FIFTEENTH REPORT

OF THE

Industrial Commission of Colorado

For the Biennium
December 1, 1936
to
November 30, 1938

Administering:

- Workmen's Compensation Act
- Industrial Relations Act
- State Compensation Insurance Fund
- Factory Inspection Department
- Boiler Inspection Department
- Department of Wage Claims
- Minimum Wage
- Division of Unemployment Compensation
- Colorado State Employment Service, affiliated with United States Employment Service
- Private Employment Agencies

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TO HIS EXCELLENCY,
THE GOVERNOR OF COLORADO,
State Capitol Building,
Denver, Colorado.

Sir:

In accordance with the provisions of law creating the Industrial Commission of Colorado, we have the honor to transmit herewith the report of the acts and proceedings of the Commission for the period from December 1, 1936, to November 30, 1938.

W. H. YOUNG,
GEORGE LEWIS,
RAY H. BRANNAMAN,
Commissioners.

INDUSTRIAL HEARINGS

Our records show 301 notices of changes in either wages, hours or working conditions were filed with the Industrial Commission during the past two years. Thirty-five hearings were held and awards issued by the Commission; sixteen orders were issued, ten terminating jurisdiction.

Farm labor does not come under the jurisdiction of the Commission, but through mediation we have been successful in settling some of the disputes between farm laborers and their employers.

WORKMEN'S COMPENSATION ACT

SECTION 10

We believe that Section 10 of the Workmen's Compensation Act relating to common carriers in interstate commerce should be amended to clarify its meaning. When this section was first passed it apparently was intended to apply to railroads. However, since that time other forms of transportation have developed, such as bus companies, truck lines, air lines and so on. Employees in these industries are not as yet given the protection of federal liability acts and their right to benefits under theWorkmen's Compensation Act of Colorado, even when engaged in intrastate activities, seems to be in doubt.

We therefore recommend that this section be amended to clarify and accurately define the rights of employees engaged in these industries and to afford them adequate protection where the federal government has not assumed jurisdiction.

SECTION 21

Once more we call attention to the fact that the Commission has always held that Section 21 of the Workmen's Compensation Act was intended to prevent an employer from collecting the cost of Workmen's Compensation Insurance from his employes. We again suggest that this section be amended to prevent any employer from doing this, and also to provide a penalty for violation of this section of the act.

SECTION 52

Again we strongly recommend that paragraph (a) of Section 52 of the Workmen's Compensation Act be amended to read:

> "(a) Wife **at the time of the accident,** unless it be shown that she was voluntarily separated and living apart from the husband at the time of his injury or death, and was not dependent in whole or in part on him for support."

As Section 52 reads at this time it conflicts with Section 57, which should establish dependency, in our opinion.

SECTION 84

We believe that the statute of limitations should run for one year, instead of six months, and that the act should be amended

in this respect. We also believe that such amendment should provide an exception as to the cases where it is found as a fact that the employer had knowledge of the injury and failed to make any report to the Commission. In cases of this kind we believe the period of limitation should run from the date that knowledge of such accident is brought to the attention of the Commission.

We also believe that a further limitation should be placed in the statute to provide in substance that no case shall be reopened and all claims for further benefits shall be barred after the elapse of five years from the date of the last payment of compensation or medical benefits.

BOND REQUIRED FROM INSURANCE CARRIERS

In our last report we recommended that a bond of not less than $25,000.00 be required from every insurance carrier authorized to write Workmen's Compensation Insurance in Colorado. Employers and employes would be protected if such a bond were required. At the present time many employers are paying compensation to their injured employes, due to the failure of insurance companies with which they carried insurance covering their Workmen's Compensation liability.

SUBSEQUENT INJURY FUND

We recommended in our Fourteenth Report that something be done for the employe who loses an arm, leg, foot or eye. Many employers will not employ such unfortunates, due to the fact that should they lose the other arm, leg, foot or eye, or any one in connection with the loss previously sustained, instead of being awarded compensation for permanent total disability and drawing compensation as long as they live, as provided by law where any two of said members are lost by injury in or resulting from the same accident, they will be entitled to draw compensation only for a specified number of weeks in addition to their hospital and medical expenses within the limits provided by law.

Again we say that we believe each industry should take care of its own disabled persons in such cases. Such crippled employes should not become public charges. Other states are providing subsequent injury funds and we suggest that a law be passed to protect employes under such conditions.

RECOMMENDATIONS

BOILER INSPECTION

The blanket fees of $2.50 for cast iron boilers, $5.00 for boilers not exceeding 500 pounds pressure per square inch, and $10.00 for all other boilers carrying more than 500 pounds, are considered not elastic enough to cover the work of inspection required on the different types of boilers.

It is recommended that the schedule of fees be as follows:

Fee for all cast iron boilers	$ 2.50
Steel boilers under 50 lbs. pressure	3.00
Steel boilers 50 lbs. to 200 lbs. pressure	5.00
Steel boilers 200 lbs. to 500 lbs. pressure	7.50
Steel boilers over 500 lbs. pressure	10.00

It is also recommended that the law be amended to include inspection of pressure vessels with the following fees:

Tanks under 20 inches in diameter	$3.00
Tanks 20 inches to 36 inches in diameter	4.00
Tanks over 36 inches in diameter	5.00

FACTORY INSPECTION

The report of the Department of Factory Inspection shows the need of increasing the force of inspectors. This department is not inspecting hotels, rooming houses, restaurants or stores, and a large percentage of schools, theaters, factories and other places comprehended in the law, due to lack of inspectors. It is therefore strongly urged that two additional inspectors be authorized and sufficient money appropriated for that purpose.

Outside of the city of Denver there is no official inspection of elevators in Colorado. It is recommended that this phase of factory inspection be given consideration to the end that the workers and the public generally be more adequately protected from injury.

MONOPOLISTIC STATE FUND

It is the opinion of the Commission that the State Compensation Insurance Fund should be monopolistic in character. The theory of workmen's compensation is that each industry should take care of its own losses in exactly the same manner as they repair or replace broken or worn out machinery.

The State Fund has been in operation since 1915, and during that time has proved the necessity for its existence, providing a means of carrying this class of insurance at a much cheaper premium rate than can possibly be done by the old line companies. The cost of carrying this class of insurance has steadily increased, due to the fact that the legislature and the people from time to time have seen fit to increase the benefits under the act, and undoubtedly will continue to do so.

A monopolistic State Fund can write insurance at a considerable saving to the employers of the state, and assure prompt and reasonable benefits to the workers. It is our belief that greater benefits would inure to the workers themselves, such as expedition in the settling of claims.

In the year of 1937, 20,702 accidents were reported to the State Fund and only one out of every thirty-seven went to a hearing. The State Fund is the first on the list of the Industrial

Commission in the making of admissions and admitting liability, indicating that less litigation is necessary.

The State Fund is limited by law as to expenses. Salaries are regulated by law, and no commission is paid on any business.

In stating that the Commission favors a monopolistic State Fund, the Commission not only means the abolition of private insurance, but also the abolition of self-insurance permits. While many of the self-insurers have handled their cases in a very admirable manner, it is the Commission's belief that, considering the problem as a whole, the interest of the workers is better protected by requiring insurance with a monopolistic fund.

RECOMMENDATIONS FOR AN EFFECTIVE WAGE CLAIM LAW

Meritorious wage claims fall into two general classifications: (1) where the employer is able but unwilling to pay, and (2) where the employer is willing but unable to pay. The former arises from entertaining the feeling of injury, real or imaginary. The latter arises from an attempt to operate an enterprise without money. All just wage claims that are not paid produce a chaotic condition in trade and commerce.

Employers are legally obligated to pay their workers for services rendered. Enforcement requires the ordinary legal procedure in courts. The expense and delay make such actions prohibitive in all but isolated cases. This handicap has the one advantage in that the court dockets would soon be clogged with such cases.

Most states have tried to cope with this anarchic situation with remedial legislation. Some have passed laws providing for a continuance of wages to the employe until all are paid, and other forms of damages collectible by the plaintiff in court. But it has been found that penalties alone do not solve the problem.

To overcome these difficulties several states have created special administrative machinery to make it seldom necessary to appeal a case to the courts. This legislation empowers the Industrial Commission to accept assignments of wage claims and to bring action to recover the unpaid wages. Hearings are held to determine the validity of the claim, decisions are made and if the employer then refuses to pay as directed the Commission may bring civil action in the courts to collect the wages. Where this procedure is used it is found that nearly all cases are settled without going to court.

A law conferring such powers on the Industrial Commission of Colorado is urgently needed. The law should also define when wages are due and from whom. It should provide penalties for willful refusal to pay just claims. It must provide that an employer in arrears in the payment of wages must be able to show that he has the prospect of sufficient money wherewith to pay his labor and it must provide a penalty for false pretenses in obtaining labor where there is not this assurance. All this should be made to conform with our present laws regarding the payment of wages.

Such a law will go far toward eliminating unfair competition and discrimination against fair and responsible employers. It will increase the efficiency incentive to workers and it will remove the hardship, distress and bitterness resulting from the non-payment of wages.

INVESTIGATOR'S REPORT

The duties of the investigator, like those of the Commission itself, are concerned with the fifty-four state statutes known as the labor laws. These laws cover the economic life of the state. In some manner they affect every individual in Colorado. In addition the investigator must have a working knowledge of many federal labor laws to assist our employers and employes in intelligent and lawful conduct, for as social legislation increases our activities increase.

Violation of the Woman's Eight-Hour Law is the complaint we most frequently receive. Each complaint is investigated. Each investigation has a healthful effect. When we secure evidence acceptable to a court we prosecute. A conviction spreads the healthy effect to the whole community. We have prosecuted three cases in the courts of Denver, one in Colorado Springs and one in Pueblo. All actions resulted in convictions. In the 199 other cases investigated (except for those found to be spite complaints) the employers were given notice to cease and desist.

