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Appeals in Workmen's Compensation

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FIFTY ODD YEARS AGO attorneys showed very little interest in workmen's compensation claims since the fees available were uninviting. The benefits to the injured workman were payable bi-weekly with no accrued benefits. Fees, if collected, were paid by the workman out of the small amount paid to the injured with benefits checks amounting to less than thirty dollars bi-weekly. However, there were lawyers who handled such cases, becoming specialists in the workmen's compensation law.

When enacted, the administration of the law was intended to obviate the necessity for legal counsel; however, the recipient of benefits had to show he was injured in the course of his employment and the injury arose out of it. This posed a legal question and the advice of lawyers oftentimes was necessary. Most of the early litigation in workmen's compensation was predicated upon this legal requirement. Those early cases are the guideline today on this question.

Administrative law designed to reduce the work load of the courts was in its infancy when workmen's compensation laws were enacted in Ohio and, although the processing of claims, establishment of hearing procedures, and decisions followed administrative procedure acts, county courts of common pleas were given jurisdiction over questions of fact and law on appeal. Certain specified orders were appealable while on others, such as extent of disability, the Commission order was final.

Early industrial commissioners were dissatisfied with the results on appeal to courts, feeling cases before them were poorly prepared and inadequately prosecuted for the purpose of perfecting an appeal to the court which would increase the chargeable fee. Rehearings were inaugurated whereby cases were heard before a referee, a record prepared and evidence submitted under court rules on admissibility. The record was reviewed and reheard by the Commission after which a final decision was rendered.

If such a case was appealed to court, counsel for both parties read their portions of the testimony to a jury, thereby confining the case to the allegations and facts as presented to the Commission. Since Ohio's Act provided for a state fund, the Commission was represented by assistant attorneys general while self-insuring employers provided their own lawyers. Many objections were raised by the attorneys defending commission orders on the rehearing method of trying cases. Physicians

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were never seen and observed by jurors, claimants and witnesses were not observed when under cross examination and, as stated over and over, the jurors did not observe the squirming, blushing, hesitancy in answering questions and evasiveness of those testifying.

The General Assembly drastically revised the workmen's compensation law in 1955 and created the Bureau of Workmen's Compensation headed by an Administrator who assumed some duties formerly held by the Commission, but gave him joint authority on other matters. The new law resulted in the Administrator having original jurisdiction over the allowance of claims. He appointed deputy administrators to man branch offices where claims were assigned to be processed and hearings conducted on contested claims. It was further provided that any party dissatisfied with the deputy's ruling could request a reconsideration before the Administrator, this being a matter of right. After a hearing before the Administrator a dissatisfied party could appeal to a board of review, which boards were created by the amendment. Another step was provided whereby either party could ask for leave to appeal to the Commission. A new facet was provided for in this step which permitted the Administrator to ask for leave to appeal, if he so desired. If leave is granted, the Commission would hear the parties and render a decision, however, if leave was denied the claimant or employer could file an appeal from the board's order to the Court of Common Pleas. No such appeal was granted to the Administrator. It is of interest to note that all reconsiderations and appeal hearings were *de novo*.

Many attorneys lost their cases in court because they appealed from the wrong order. It is provided the order of a board of review becomes the order of the Commission if no appeal therefrom was granted. Some lawyers appealed from the Commission order denying the leave to appeal rather than from the board's order which either allowed the claim or denied it. The Ohio Supreme Court held that the appeals procedure was created by the Workmen's Compensation statutes and had to be construed strictly and the appeal must be taken from the order granting or denying benefits.

It is of financial importance for the claimant to attempt to have his claim allowed and compensation awarded at any of the appeal steps, forcing the employer to perfect the appeal to court since the law provides for the payment of such compensation pending a final order on the appeal. If the award is reversed it is provided the compensation previously paid will be refunded to the employer's account out of the Surplus Fund. There is no provision to collect such overpayment from the claimant. There are many occasions when the award has been paid out before the matter comes to trial.

It is provided that either the employer or the claimant may appeal to the Court of Common Pleas. The mere filing of such a notice with

copies to the other side confers jurisdiction of the court, however, the Commission and the Administrator must be included as parties defendant. Once the appeal is filed proceedings in court will be *de novo* and follow the rules for civil procedure. Regardless of whether it is the employer's or claimant's appeal the claimant must file a petition to which the employer answers.

