers to be prepared at all times to act immediately on notice that their services were required. The injury was not compensable for it did not arise out of nor did it occur in the course of employment.[16] An injury suffered by a worker enroute to a mandatory examination by the Commission's medical staff during consideration of the worker's claim for permanent partial disabil-

12. State *ex rel.* Hill v. Industrial Comm'n, 172 Ohio St. 115, 173 N.E.2d 890 (1961).

13. OHIO REV. CODE § 4123.571.

14. State *ex rel.* Smith v. Industrial Comm'n 112 Ohio App. 1, 174 N.E.2d 115 (1960).

15. State *ex rel.* Marquette Cement Mfg. Co. v. Industrial Comm'n, 175 N.E.2d 836 (Ohio Ct. App. 1960).

16. Simerlink v. Young, 172 Ohio St. 433, 178 N.E.2d 168 (1961).

ity also was not compensable.[17] And for a similar reason, a worker injured while trying to jump over his employer's parking lot fence could not recover compensation. The worker was going to his automobile parked in the lot to eat lunch during the regular lunch period.[18]

### *Causal Relationship*

No more difficult medico-legal issue arises than the crucial problem of whether the physical condition of the injured employee is the direct result of, or was proximately caused by, the employment incident. An injury to one worker's left foot and leg was compensable, but when that worker sought to prove a subsequent back ailment arising from the same incident his claim was denied. The most favorable evidence supporting this additional claim was that there was a "remotely possible" causal relationship.[19]

### *Accident and Injury*

A heart injury resulting from the force exerted by a workman to prevent a loaded wheelbarrow from tipping sideways was not the result of an accident. The claim stemming from this incident was not compensable.[20] The court relied on the *Dripps* doctrine, for the incident occurred in 1954 prior to the statutory amendments of 1959.[21]

## WORKMEN'S COMPENSATION PRACTICE

### *The Fee*

Each year legal issues over attorney's fees appear to arise.[22] The past year was no exception. The Ohio Supreme Court held that where a controversy occurs over the amount of the fee, the attorney cannot assert a claim for a fee in any amount not fixed by the Commission in accordance with Ohio Revised Code section 4123.06.[23] Furthermore, in the absence of a fee fixed by the Commission no lien of any amount exists against the compensation check issued.

17. Carlson v. Young, 171 N.E.2d 736 (Ohio Ct. App. 1959).

18. Clites v. Young, 176 N.E.2d 741 (Ohio C.P. 1960).

19. Ulicny v. Youngstown Sheet & Tube Co., 174 N.E.2d 926 (Ohio Ct. App. 1960).

20. Stewart v. Young, 112 Ohio App. 433, 176 N.E.2d 322 (1960).

21. For a discussion of the statute, see Schroeder, *Survey of Ohio Law — Workmen's Compensation,* 11 WEST. RES. L. REV. 453 (1960).

22. Schroeder, *Survey of Ohio Law — Workmen's Compensation,* 11 WEST. RES. L. REV. 453, 458 (1960); Schroeder, *Survey of Ohio Law — Workmen's Compensation,* 12 WEST. RES. L. REV. 593, 594 (1961).

23. Adams v. Fleck, 171 Ohio St. 451, 172 N.E.2d 126 (1961). See also discussion in *Personal Property* section, p. 508 *supra. See Recent Decision,* p. 608 *infra.*

*Unauthorized Practice*

Developments in 1961 substantiated the prediction made in last year's survey article that practice by laymen before the Commission and Bureau of Workmen's Compensation "will become a major problem."[24] One lower court case involved a breach of contract suit by an actuarial corporation which had agreed to procure and maintain the lowest possible rates for an employer by filing protests, opposing claimants, and protesting rates. Such a contract was held unenforceable and against public policy because the service performed constituted the unauthorized practice of law.[25] The organized bar is undertaking affirmative action against lay practice before the Commission and Bureau of Workmen's Compensation. Armed with such decisions as the one reported above plus *McMillen v. McCahan*[26] and the recent case of *In re Battelle Institute*[27] as well as high court decisions from sister states, such as *Hoffmeister v. Tod*[28] in Missouri, the bar associations have opened an aggressive attack on lay compensation practitioners. At stake is the necessity for the Ohio Supreme Court to reconsider the guidelines laid down twenty-five years ago in *Goodman v. Beall.*[29] Here the court held that the appearance and practice before the Commission prior to the disallowance of a claim and the beginning of the old rehearing procedure was not ordinarily the practice of law. In 1955 the rehearing proceedings were abolished. The Commission and Bureau today are entitled to a modern reconsideration by the Ohio Supreme Court as to what constitutes the unauthorized practice of law in compensation cases. Certain language in the *Goodman* case could still be important:

> In keeping with an enlightened age, the act was designed to create a new system, fair to both employee and employer, and to do away with the vexations and protracted litigation which had proved so costly, exhaustive, and unsatisfactory, ofttimes resulting in great injustice.
>
> In the vast majority of instances no special skill is required in the preparation and presentation of claims.
>
> Since the inception of the Workmen's Compensation Act it has been common practice for laymen to assist an injured or diseased workman or

24. Schroeder, *Survey of Ohio Law — Workmen's Compensation,* 12 WEST. RES. L. REV. 593, 594 (1961).

25. Harrington Inc. v. Windmiller, 177 N.E.2d 816 (Ohio Munic. Ct. 1961).

26. 167 N.E.2d 541 (Ohio C.P. 1960). In this case a common pleas court enjoined a layman from preparing appeals, filing forms, and giving advice to claimants before the Industrial Commission as such activity constituted the unauthorized practice of law.

27. 172 N.E.2d 917 (Ohio C.P. 1961). The court held that salaried personnel of the legal department of the patent section of the Battelle Memorial Institute engaged in the unauthorized practice of law when they performed legal services regarding patents and inventions for the industrial sponsers of the institute.

28. 349 S.W.2d 5 (Mo. Sup. Ct. 1961). A layman was held in contempt for engaging in the unauthorized practice of law through advising members of the public as to their rights under the Workmen's Compensation Law.

29. 130 Ohio St. 427, 200 N.E. 470 (1936).

> his dependents in the submission of a claim. Often this is done as an accommodation by representatives of the employer or by representatives of an organization to which a claimant may belong, and such usually simple services are for the most part performed in an expeditious and satisfactory manner. In our judgment this is not the practice of law; but in so holding it is neither our intention nor purpose to modify the definition of the practice of law announced in the first paragraph of the syllabus of Cuyahoga Abstract Title & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650.[30]

Piecemeal attacks by the injunctive or declaratory judgement process against individual lay practitioners are inadequate to test the legal issue involved. The Commission and Bureau operate a state-wide compensation system which demands a uniform rule on compensation practice. Only the Ohio Supreme Court can resolve the current dilemma.

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30. *Id.* at 429-30, 200 N.E. at 471-72.