Other laws limiting hours are comparatively well observed. Only one conviction of a druggist was necessary, none of cement or plaster plants or public works contractors.

I investigated fifty-four lump sum applications of beneficiaries of our workmen's compensation. My report shows that many of the glowing prospects would be of dubious benefit to the claimants if they had been permitted to use their compensation money for speculation. But proposed home ownership has been regarded with favor when an appraisal justified the expenditure.

There have been brought to my notice for examination eighty-four attempts to change conditions of employment or wages or hours without regard to the 30-day notice provided in Section 29 of the Industrial Commission Law. No convictions have been required, as my instructions from the Commission have been followed in all such cases. Enforcement of this section has resulted in great savings to the people of Colorado in preventing illegal and unnecesary strikes and lock-outs.

Our Child Labor Law does not apply to minors engaged in agriculture. Unlike many eastern states, child labor in our factories is not a problem. Few cases are reported to me. Rare cases of minors employed as entertainers where liquor is sold are brought to my attention. This practice is promptly stopped.

Black-listing seems to be on the increase, but this is one of the hardest laws to enforce because of lack of positive evidence. Our warnings have prevented the spread of many apparent cases. Discrimination is closely related but is more manifest and several jobs have been restored to workers through the efforts of your investigator.

The truck system is still employed in isolated instances. The enforcement of this law has resulted in thousands of dollars to our merchants. This and other wage claim laws make my work more

closely connected with the Wage Claim Division than with any other office under the direction of the Industrial Commission.

Non-observance of prevailing rates on public works as set by the Commission requires correction occasionally. Several cases of employment of non-residents on public works contrary to law have been rectified within the last two years. Illegal or even questionable importation of labor into Colorado must be investigated, which always arrests the movement. Such an investigation saved the pea crop of the San Luis valley last summer when itinerant pea pickers staged a short-lived strike. The most regular influx of labor is the migration of beet laborers each spring.

Some booking agents and other private employment offices require an examination frequently to be sure that they are observing the laws governing them. Also we must stop unlicensed persons from engaging in the employment business.

Five unsuccessful investigations were undertaken to trace imposters representing themselves as being connected with the Industrial Commission. It was reported that these people called employers on the telephone and badgered them.

Constant checking, occasional convictions, continual investigations and mediations have prevented disastrous strikes, loss of business and unwarranted wage cuts. All the evidence indicates that the number of fair-minded employes and employers is increasing and that the working conditions and profitable business activities are above average in Colorado. These happy circumstances can be attributed in part to the successful arbitration of employment disputes and the enforcement of the laws under the jurisdiction of the Industrial Commission.

Respectfully submitted,

ROY G. LEE.

FACTORY INSPECTION

The duty of enforcing the Factory Inspection Law was transferred to the Industrial Commission by the 1933 session of the state legislature as a part of the Code Bill.

This law includes the duty of making annual inspection of all factories, mills, work shops, bakeries, laundries, stores, hotels, boarding or bunk houses, theatres, moving picture houses and places of public assemblage or any kind of establishment where laborers are employed or machinery used.

It was at once found to be impossible to inspect all the different places named in the law with only two inspectors allotted, although the law provides for the appointment of four.

This state of affairs existed four years ago and has persisted during the past biennium. Four years ago the Commission called attention to this state of affairs, pointing to the fact that the people of the state were entitled to receive the protection of all the inspections contemplated in the statute creating the department. At that time we strongly urged the appointment of more inspectors to do the necessary work.

Faced again during the last biennium with lack of sufficient inspectors to do the work and subjected to very limited appropriation it was found to be impossible to undertake a comprehensive and thorough inspection of all the places named in the law. It was then decided to confine activities to those places which proved to be most necessary, the inspection of which would be of most general benefit.

In again presenting a strong appeal for more inspectors and more provision for their maintenance, and the reasons therefor, it is well to give some actual figures which are compiled from the records.

During the past two years the inspectors were able to reach only forty-two of the sixty-three counties in the state, leaving twenty-one counties unvisited.

These twenty-one counties, where no inspections were made, have 581 school houses. There is a total enrollment of 20,941 pupils —10,691 boys and 10,251 girls—all denied the protection that is their just due.

According to the latest figures available there are 12,891 different places in the state that should be inspected annually, if the law is fully complied with as intended. Of these 12,891 places, 5,088 are inspected annually—forty per cent of the total.

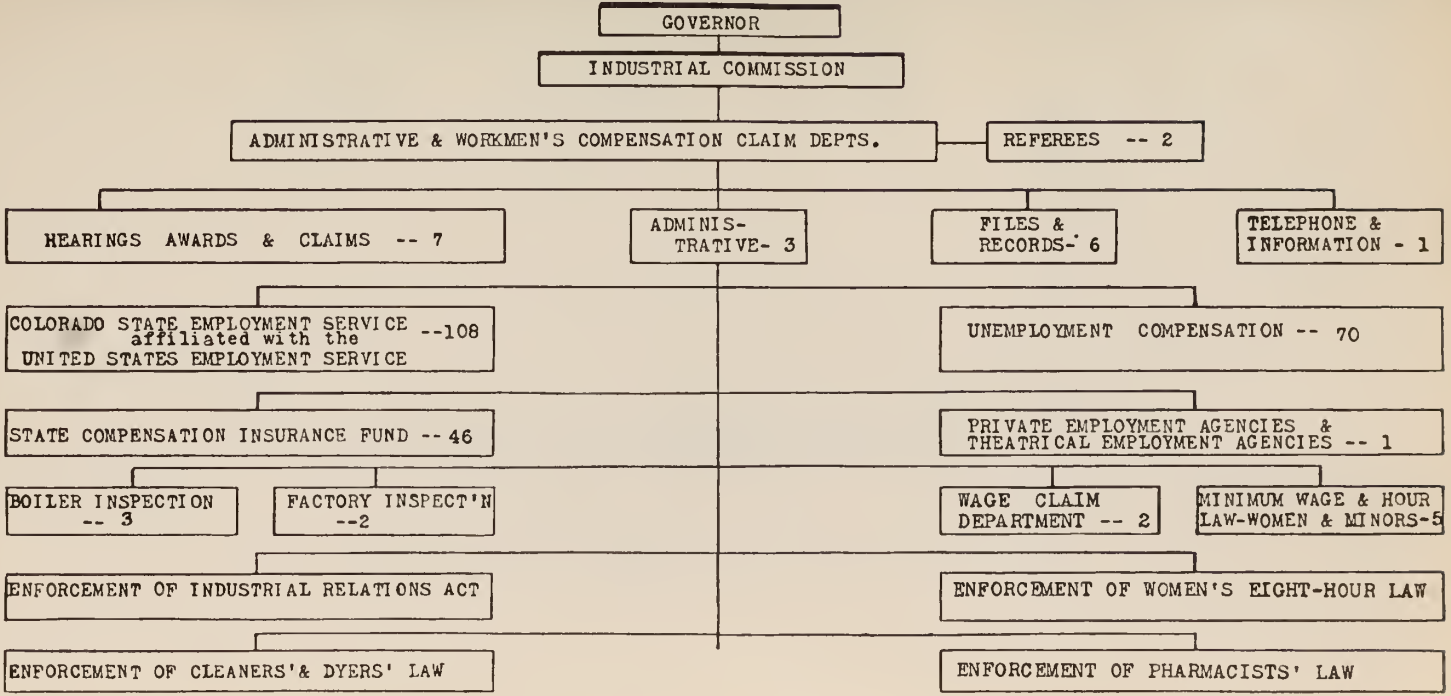
There are 1,104 hotels in the state. None could be inspected.

There are 3,598 stores in the state. None of these could be covered.

There are 1,454 factories in the state; 369 were inspected—1,085 were not.

More good results can be shown as the result of inspecting theatres and moving picture houses, where men, women and chil-

DEPARTMENTS AND LAWS ADMINISTERED BY THE INDUSTRIAL COMMISSION OF COLORADO



Listed above are the most important of the laws administered by the Industrial Commission. There are numerous other laws enforced by this Department. Figures shown denote the number of employes as of November 30, 1938.

dren regularly congregate. There are 217 theatres and moving picture houses in the state. One hundred twenty of these were inspected—forty-seven in Denver, seventy-three in the state.

During the past two years there has been a heavy increase in the number of auto service stations in the state. It is the duty of the Commission to have these stations inspected. At the present time there are 2,029 of these, made up of 259 auto accessories, 690 garages and 1,080 service stations. Of this number 996 were inspected annually during the period covered by this report.

The number of inspections and the number of orders issued are shown by months in the table below. This shows a monthly average of 423 inspections for the biennium. Previous report covering a like period showed a monthly average of 355—an increase of more than sixteen per cent in the number of inspections.

	Number of Inspections	Safety Orders	Sanitary Orders
December, 1936	353	30	11
January, 1937	171	13	....
February	367	34	15
March	528	35	19
April	440	42	18
May	512	80	40
June	504	37	18
July	356	19	11
August	245	17	7
September	509	42	18
October	608	31	15
November	487	35	17
December	317	19	9
January, 1938	425	10	5
February	371	11	9
March	466	12	14
April	353	12	16
May	476	10	22
June	390	10	15
July	406	20	15
August	567	29	21
September	200	6	2
October	714	35	40
November	411	12	20
	10,176	601	377

ANNUAL INSPECTIONS

The report shows that each year 5,088 inspections are made in Denver and the state. These are classified as follows:

	Denver	State	Total
Auto, Including Garages	485	511	996
Bakeries	102	151	253
Cleaners	353	205	558
Creameries	40	122	162
Confectioneries	51	45	96
Factories	275	94	369
Laundries	58	67	125
Machine Shops	30	23	53
Mills and Elevators	15	82	97
Newspapers	53	40	93
Printing Offices	106	22	128
Schools	91	523	614
Theatres	47	73	120
Utilities	21	65	86
Unclassified	774	564	1,338
	2,501	2,587	5,088

CONCERNING OFFICIAL INSPECTION OF SCHOOL HOUSES

It is the aim of the Industrial Commission of Colorado, having the duty of inspecting school houses, to reach the greatest number of school buildings possible within the year.