The *de novo* process, although sought after by employers, has not had the good effect anticipated. Cases are again being decided on facts never heard by any of the various hearing officers, just as the early commissioners observed. This is accomplished through the amendment of the petition by claimant's lawyers after the proof has been submitted. Claims have been allowed by juries for a low back injury when the claim had been processed through the lower bodies for a shoulder injury. Such cases are generally fraudulent and steps should be taken to eliminate this practice. Any appeal from the order of the hearing body below should be confined to the matters presented to and considered by that body. Appeals in workmen's compensation claims should follow the administrative procedure act applicable to other boards and commissions wherein appeals to the courts are on question of law only. Although the National representatives of the AFL-CIO support this approach, the Ohio Council AFL-CIO adamantly opposes it. The question before the jury is the right of the claimant to participate in or continue to participate in the workmen's compensation insurance fund.

Juries must hear the testimony of the claimant, his witnesses, if any, and the opinion of a physician. The physician may have been the attending doctor or may be some specialist who has never known the claimant. The claimant and witnesses must present a *prima facie* case describing an injury which was accidental in character and result, arising out of and in the course of the employment. The medical witness must state that the disability was the probable result of the injury. If it is a death claim the physician must testify that the death was probably caused by the injury or hastened the demise of the injured by a measurable degree.

Jurors as selected are average Americans with the education usually found present when twelve people are selected somewhat at random. Business leaders and professional people are usually excused from jury duty. Being well aware of this fact, a successful claimant's lawyer can be selective in choosing his expert medical witness. Those lawyers with large practices have physicians with a long list of credits which greatly impresses the jury. Little do the jurors know these physicians are sometimes used by claimant's lawyers because of their favorable testimony. Many of these witnesses never appear in the courtroom where they can be observed both under direct examination and cross examination through the use of the deposition.

Unfortunately very little can be said for the quality of the medical testimony heard by jurors as presented by claimants' attorneys. If the treating physician has stated in reports during the administrative procedure prior to court there is no causal relationship between the injury and the disability he will not be called upon to testify. However, if he is favorable he will be called since his testimony will have a good effect on the jury, particularly if the trial is in a small town where the physician enjoys a good reputation. One such claim was allowed by a rural area jury where the question was whether the deceased claimant's leukemia was the result of an accidental overexposure to radiation. The employer and the Atomic Energy Commission had several outstanding highly qualified specialists testifying that the type of leukemia present could not have been caused by radiation. However, the family physician testified to the contrary, and the jury found for the widow.

Jurors naturally are impressed by professionals when they testify. Technical language and medical terms intrigue the average person and jurors are average. They have no way of knowing whether the testimony departs from generally accepted medical theories. They are not aware of the care with which the hypothetical question has been prepared, nor the fact the physician has probably seen the question prior to its being presented in court or in deposition form. Medical testimony is available which will refute practically any old established and proven medical theory. The only problem confronting the attorney is the knowledge of the source.

Administrative bodies hearing cases are usually well acquainted with the names of physicians who will testify as a specialist in everything. They know the weight which can be given to this testimony. Also, the assistance of specialists in every field of medicine who have no interest whatever in the particular claim are available to them for medical advice and are frequently relied upon in assisting the administrator in arriving at a decision.

Ohio's occupational disease law is administered by administrative offices with no appeal permitted on question of law. Although attempts have been made to amend this section the General Assembly has not seen fit to do so. Very few complaints are made on this procedure and no charges of unfairness have been lodged. True, some lawyers feel in a particular case they could have won a verdict for the claimant in court, but again it would be on the basis of laymen serving on juries attempting to understand medical testimony and rendering decisions based on such testimony. The value of such testimony has been discussed above.

The newest trend among claimants' lawyers is the mental illness allegation. Any time a physician cannot find objective causes for the pain a claimant alleges is present, and upon being told it is unaccounted

for medically, the claimant is sent to a psychiatrist. Since this doctor is selected by the claimants' lawyer there is no doubt a finding of a neurosis of one of the many types will be reported as being present and causally related to the injury. No treatment has been rendered for the condition and none is recommended. The condition, however, is reported as disabling and a degree of disability is supplied in percentage.

This phase of workmen's compensation is extremely hard to administer since it appears the mental problem does not need treatment, therefore, it must be presumed it will disappear and be forgotten upon the payment of compensation. This operates at about $100 per 1% or $2,000 for 20%. This appears to be the gold cure referred to for many years by defense counsel in personal injury claims.

It is extremely difficult for administrators to accept the fact that a truck driver who had an injury, lost no time and earning his usual wage, could have a neurosis to a disabling degree. Unfortunately they are frequently forced to accept this theory based on medical reports. Again, jurors are asked to decide this question based on testimony of physicians engaged in the specialized practice of psychiatry.

There is a solution to the problem of appeals in the Ohio Workmen's Compensation Act. Permit the administrative officers who are well trained and have many years of experience to determine the facts and law with court appeals on questions of law only. Since Ohio is a State Fund operation, hearing officers probably should not be responsible to the Bureau of Workmen's Compensation. This alliance could affect their judgment since they must defend the insurance fund against any claim which is, in their opinion, unlawful.