Our records show that less that eighteen percent of the 3,000 school buildings in the sixty-three counties were reached last year. Our records also show that no inspection at all was possible in twenty-one counties with 581 school houses and a total enrollment of 20,941 pupils. The reason for this condition is an insufficient number of inspectors to do the work.

This distressing condition is shown by the following figures. Names of counties are from our own records: all figures are from the records of the State Superintendent of Public Instruction for the year 1936.

1936 Counties	No. School Houses in County	Enrollment Boys	Girls	Total
Baca	82	1,218	1,230	2,448
Clear Creek	13	362	325	687
Conejos	36	1,431	1,357	2,788
Custer	24	254	241	495
Dolores	22	217	194	416
Gilpin	13	191	201	392
Grand	21	313	304	617
Gunnison	29	730	689	1,419
Hinsdale	5	42	41	83
Jackson	10	149	162	313

1936 Counties	No. School Houses in County	Enrollment Boys	Girls	Total
Mineral	3	72	74	148
Moffat	69	562	525	1,087
Montezuma	40	1,254	1,223	2,477
Park	35	428	410	838
Pitkin	16	194	181	375
Rio Blanco	33	320	335	655
Routt	68	1,116	1,030	2,146
Saguache	22	762	726	1,488
San Miguel	18	313	309	622
Summit	9	111	96	207
Teller	13	652	592	1,244
	581	10,691	10,250	20,941

Here we have a total of 20,941 school children of all ages in the counties named regularly attending school in buildings erected many years ago. The Commission is anxious that the condition of these buildings, whatever it is, should be ascertained by official inspection.

To this end we need the co-operation and support of all school authorities—county superintendents, school teachers, as well as parents who certainly are most anxious for the safety and welfare of their children.

We are proud of past achievements. Yet we are anxious to push forward and accomplish more.

REPORT OF STATE BOILER INSPECTION DEPARTMENT

December 1, 1936, to November 30, 1938

RECEIPTS

December, 1936	$ 367.50	December, 1937	$ 452.50
January, 1937	460.00	January, 1938	362.50
February, 1937	615.00	February, 1938	450.00
March, 1937	690.00	March, 1938	575.00
April, 1937	972.50	April, 1938	745.51
May, 1937	627.76	May, 1938	860.00
June, 1937	1,043.03	June, 1938	853.99
July, 1937	1,247.50	July, 1938	1,217.68
August, 1937	1,035.21	August, 1938	682.58
September, 1937	895.00	September, 1938	1,152.58
October, 1937	990.00	October, 1938	1,272.54
November, 1937	752.50	November, 1938	695.12

TOTAL		$19,016.00
2,888 boilers @ $5.00 each	$14,440.00	
1,829 boilers @ $2.50 each	4,572.50	
Interest on registered warrants	3.50	
	$19,016.00	
Inspections made—fees not yet collected:		
296 inspections @ $5.00	$ 1,480.00	
183 inspections @ $2.50	457.50	
	$ 1,937.50	
Registered school and county warrants held		$152.50

DISBURSEMENTS

Incidental	$ 779.31
Traveling	4,104.56
Salaries	11,400.00
Special expense—new car	526.00
	$16,809.87
Total receipts	$19,016.00
Total disbursements	16,809.87
Actual profit to date	$ 2,206.13
Fees not yet collected	1,937.50
Warrants held	152.50
Total profit, over and above all expenses, including fees not yet collected, and warrants held	$ 4,296.13

Inspections made from December 1, 1936 to November 30, 1938

	Wm. M. Crowley	Chas. E. Hall	Ed. G. Griswold	
December, 1936	73	44		
January, 1937	52	118		
February, 1937	109	80		
March, 1937	121	107		
April, 1937	118	95		
May, 1937	85	119		
June, 1937	165	116		
July, 1937	115	160		
August, 1937	170	127		
September, 1937	193	131		
October, 1937	46	72		
November, 1937	37	27		
December, 1937	74	53		
January, 1938	53	20		
February, 1938	131	123		
March, 1938	104	49		
April, 1938	99	151		
May, 1938	125	79		
June, 1938	167	144		
July, 1938	118	62		
August, 1938	165	121		
September, 1938	168			198
October, 1938	58			116
November, 1938	39			141
	2,585	1,998		455
Total Inspections				5,038

(The above figures represent total number of inspections made, including those on which fees have not yet been collected, also free inspections, and a number which have not as yet been billed.)

Following are inspections made of boilers at State Institutions, State Armories, etc., which are on the books as "Free Inspections."

January, 1937	8
April, 1937	20
May, 1937	9
July, 1937	10
August, 1937	4
September, 1937	8
October, 1937	4
November, 1937	3
December, 1937	1
January, 1938	1
February, 1938	11
March, 1938	8
April, 1938	12

May, 1938	2
June, 1938	6
July, 1938	2
August, 1938	2
September, 1938	6
October, 1938	9
November, 1938	9
Total free inspections	135

The number of inspections vary from year to year, as some firms go out of business, plants being electrified, etc. There are also many new boilers, or new installations of second hand boilers, a majority of which are not reported to the office, as required by law, and no inspection made. However, even if we had a list of these, it would be impossible to inspect all of the boilers with a force of two inspectors.

Our cash receipts exceed our disbursements. The money is turned into the General Fund. With the aid of two more inspectors we could cover the state thoroughly and give more time to each inspection—which should be done. The Boiler Inspection Department was created solely as a safety measure (a protection of human life and property), but has also developed into a revenue producing agency, without losing any of the initial purpose or intent of the law.

It is gratifying to report, that each year we find a great number of the many hundreds of boilers inspected by us, in better condition than the previous year, this being due to the fact that after the inspection of each boiler, substantial repairs or replacements are ordered in at least seventy-five per cent of all cases; and these repairs, when properly made, place the boilers in a safe condition preventing many accidents which might otherwise occur.

Our duty is to protect the public against the operation of boilers that are not safe. This is also an individual service, but not made merely as a consideration to the owner of the boiler. The majority of boilers in use throughout the state are not insured, and the owners or users are dependent upon the state's inspection to ascertain whether or not their boilers are safe. They claim the protection of the law and in most cases are anxious to have the inspections made.

When boilers are found by our inspectors to be in a dangerous condition, if they are so old and deteriorated that proper and sufficient repairs cannot be made to place them in safe working order, we are compelled to condemn their use.

It is perhaps not known to many that our state has no law pertaining to the licensing of engineers or firemen. This is one of the worst elements we have to contend with, as apparently any one who can get the job, regardless of whether he has any knowledge of boilers or even machinery, may operate a boiler without restriction, the result being that through the improper care of boilers, ignorance of their management and the requirements of

repairs necessary, tampering with attachments, no knowledge of the proper installation of valves, safety devices, etc., or even how to open up and clean a boiler, many boilers are totally ruined or damaged by an attempt at local repairs which only weaken a boiler and make it unfit for the necessary repairs.

The boiler manufacturers of today are very conscientious in their efforts to produce not only efficient boilers, but boilers that are well constructed and safe in every way, and they have achieved marvelous success; but there is no boiler, no matter of what superior construction, that will indefinitely, without deteriorating, stand up or retain its merits and efficiency of strength and safety, if it is subjected to carelessness and neglect.

As long as there are boilers, just so long will there be boiler explosions, and our duties lie in the prevention of such accidents to the greatest extent possible, since it is the human life that is so much at stake.

MINIMUM WAGE DIVISION

The Thirty-first General Assembly amended the 1917 Minimum Wage and Labor Law for women and minors and voted an appropriation of $19,060 for the biennial period. This became effective on July 1, 1937 and a Minimum Wage Division of the Industrial Commission was set up with a staff consisting of three investigators, a stenographer and a secretary.

The Industrial Commission requested the Women's Bureau of Washington, D. C. to assist in initiating the work in Colorado and they responded most graciously.

A state-wide survey of wages and hours of women and minor employes in the following occupations was made: Laundries, Retail Trades, Hotels and Restaurants and Beauty Parlors. The following towns were surveyed: Alamosa, Boulder, Canon City, Colorado Springs, Delta, Denver, Fort Collins, Greeley, Grand Junction, La Junta, Longmont, Loveland, Monte Vista, Montrose, Pueblo, Salida and Trinidad. A statistical report of the results of these surveys was tabulated. Payroll data from 466 separate establishments covering 10,119 women employes had been collected, as follows: 111 Retail Stores—including Department Stores, Women's Ready-to-Wear, Limited Price and Miscellaneous —with 8,043 women in 19 towns; 206 Hotels and Restaurants with 2,063 women in five (5) towns; 56 Laundries with approximately 1,541 women employes in 14 towns; 76 Beauty Parlors with 323 women employes in 13 towns.

Upon the completion of the wage and hour survey a Cost of Living survey of the entire state as a basis of determining a minimum wage was made. Items considered for purposes of this survey included rent, clothing, food, on the basis of (1) room and board, (2) restaurant meals and sleeping rooms, (3) weekly market order for an adequate diet. Food was calculated on the basis of a market order for an adequate diet for a moderately active woman (prepared by the Home Economics Department of the U. S. Department of Labor, Washington, D. C.). Rooms were calculated on the basis of (1) Location, (2) Ventilation, (3) Privacy, (4) Lighting. Other items entering into the Cost of Living budget were: Transportation, Insurance, Health and Medical Care, Personal Appearance and Miscellaneous Items, classified under budget item No. 4 as "Other Living Essentials."

When tabulating and the writing up of reports on various phases of the cost of living had been finished, the Industrial Commission appointed a Cost of Living Committee. The duties of this committee consisted of using the data assembled in the Minimum Wage Division office and the collection of such supplementary information, which they thought were essential, and the making of eventual determination of a standard budget for a single woman to meet the provisions of the Colorado law. The law reads that: "It shall be unlawful to employ women in any occupation within the state of Colorado for wages which are inadequate to supply the

necessary cost of living and to maintain the health of women so employed * * *'' ''* * * and to provide a reasonable surplus for support during periods of sickness or other emergencies.''

In November, 1937, a Laundry Wage Board was appointed by the Industrial Commission. Three members representing employers, three representing employes, three representing the public. Seven (7) meetings were held. The final meeting was held March 4, 1938 and recommendations were submitted to the Industrial Commission.

In accordance with the provisions of the Colorado law, the Industrial Commission of Colorado set a public hearing to be held in the senate chambers of the Capitol, March 31, 1938. The hearing unexpectedly developed major proportions and occupied eighteen (18) half-day sessions in all, closing April 21. Evidence provided by twenty-five women workers from laundries in Denver and Colorado Springs proved conclusively that they were sadly underpaid.

On June 20, 1938, the Industrial Commission's Laundry Wage Order went into effect. The wage was set at 32 cents an hour in Zone A, and 28 cents an hour in Zone B, with a guaranteed weekly wage of $12.80 for 40 hours in Zone A and $11.20 for 40 hours in Zone B.

April 29, 1938, the first meeting of the Retail Trades Wage Board was held. There were seven (7) meetings altogether, with work completed June 13, 1938. Recommendations were drafted and submitted to the Industrial Commission. A public hearing was held on June 28, 1938.

In July and August, 1938, a complete investigation was made of all laundries in the city of Denver. One hundred seven (107) separate establishments were investigated in the city, which included hand laundries, hospital and institution laundries. During October and November, 1938, 348 laundries, including hospital, institution and hand laundries, throughout the state were investigated.

In December, 1938, Wage Order No. 2, covering the retail trades, was issued by the Industrial Commission. The order to become effective January 16, 1939. This order provides for a minimum weekly wage of $14.00 for a 48-hour week for Zone A—minimum hourly wage shall be 29⅙ cents; a minimum weekly wage of $13.00 for a 48-hour week in Zone B—minimum hourly wage of 27 1/12 cents; a minimum weekly wage of $11.00 for a 48-hour week—minimum hourly wage of 22 11-12 cents.

GERTRUDE A. LEE,
Secretary.

DEPARTMENT OF WAGE CLAIMS

The activities of the Wage Claim Department have increased considerably during the past two years. A total of $49,518.82 has changed hands as a result of our intervention in disputes between employers and employes concerning wages. This sum of purchasing power has been restored to the proper place. A total of 1,606 wage claims were filed during this period and the rate of collections has risen from seventy to eighty-one per cent. We also have attended to 704 inquiries listed as suspense claims.

Many cases filed with this department necessitate the arranging of conferences at which time both the employe and the employer are requested to be present. In these cases, we act as mediator and by composing differences that often arise in these cases, we are usually able to effect a settlement that is satisfactory to both of the parties involved. Almost every resident of Colorado is an employer or employe at some time and as such may need the services of the only impartial body that can settle wage controversies without expense.

Several claims are pending at the present time filed against employers engaged in the Metal Mining Industry representing thousands of dollars of wages that have been earned during the past two years and remain unpaid for the reason that some individuals continue to take advantage of the ineffectiveness of our Wage Claim Laws.

The Metalliferous Mining Law which became operative in 1935, has failed to remedy this situation because it can only be enforced through the district attorneys having jurisdiction in their respective districts. We have been unable to get any co-operation whatsoever from the district attorneys in the enforcement of this law.

For the protection of the great majority of employers who consider it a moral duty to meet a pay roll, doing so must be made a legal obligation. It is unfair to the employers who meet their pay roll to compete with unscrupulous persons who are permitted to escape the payment of wages.

For the protection of the employes engaged in metal mining, we believe the present law should be amended so as to require the posting of a penal bond to insure the payment of wages before operations are permitted in the state of Colorado. Security of wages in the Metal Mining Industry must be had if we are to correct the unhealthy condition that exists in our state at the present time. The shoe string promoter is thriving on the unemployment condition that has existed for the past several years and is obtaining labor hoping that he will be able to capitalize in the employe that is in need of a job. This type of employer, if successful in his mining venture, will pay his employes a small wage and if he is unsuccessful, he has nothing to lose and as he has no money or assets that can be liquidated to meet his pay roll, he is allowed to escape his obligations without penalty.

Theft of labor must be curbed and apparently the only way to correct this situation is for the legislature to pass stringent

labor laws which carry a penalty of imprisonment where it can be proved that the defendant has continued to obtain the labor of another unlawfully. Our files will prove that several claims have been filed against the same employers from time to time that have been unable to pay prior claims filed against them for non-payment of wages. This type of an employer is judgment proof so he is allowed to continue his tactics month after month with no fear of penalty. It would seem as though this type of employer obtains labor under false pretenses and should be punished for so doing.

Since the small wage claim court is not operative in this state as provided by law upon the payment of a $1.00 docket fee it merely adds to the exasperation of an employe when told that his only remedy is to start suit to collect the wages he has already earned. If an employer is intent on cheating a worker and if this office is unsuccessful in effecting a settlement for him, no other course is open within the law.

We believe that the coming legislature would be doing the laborers of this state a good deed while protecting the employer who meets his obligations by passing a law enabling the Industrial Commission to accept an assignment of the worker's claim and sue the employer when all other methods of persuasion have failed.

RESUME

WORK DONE FROM DECEMBER 1, 1936, TO DECEMBER 1, 1938

1936	Claims Filed	Claims Settled	Suspense Claims	Amount Collected	Settlement Percentages
Dec.	88	59	57	$ 3,574.84	67
1937					
January	68	38	17	1,546.76	57
February	65	61	28	1,831.58	94
March	63	61	26	1,653.82	97
April	59	52	19	1,231.43	88
May	68	56	27	2,252.70	83
June	75	60	24	1,434.56	80
July	81	65	34	2,101.08	80
August	97	54	49	1,363.15	56
September	71	70	43	1,794.12	98
October	75	62	28	1,853.94	83
November	71	62	32	2,486.60	87
December	69	55	28	3,042.42	80
1938					
January	63	60	28	2,614.89	95
February	38	36	19	1,863.24	95
March	60	50	31	2,395.69	83
April	63	55	22	2,783.18	87
May	67	52	28	2,858.68	80
June	76	59	27	1,283.97	80
July	59	41	18	1,550.62	70
August	68	60	26	2,673.95	88
September	57	52	23	2,278.86	90
October	51	47	21	1,969.16	92
November	54	49	64	1,039.58	91
Totals	1,606	1,316	704	$49,518.82	81

WAGES ON PUBLIC WORKS

In accordance with the provisions of law, the Industrial Commission of Colorado adopted the following schedule of wages to be paid by contractors on public works on contracts in excess of $5,000.00 to which the State of Colorado is a party:

(The rates are not to apply to the regular employes of the State Highway Department.)

The schedule for all contracts to which the State of Colorado is a party, outside of the cities of Denver, Colorado Springs and Pueblo, and outside of a radius of fifteen miles of these cities, shall be as follows:

Common labor	$0.60 per hour
Semi-skilled labor	.75 per hour
Skilled labor	1.10 per hour

The schedule for all contracts to which the State of Colorado is a party in the cities of Denver, Colorado Springs and Pueblo, and within a radius of 15 miles of said cities shall be:

Common labor	$0.62½ per hour
Semi-skilled labor	.80 per hour
Skilled labor	1.25 per hour

(Denver Scale: See paragraph "Changes" on page 26.)

Provided that the radius of 15 miles outside of the city limits of Denver, Colorado Springs and Pueblo shall not apply to work on public highways, but that the wage scale established by this Commission for highway work shall prevail.

Skilled Labor shall consist of the following: Carpenters, bricklayers and terrazzo workers, iron workers (structural, ornamental and rod workers), steam fitters, roofers (slate, tile and composition), sheet metal workers, plumbers, plasterers, painters, paperhangers and decorators, tile and marble setters, lathers, electrical workers, glaziers, engineers—hoisting and shovel, elevator constructors, cement finishers, asbestos workers, stone masons.

Semi-Skilled Labor shall consist of the following: Drainlayers, hod carriers (serving plasterers, bricklayers and masons), truck drivers of trucks larger that 1½ tons rated capacity, and machine operators (not classified as engineers), tile, marble and terrazzo helpers, assistants to mechanics (not classified as apprentices and assistants learning trades).

All the above schedules are based on a 30-hour week.

WAGES ON HIGHWAYS

The following classification of labor and wage scales are established by the Commission as the classification of labor and wage scales to be used in highway construction in Colorado, effective on all contracts advertised after October 1, 1936:

Executive or administrative employes shall include the contractor, superintendents, timekeepers, bookkeepers, clerical employes, storekeepers, or other office employes in a position of special trust and responsibility.

Supervisory employes shall include foremen, or any employes whose principal duties are to direct the work of others.

The classification of the important labor positions is as follows:

Skilled Labor: Air compressor operator of 750 feet or over; asphalt plant engineer; bricklayer, journeyman; blacksmith, journeyman; carpenter, journeyman; cement finisher, journeyman; concrete mixer with loader operator; crane operator; crusher operator; drag-line operator; dredge runner; drill dresser; electrician, journeyman; elevating grader operator; finishing machine operator (concrete or asphalt); hoisting engineer; iron workers, journeymen, structural, ornamental and rod workers; mechanic (journeyman machinist or boilermaker); painter, journeyman; paver operator (27 cu. ft. capacity or greater); pile driver engineer—carpenter, iron workers; plumber—pipefitter, gasfitter and steamfitter, journeyman; powder man; power shovel operator, engineer and craneman; rigger; roller operator; stonemason, journeyman; tractor operator.

Intermediate Grade: Air compressor operator, less than 750 ft., asphalt plant drier or head fireman, asphalt raker, baker, blade grader operator, blacksmith's helper and apprentice, carpenter's apprentice, cement finisher's apprentice, churn drill operator, cook, distributor driver, distributor operator, drag tender, electrician's apprentice, fireman and oiler, gasfitter's apprentice, grader operator, iron worker's apprentice, jack-hammer operator, jetting machine operator, mechanic helper (machinist or boiler maker), painter's apprentice, paver operator (under 27 cu. ft. rated capacity), plow holder (4-up or more), pipefitter's apprentice, plumber's apprentice, quartermaster, pump man, screening and/or washing plant operator, spreader box man (asphalt, stone or gravel), steamfitter's apprentice, stone mason's assistant (mortar man), teamster (4-up or more), tree pruner, truck driver.

Unskilled Labor: Common and unskilled labor.

The minimum wage for all skilled labor shall be one dollar and ten cents ($1.10) per hour.

The minimum wage for all intermediate labor shall be seventy cents ($.70) per hour.

The minimum wage for all unskilled labor shall be fifty-five cents ($.55) per hour in Denver and radius of fifty miles, remainder of state fifty cents ($.50) per hour.

The minimum wages to be paid to camp help may be on a weekly or monthly basis and shall be not less than would be earned by other labor of similar classification working the full number of hours permitted under these provisions.

The wages of all labor shall be paid in legal tender of the United States, except that this condition will be considered satisfied if payment is made by negotiable check, on a solvent bank, which may be readily cashed by the employe in the local community for the full amount, without discount or collection charges of any kind. Where checks are used for payment, the contractor shall make all necessary arrangements for them to be cashed and shall give information regarding such arrangements.

All apprentice labor used in connection with this contract shall be in accordance with the established policy for apprentice regulation promulgated and in effect by the State Commission on Apprentice Training, in conformity with rules and regulations by the Federal Government and while apprentices are classed generally in the intermediate grade or semi-skilled, this would apply only where apprentices had two years experience. Rates of wages for apprentices are already worked out and are well established as is the percentage of apprentices to journeymen to be employed on the job. Regulation of numbers of apprentices, rates of pay and hours of employment are the subject of contract and understanding between employers and employes in the skilled trades and are recognized as such by the Colorado Commission on Apprentice Training.

CHANGES IN FOREGOING SCALES

Denver—Changes have been made by award of the Industrial Commission in the foregoing wage scales for contracts to which the State of Colorado is a party for labor employed within the City of Denver, and within a radius of 15 miles thereof, as shown by the prevailing wage scale for Denver and a radius of 15 miles on page 27 of this report.

Boulder—Changes were also made by awards of the Commission in Boulder, raising the rate for common labor to 62½ cents per hour; hod carriers 90c per hour, and leaving the skilled labor rate at $1.10 per hour.

Pueblo—Changes were recognized by the Commission in an award in Pueblo, fixing the rate for bricklayers at $1.50 per hour, plasterers at $1.50 per hour, and lathers at $1.50 per hour.

Aside from these changes, no changes have been made in the state. The original scale for Denver, Colorado Springs and Pueblo, and within a radius of 15 miles, was 62½ cents per hour for common labor, 80 cents per hour for semi-skilled labor, and $1.25 per hour for skilled labor.

BUILDING TRADES

Prevailing Scale of Wages in the City of Denver and Within a Radius of 15 Miles

Trade or Occupation	Hourly Wage Rate
Acetylene cutter	$1.43
Acetylene welder	1.43
Arc welders	1.43
Asbestos workers	1.25
Asphalt plant engineer	1.43
Blacksmith	1.43
Blaster—powderman	1.43
Boilermaker	1.43
Bricklayer—building	1.50
Bricklayer—street paving	1.50
Bricklayer—sewer	1.75
Bricklayer—manholes	1.75
Cable splicer	1.43
Carpenter—finish	1.43
Carpenter—forms, buildings	1.43
Carpenter—rough	1.43
Caulker (boat or steel plate)	1.43
Caulker—building openings	1.43
Caulker—pipe water or gas (jointers or yarners)	1.43
Cement finisher—building work (including composition and mastic)	1.43
Cement finisher—paving	1.43
Cement finisher—bridges, dams and culverts	1.43
Cement finisher—highway	1.43
Cork layers—hot pitch nailed	1.43
Cork layers—cemented	1.50
Drain layers	1.00
Electrician	1.43
Electrician—maintenance	1.43
Electrician—lineman	1.43
Elevator constructor	1.44
Form setter—curb and gutter	1.43
Form setter—buildings	1.43
Form setter—steel forms, buildings	1.43
Form setter—Steel sewers, etc.	1.43
Form setter—dams, bridges, etc.	1.43
Form setter—highways	1.43
Gasfitters	1.43
Glazier	1.20
Glazier—art glass	1.20
Hydrant and valve setter—water, gas	1.43
House mover (foreman)	1.43
House wrecker (foreman)	1.43
Iron worker—structural	1.43
Iron worker—ornamental, including bronze	1.43
Iron worker—riggers	1.43
Iron worker—tank erector	1.43
Lather—metal	1.50
Lather—wood	1.50
Linoleum mechanic	1.00
Machinist	1.43
Machine setters	1.43
Curb setter—stone	1.50
Mason—stone	1.50
Mechanic—repairman	1.43
Metal trim workers (including partitions)	1.43
Millwright	1.43
Operator (air compressor — tunnel or caisson)	1.43
Operator—air compressors	1.43
Operator—bituminous mixer	1.43
Operator—bituminous distributor	1.43
Operator—roller (bituminous pavement)	1.43
Operator—cement gun over 1 inch thick	1.00
Operator—cement gun under 1 inch thick nozzle opp.	1.50
Operator—crane, dragline clamshell	1.50
Operator—crane or derrick	1.43
Operators—crane, locomotive	$1.43
Operator—dredge	1.50
Operator—ditching, trenching machine	1.43
Operator—elevating grader	1.43
Operator—concrete finishing machine	1.43
Operator—hoisting engine (2 or 3 drums)	1.50
Operator—hoisting engine (1 drum)	1.43
Operator—industrial locomotive	1.43
Operator—mixer with loader	1.43
Operator—motorized equipment excavators and hoisting	1.43
Operator—power saw	1.43
Operator—crusher plant engineer	1.43
Operator—paving joint machine	1.43
Operator—pile driver engineer	1.43
Marble setters	1.50
Operator—power shovels	1.50
Operator—stationary plant	1.43
Operator—road roller	1.43
Operator—bulldozer	1.43
Operator—sawmill	1.43
Operator—caterpillar tractor (over 35 h.p.)	1.43
Painter—paper hanger	1.25
Painter—steeplejack	1.65
Painter—rough	1.25
Plasterer	1.50
Plastering trade—modeler, model maker and caster	1.50
Plumber	1.43
Pipe fitters	1.43
Pipe layers—sewage	1.43
Pipe layer—gas, water	1.43
Rodmen	1.43
Roofer—composition	1.35
Roofer—sheet metal	1.43
Roofer—slate and tile	1.35
Roofer—tar and gravel	1.35
Reinforcing steel worker—building and construction	1.43
Reinforcement placer—pavement	1.43
Reinforcement placer—bridge, dam, culvert	1.43
Riggers—general	1.43
Sheet metal worker—ventilation	1.43
Soft-floor layers	1.43
Stair builders	1.43
Steam and pipe fitter	1.43
Stone cutters	1.25
Stone cutters—ornamental	1.25
Terrazzo layers	1.43
Tile layers	1.50
Tool dressers	1.43
Well drillers	1.43
Well drillers (diamond point)	1.50
Waterproofers	1.35
Winchman (nigger head)	1.43
Asbestos worker—helper	.714
Asphalt raker	1.00
Blacksmith—helper	1.00
Boilermaker—helper	1.00
Caulker—helper	.80
Concrete finisher's helper	.714
Elevator construction—helper	1.01
Form movers	.714
Fallers	.714
Gasfitters—helpers	1.00
Grader—fine grade or dumpman	1.00
Hod carriers	1.00
Kettleman—asphalt or kettle	.80
Machinist—helper	1.00
Marble setter—helper	.90
Mason's helper—stone	1.00

BUILDING TRADES—Continued
Prevailing Scale of Wages in the City of Denver and Within a Radius of 15 Miles

Trade or Occupation	Hourly Wage Rate
Mechanic—helper	$1.00
Millwright—helper	.714
Mortar mixer (brick-plaster)	1.00
Operator—electric locomotive motorman	1.43
Operator—fireman	1.00
Operator—jack hammer or drill runner	1.00
Operator—jack hammer or driller open cut	1.00
Operator—jack hammer or drill runner—tunnel	1.00
Operator—mucking machine	1.43
Operator—oiler or greaser	1.00
Operator—oil spreader	1.43
Operator—helpers (pile drivers)	1.00
Operator—machine road grader	1.43
Operator—power shovel Pitman	1.00
Operator—pumps	1.43
Operator — caterpillar tractor (35 h. p. and less)	$1.00
Plumber—helper	1.00
Pipefitters—helpers	1.00
Roofer—helper	.80
Steampipe fitter—helper	1.00
Terrazzo and tile layer—helpers	.90
Timberman—mine timber	1.43
Tool dresser—helper (hand)	1.00
Truck drivers (over 1½ ton rated capacity or 3-yard load and over)	1.00
Truck drivers (1½ ton or under and less than 3-yard load)	.75
Waterproofers—helpers	.80
Window cleaner	.80
Plasterer—laborer	1.00
Caisson digger	1.00
Vibrator operator, concrete	1.00
Teamsters, not including teams	.75
All unskilled labor	.714

Apprentices

The following wage scales for apprentices in Denver have been approved by the State Board for Vocational Education, as authorized under the Colorado Apprentice Law (Chapter 87, Session Laws of 1937):

Carpenters

1st year	$10.00 per week
2nd year	14.00 per week
3rd year	18.00 per week
4th year	25.00 per week

Steam Fitters

1st year	$3.00 per day—7 hours
2nd year	3.50 per day—7 hours
3rd year	4.00 per day—7 hours
4th year	4.80 per day—7 hours
5th year	4.80 per day—7 hours

Sheet Metal

	1st 6 Months Prevailing Journeymen's Wage	2nd 6 Months Prevailing Journeymen's Wage
1st year	30%	35%
2nd year	40%	45%
3rd year	50%	60%
4th year	70%	80%

Plumbers

	1st 6 Months	2nd 6 Months
1st year	$ 6.00 per week	$ 9.00 per week
2nd year	12.00 per week	12.00 per week
3rd year	15.00 per week	15.00 per week
4th year	18.00 per week	18.00 per week
5th year	22.00 per week	22.00 per week

Plasterers

1st year	25% of prevailing journeyman's wage
2nd year	40% of prevailing journeyman's wage
3rd year	60% of prevailing journeyman's wage
4th year	75% of prevailing journeyman's wage

Bricklayers

	1st 6 Months Prevailing Journeymen's Wage	2nd 6 Months Prevailing Journeymen's Wage
1st year	20%	20%
2nd year	30%	35%
3rd year	50%	60%
4th year	65%	75%

Electricians

1st year	$10.00 per week
2nd year	.50 per hour
3rd year	.65 per hour
4th year	.75 per hour

Painters

1st year	25% of prevailing journeyman's wage
2nd year	33⅓% of prevailing journeyman's wage
3rd year	50% of prevailing journeyman's wage
4th year	75% of prevailing journeyman's wage
Junior journeymen	85% and 90% of prevailing journeyman's wage

The following regulations have also been adopted on the number of apprentices to be worked with journeymen:

Carpenters—One apprentice to five journeymen.

Steam Fitters—One apprentice may be hired where one journeyman is employed for 10 months in any one year—one additional apprentice may be hired for each four journeymen. No shop is allowed more than seven apprentices.

Sheet Metal—One apprentice to two or more journeymen, provided the total number shall not exceed one apprentice to four journeymen employed.

Plumbing—One to five journeymen. Not more than three apprentices in any one shop.

Bricklaying—One apprentice to five journeymen.

Electrical Wiremen—Any shop employing two or more journeymen may employ an apprentice, provided the total number of apprentices shall not exceed one apprentice to four journeymen employed. Limit of three to each shop.

Plasterers—One apprentice for the first journeyman; two for 10, or a ratio of one to five.

Painters—One apprentice for three journeymen; two apprentices for eight, and three for 24.

METAL MINERS' WAGES

District	Machine Miners	Machine Helpers	Muckers	Trammers	Common Laborers	Mechanics	Carpenters
Alma	$4.50-$5.00	$4.50-$5.00	$4.00-$4.65	$4.00-$4.65	$3.85-$4.75	$5.25-$6.00	$5.00-$5.65
Silverton	4.50- 5.50	4.50- 5.00	4.00- 4.75	4.00- 4.75	4.00- 4.85	4.50- 6.00	8.00- 8.25
Central City	4.50- 4.75	3.75- 4.50	3.75- 4.50	4.00- 4.50	3.75- 4.00	5.00-	5.00- .....
Ouray	4.50- 5.50	3.75- 4.25	3.75- 4.50	3.75- 5.00	3.00- 4.50	4.00- 6.00	4.50- 6.00
Boulder	4.00- 5.00	4.50- 5.00	4.50- 5.00	3.50- 3.60	3.50- 4.25	4.25- 5.00	4.50- 6.00
Leadville	4.50- 7.50	4.25-	4.25-	4.25-	4.25-	5.25-	6.00- .....
Cripple Creek	4.00- 4.85	4.00- 4.25	4.00- 4.25	4.00- 4.25	3.75- 4.25	5.15- 5.25	5.00- 6.00
La Plata	4.50- 5.00	4.00- 4.50	4.00- 4.25	4.00- 4.25	3.50- 3.75	5.00-	5.00- 6.00

MILL WORKERS' WAGES

District	Tablemen	Millwright	Trammers	Common Laborers	Truck Drivers	Machinists	Crusher Men
Alma	$4.60-$5.75	$7.50-$10.00	$4.50-$4.65	$3.85-	$4.40-$5.00	$5.00-$5.25	$4.40-$6.00
Silverton	4.25- 5.75	8.00-	4.00- 4.50	3.75-$4.40	4.75- 5.00	4.50- 6.00	4.25- 4.95
Central City	4.50- 5.00	5.00-	4.00-	3.50- 4.00	3.50- 4.00	4.50-	3.75- 4.50
Ouray	4.00- 5.00	5.00-	4.00-	3.50- 4.00	4.00-	4.50- 6.00	..... - .....
Boulder	3.75- 4.80	4.25-	..... -	3.50- 4.25	..... -	4.25-	4.00- .....
Leadville	..... -	..... -	..... -	..... -	..... -	..... -	..... - .....
Cripple Creek	..... -	..... -	4.00-	3.50- 4.50	4.00-	..... -	4.00- .....
La Plata	4.50-	..... -	..... -	3.50- 3.75	4.00-	5.00-	3.75- 4.50

SMELTER WORKERS' WAGES

	High	Low
Blast Furnaces	$5.27	$4.38
Charge Floor	6.10	4.38
General Gang	4.17	4.17
Bag House	5.47	5.47
Cottrell	4.80	4.80
Roasting-Sintering	7.92	4.36
Miscellaneous	5.48	4.17
Ore Handling	6.44	4.17
Sulphide Mill	5.20	4.17
Sample Mill	4.96	4.17
Mechanical	6.40	4.39
Power Plant	5.26	4.52
Mason	4.96	4.38
Electrical	6.44	4.17
Carpenters	6.07	4.38
Machinist	6.48	6.48
Blacksmith	6.48	6.48
Laborers	4.17	4.17

Eight hours per day.
Time and a half for overtime.

COAL MINERS' WAGES

Day Wages Outside

	Wage Rates Per Day	Per Hour
Basic Top	$5.25	$0.750
First Hoisting Engineer	6.25	.893
Second Hoisting Engineer	6.00	.857
Third Hoisting Engineer	6.00	.857
Fireman	6.00	.857
Blacksmith	6.35	.907
Blacksmith Helper	5.20	.743
Box Car Loader Operator	6.00	.857
Car Dropper	5.50	.786
Car Repairer	5.50	.786
Tipple Men	5.50	.786
Lamp Men	5.25	.750
Slate Pickers—Boys	4.14	.591
Slate Pickers—Men	5.20	.743
Unclassified	5.00	.714

Day Wages Inside

Basic Bottom	6.25	.893
Fire Boss	6.50	.929
Shot Firers	6.50	.929
Machine Runner	6.50	.929
Machine Runner Helper	6.25	.893
Nippers	5.50	.786
Oilers and Greasers	4.80	.686
Trappers	4.40	.629

All above figures are for a seven-hour day.

STEEL WORKS

The one large steel plant in Colorado, located at Pueblo, provides employment for a large number of men skilled and unskilled. The total number of employes varies abruptly depending on a variety of causes. However, the number of employes frequently runs as high as 5,000 at times when the entire plant is in operation.

In this plant the Pittsburgh scale prevails on tonnage work. For all other work, skilled and unskilled, the pay is what may be termed the "going wage." In most cases a guarantee is fixed so that those scaled on the hour basis are assured of a definite fixed sum in pay for the time consumed. This plan of pay also obtains on what is known as contract work.

FARM WAGES IN THE MOUNTAIN STATES

The following table of rates of wages paid on farms in the eight mountain states is gleaned from reports sent to the United States Department of Labor covering the summer of 1938. These rates are presumed to be the going rate of wages.

	Per Month		Per Day	
	With Board	Without Board	With Board	Without Board
Montana	$24.00	$48.75	$1.00	$1.50
Idaho	35.00	50.50	1.60	2.15
Wyoming	32.00	45.50	1.45	2.10
Colorado	24.75	39.00	1.25	1.80
New Mexico	23.25	34.25	1.15	1.50
Arizona	29.00	45.40	1.45	1.75
Utah	36.25	49.75	1.75	2.20
Nevada	35.25	51.00	1.45	2.45

WORK IN BEET FIELDS

	1932 Per Acre	1934 Per Acre	1936 Per Acre	1938 Per Acre
Bunching and Thinning	$ 6.00	$ 5.50	$ 7.50	$ 8.00
Hoeing	2.00	1.50	1.76	2.50
Weeding	1.00	1.00	1.25	1.50
Pulling and Topping	6.00	7.50	9.75	10.25
	$15.00	$15.50	$20.25	$22.80

The price paid for labor in the beet fields is based on a contract between the grower and the worker, known as the contractor. The total for all operations is higher than the price paid for the same class of work in any year since 1930. In 1934 no contracts were made (parties to the contract having failed to reach an agreement) and the figures printed for that year are minimum amounts, as in many cases a total of $18.00 for the field work was realized during that year.

The total price paid for the field work in 1938 is a minimum guarantee. The price paid for the labor of pulling and topping

is affected by a sliding scale based on the yield in tons to the acre. For all tonnage over twelve per acre the price paid is 80 cents a ton. The 1938 yield was about fifteen tons per acre, which would increase the total amount paid to the worker to $23.80 per acre for all the work. This amount is slightly above the average received by the worker for a 20-year period.

The record in this office shows the annual payments for work in beet fields in Colorado since 1920. Variations in total amounts paid is shown below:

1920	$30.00	1930	$23.00
1922	18.00	1932	15.00
1924	23.00	1934	15.50
1926	24.00	1936	20.25
1928	23.00	1938	20.80

The acreage cultivated in Colorado has varied a great deal, although the companies aim to have enough acreage under contract to produce sufficient beets to maintain a campaign of grinding lasting about ninety days. This is not always realized. Some campaigns last no longer than sixty days. However, the estimated acreage in beets for the whole state is approximately 200,000 annually.

None of the unsatisfactory conditions surrounding the share cropper, as the system is known in many of the southern states, are present in the beet-growing industry in Colorado. In beet field work the worker is always paid in money as fast as the various divisions of the growing crop are "laid by." The worker never is compelled to depend on returns from the sale of the crop which he produces by his labor.

Each beet field work contract contains the names and ages of all children between the ages of fourteen and sixteen years who may be used in cultivating the particular tract covered, and also contains the stipulation that none of these shall be employed longer than eight hours in any one day.

WAGES—MISCELLANEOUS OCCUPATIONS

Following figures are from reports sent to the Commission by private employment agencies covering wages offered and paid for the kinds of work mentioned:

Farm and dairy hands, $25.00 to $35.00 per month with board.
Cooks on farms and in camps, $1.00 a day and board.
Married men on farms, $25.00 to $45.00 a month.
Man and wife cooks, $60.00 to $80.00 a month and board.
Railroad extra gang, 25c to 35c an hour; board, 90c a day.
Sheepherders, $30.00 to $35.00 a month and board.
Tie cutters, piece work, 5c each.
Timber cutters, $2.50 a thousand feet.
Truck drivers, $4.00 a day.
Bean harvesters, $1.50 a day.
Grain threshers, $1.50 a day and board.
Hay hands, $1.50 a day and board.

Hotel and house work—Chefs, $150.00 a month; fry cooks, $80.00 a month; women cooks, $75.00 a month; pantrymen, $75.00 a month; pantry women, $40.00 a month; dishwashers, $30.00 a month; porters, $40.00 a month; housemen, $40.00 a month; chambermaids, $10.00 a week; housegirls, $6.00 a week; waitresses, $12.00 a week. All the foregoing include board.

DENVER AVERAGE WAGES

The average weekly wage of Denver young men and women between the ages of sixteen and twenty-four employed full time in gainful occupations is $14.02. More than 80 per cent were found to be drawing salaries of less than $20.00 a week, of which number over two-thirds are within the brackets of $10.00 and $15.00. It is further shown that less than 2 per cent hold jobs paying $35.00 a week. These figures are the result of a survey among 6,591 persons in Denver in 1938.

UNION WAGE SCALES—DENVER

	Hours	Per Week	Per Day	Per Hour
Auto Painters	8	$30.00	$6.00	$0.75
Bakery Workers	8	33.00	6.60	.75½
Bakery Drivers	9	30.25	5.04	.....
Barbers	8	40.00	6.67	.....
Bindery Women	8	22.25	4.04	.50
Blacksmiths	8	52.80	8.80	1.10
Boilermakers	8	44.00	8.80	1.10
Boilermaker Helpers	8	34.00	6.80	.85
Bookbinders	8	44.50	8.10	1.01
Brieklayers	7	52.50	10.50	1.50
Cap and Millinery Workers—				
High	8	30.00	6.00	.75
Low	8	15.00	3.00	.37
Carpenters and Joiners	7	50.00	10.00	1.43
Carpenters Brotherhood	8	36.00	7.20	.90
Cement Finishers	7	50.00	10.00	1.43
Clothing Workers	8	20.00	8.00	1.00
Cooks	8	24.00	4.00	.50
Drain Layers	7	.....	.....	1.25
Electrical Workers—				
No. 68	7	50.00	10.00	1.43
No. 111	8	.....	.....	1.00
No. 877	8	56.00	11.20	1.40
Engineers—				
Derriek	7	.....	.....	1.50
Portable	7	.....	.....	1.40
Oilers	7	.....	.....	1.00

UNION WAGE SCALES—DENVER—Continued

	Hours	Per Week	Per Day	Per Hour
Film Employes—				
High	7¼	$35.00	.....	.....
Low	7¼	20.00	.....	.....
Garment Workers	8	16.00	$ 3.20	$ 0.40
Granite Cutters	7	43.75	8.75	1.25
Hod Carriers	7	35.00	7.00	1.00
Jewelry Workers—				
Class A	8	.....	.....	1.00
Class B	8	.....	.....	.75
Lathers	7	52.50	10.50	1.50
Mailers—				
News	8	34.12	.....	.....
Job Shops	8	43.50	8.70	1.08
Meat Cutters No. 634	9	35.00	6.00	.....
Meat Cutters No. 641—				
High	8	40.80	6.12	1.02
Low	8	19.60	2.94	.49
Milk Drivers	9	27.50	4.58	.....
Painters	7	43.75	8.75	1.25
Plasterers	7	52.50	10.50	1.50
Plumbers	7	50.00	10.00	1.43
Pressmen—				
Cylinder	8	43.50	8.04	1.02
Platen	8	38.50	7.70	.96¼
Webb	8	40.70	8.14	.....
Retail Clerks	9	27.50	3.50	.35
Elevator Constructors	8	.....	.....	1.44
Molders	8	39.60	7.20	.90
Photo Engravers	8	50.00	10.00	1.25
Roofers	7	47.25	9.45	1.35
Sign Painters	7	50.00	10.00	1.43
Steam Fitters	7	50.00	10.00	1.43
Stereotypers—				
Day	7½	.....	8.00	.....
Night	7½	.....	8.40	.....
Stone Cutters	7	43.75	8.75	1.25
Structural Iron Workers	7	.....	10.00	1.43
Sheet Metal Workers	7	50.00	10.00	1.43
Stationary Engineers	8	35.00	7.00	.87½
Tailors	8	20.00	8.00	1.00
Typographical—				
Job Shops	8	43.50	8.70	1.08
Newspaper	7½	43.45	8.69	1.19
Waiters	8	13.20	2.20	.....

UNION WAGE SCALES—PUEBLO

	Hours	Per Week	Per Day	Per Hour
Bakery Workers	8	$30.00	$6.00	$0.75
Brewery Workers	8	33.00	6.50	.82
Bricklayers	8	60.00	12.00	1.50
Brickmakers	8	18.90	3.78	.47
Carpenters	8	44.00	8.80	1.10
Electrical Workers	9	20.00	4.00	.50
Film Operators—				
Class A	..	46.00	6.57	1.15
Class B	..	35.00	5.00	.87½
Machinists	8	40.32	6.72	.84
Musicians	5	30.00	7.50	1.50
Packing House Workers	8	.....	.....	1.04
Painters	8	40.00	8.00	1.00
Plasterers	8	60.00	12.00	1.50
Plumbers	8	55.00	10.00	1.25
Pressmen—				
Cylinder	6.40	39.50	.....	.....
Platen	6.40	33.00	.....	.....
Webb	6.40	45.00	.....	.....

THEATRICAL EMPLOYMENT AGENCIES

In 1935 the state legislature enacted the Private Theatrical Ageney Law requiring a state license from those engaged in the business of conducting an agency, bureau or office for the purpose of procuring or offering engagements for circus, theatrical or other entertainments or exhibitions or performances.

An annual license was fixed. All licenses expire same date, December 31, each year. Bond in the sum of $1,000.00 is required. The license fee is $100.00 a year for principal offices and $50.00 a year for agents acting for principals.

At the present time there are four principal private theatrical employment agencies in force and two others acting as agents.

Receipts from these agencies during the past two years totaled $700.00, all of which was turned in to the state treasury—85 per cent to the credit of the general fund and 15 per cent for administration of the law.

This law is a very peculiar and unusual one and it has been somewhat difficult to administer it in a way that would not impose a hardship on persons and undertakings that are affected only by inference, and at the same time give full protection to the agencies which paid the state license. However, the Commission feels that all its decisions and acts under the law have been fair and just. Thus far no court action has been necessary in any case.

PRIVATE EMPLOYMENT AGENCIES

The duty of enforcing the state Private Employment Ageney Law was transferred to this Commission by the Code Bill in 1933, and this law has been administered since that time by this department.

The number of licenses in effect has varied from time to time —some of the older agencies failing to renew their licenses, while others were added to the list. There are now twenty-one state private employment ageney licenses in force—all but three being located in Denver. One is located in Pueblo, one in Colorado Springs and one in Boulder.

The total amount of money collected for licenses during the period covered by this report (December 1, 1936, to November 1, 1938) is $2,025.00. All of this money was turned in to the state treasury to the credit of the general fund. No direct appropriation was made by the legislature for administration expenses, such as printing, postage, supplies, etc.

During the two years all complaints filed against private employment agencies were promptly investigated and determined. Most of the complaints consisted of claims for refund of fees paid. In every case where the agency was found to be at fault and liable refunds were made. In no case has it been necessary to resort to court action against any of the agencies.

The total amount of money returned to applicants by agencies was $95.00, paid to twenty-two claimants.

Report of the

UNEMPLOYMENT COMPENSATION DIVISION

For the Biennium December 1, 1936, to November 30, 1938

THE UNEMPLOYMENT COMPENSATION ACT

The Unemployment Compensation Act of the state of Colorado was approved by the governor on November 20, 1936. The act received the approval of the Social Security Board, as required by Section 903 of the Social Security Act, on November 27, 1936. The Unemployment Compensation Division was set up on the first day of December, 1936, under the administration of the Industrial Commission. Certain amendments were enacted by the legislature and approved by the governor during the legislative session beginning in January, 1937.

The Unemployment Compensation Act covers employers of eight or more workers, Colorado employers subject to Title IX of the Social Security Act, and such employers as may voluntarily elect to become subject. Certain types of employment are exempt. Contributions to the pooled fund are made by the employer at the rate of 2.7 per cent for 1938.

Unemployed workers who qualify will receive a weekly amount equal to about 50 per cent of their average weekly wage, but not more than $15.00. The benefits will be paid only after the individual, when he is out of work, registers at a Colorado State Employment Service Office and files his claim. He must be physically able and available for work. The length of the benefit period depends on the amount the worker has earned in covered employment during a previous period of approximately two years, but no worker may receive benefits of more than sixteen times his weekly benefit amount during a benefit year.

Benefit payments under the act do not begin until January 1, 1939. The activities to date of this division have related to the accumulation of the Unemployment Compensation Trust Fund and to the setting up of procedures and records necessary to payment of benefits when due.

THE FEDERAL-STATE PROGRAM

Title IX of the Federal Social Security Act levies an excise tax upon payrolls of employers having eight or more individuals in employment. The proceeds of the tax are placed in the United States treasury as general revenue. The federal law makes no provision for the payments of benefits to unemployed workers. Unemployment compensation is exclusively a function of state governments.

The federal act, however, provides that taxpayers may credit against the excise tax imposed by the Social Security Act any contributions made to states having an approved unemployment compensation act, up to the limit of 90 per cent of the federal tax.

This is the amount of contribution required by the Colorado act, and is placed in the Unemployment Compensation Trust Fund deposited with the United States treasury. These funds can be used only for the payment of benefits accruing to unemployed workers after January 1, 1939.

Title III of the Social Security Act provides for the appropriation of money by Congress for the purpose of assisting states in the administration of their unemployment compensation laws. Grants to states are made in specific amounts and for specific purposes, according to budget estimates submitted by the state administrative body and approved by the Social Security Board. All accounts of the Unemployment Compensation Division of the state are subject to audit by the federal government.

Included in this report is a balance sheet showing the condition of the Unemployment Compensation Trust Fund as of the close of business on November 30, 1938, as required by the act.

Statement of Condition of the Unemployment Compensation Fund as of November 30, 1938

ASSETS

Cash—		
Clearing Account (State Treasurer)	$ 4,421.34	
Trust Fund (Including Interest Federal Treasury)	8,860,929.67	
Total Cash Assets		$8,865,351.01
Receivables—		
Underpayments and Interest Due on Debit Memoranda Issued	$ 9,322.77	
Claims Filed in Bankruptcy Cases	8,488.08	
Judgments Obtained — Not Collected	1,349.22	
Total	$ 19,160.07	
Less Credit Memoranda Outstanding	930.31	18,229.76
Net Assets		$8,883,580.77
Analysis of Cash Income—		
1936 Contributions	$1,586,647.80	
Interest on 1936 Contributions	4,452.64	
1937 Contributions	3,659,912.39	
Interest on 1937 Contributions	6,771.87	
1938 Contributions	3,431,960.83	
Interest on 1938 Contributions	1,162.86	
Interest on Trust Fund	168,013.43	
Total		$8,858,921.82

COVERAGE

At this time there are 4,100 employers paying contributions into the Unemployment Compensation Fund of Colorado. With the passage of the 1937 amendment extending coverage to Title IX employers, 789 became subject by virtue of this extension.

Sixty-five per cent of the employers subject to the act are located in three Colorado counties: Denver, El Paso and Pueblo. Denver alone has over 50 per cent of the total state coverage. A single employer may in some cases have several different accounts when operating units are in different types of industries or different localities. Over 70 per cent of industrial activity, as reflected in the employer accounts, is centered in the trade (41 per cent), service (17 per cent), and manufacturing (12 per cent) groups.

The average of monthly figures of covered employment for 1937 reported on contribution returns show that over 80 per cent of the covered workers were found in five major industries. Trade, both wholesale and retail, showed the highest per cent of coverage with 26 per cent of the workers. Manufacturing with 21 per cent, transportation 14 per cent, service 10 per cent, and mining and quarrying with 10 per cent completed this majority of coverage.

ADMINISTRATION

Organization

The Industrial Commission administers the Unemployment Compensation Act with two coordinate divisions participating: the Colorado State Employment Service Division and the Unemployment Compensation Division. Both of these divisions, together with the newly established joint service units, are subject to the supervision and direction of the Commission through the executive director.

A condensed chart showing the organization of the Unemployment Compensation Division, the Employment Service Division, and the related joint service units is included in this report. This represents a recently completed step in the coordination program of unemployment compensation and employment service for effective administration of benefit activities starting in 1939.

Personnel

The personnel of the division is appointed by the Industrial Commission of Colorado, subject to the provisions of the Civil Service Law and regulations.

On May 26 and 27, 1938, written examinations were held by the State Civil Service Commission for the following positions: Executive director of the Unemployment Compensation and Employment Service Divisions; director of the Unemployment Compensation Division; positions within the latter division for informational representative; chief Benefits and Claims Section; principal claims deputy; field advisers; senior claims deputies; junior claims deputies; and claims clerks. These were followed by oral examinations. A permanent staff was drawn from the resulting civil service lists.

There were twenty-one division employes in December, 1936. A year later there were fifty-three persons. Gradual additions to the staff were made during 1938, until the permanent staff of more than 100 persons necessary for payment of benefits and operation of the agency was reached. Additional temporary employes will be necessary to carry the peak load in the first quarter of 1939.

The Unemployment Compensation Division suffered a great loss on February 27, 1938, when John Lynch, executive director, succumbed to a heart attack. Bernard E. Teets, his assistant, was appointed to act in that capacity early in March, and became executive director as a result of civil service examinations on August 1, 1938.

Housing

The Unemployment Compensation Division, starting operations December 1, 1936, obtained quarters by utilizing the first floor lobby of the State Office Building, with equipment borrowed from other state departments. Later offices were leased in the Midland Savings Building. When further expansion became necessary with the development of benefit and claims activities, the offices of the division were moved to the Railway Exchange Building in July, 1938. Upon completion of the new State Capitol Annex in 1939 both the Unemployment Compensation Division and the State Employment Service Division will be located in adjoining space in that building.

Fiscal Control

Administrative accounts, budgetary controls, and business management affairs are now maintained under the direction of the administrative accountant. The administrative expenditures for unemployment compensation from its inception to November 30, 1938, amounted to $243,253.69. The budgetary control exercised by the Social Security Board is rigid, and requires the utmost economy.

INFORMATIONAL SERVICE

The Informational Service performed all public relations and publicity functions of the division under an information representative until October 1, 1938 at which time the service became a joint function for the Unemployment Compensation and Employment Service Divisions.

Principal functions of Informational Service are:

1. Organization of a state-wide informational program, operating through representatives in all offices to establish friendly relations with newspapers, radio, civic organizations, public officials, labor bodies, and industry in general.

2. Planning and preparation of informational campaigns through media of press, radio, institutional talks, lecture tours, and community meetings.

The activities have become more intensive since October 1, 1938, in preparation for the payment of benefits in order to reach the greatest number of covered workers in the shortest possible

time, to inform them of their rights, benefits and responsibilities under the act.

Press releases were made covering 228 publications throughout the state through the Associated and United Press services, Denver newspapers, institutional publications and syndicated columns. Two hundred spot and chain break announcements were used by Denver radio stations in addition to features and broadcasts in news reports.

The division recently participated in a series of programs dealing with unemployment compensation, in an informational course for workers, given at the Denver Opportunity School. This series was organized for representatives of trade and labor unions in order to inform leaders who were to carry on similar courses within their own organizations. Attendance at these meetings, over a period of five weeks, averaged 130 individuals representing about fifty labor organizations.

Community "mass" meetings have been held in more than thirty major cities in Colorado. Sponsored by city officials, chambers of commerce, county commissions, and similar bodies. The meetings are promoted by street banners, newspaper stories, placards, etc. Attendance and interest displayed in these community meetings indicate that this type of program is most effective in the division's effort to inform workers and to prepare them for the payment of benefits after January 1, 1939.

ACCOUNTING

Accounts and records are under the supervision of the chief accountant. The work is handled by three units: employer accounts, wage records and benefit accounting.

All contribution reports are audited. Deposits with the state treasurer are made in the clearing account and then to the Unemployment Trust Fund in the United States treasury. This fund has earned interest in the amount of $168,013.43 to September 30, 1938.

Wage records are maintained for more than 250,000 different workers who have at some time since July 1, 1937, earned wages from a subject employer and stored up potential benefit rights. These wage records are sorted and filed numerically in social security account number sequence. An alphabetical cross-reference index permits location of worker's records by name. When a claim for benefits is made, a transcript will be made of the wage history from the file cards for determination of amount and duration of benefits.

The benefit accounting unit will handle benefit check writing, posting to claimants' benefits ledgers, preaddressing of continued claim forms and reconciliation of bank balances.

EMPLOYER CONTROL

The Employer Control Section, under a chief supervisor, handles delinquent accounts with respect to employer contributions

and individual wage records of covered workers, and maintains the division's central files of correspondence and financial reports.

A new delinquency procedure was set up to provide a system of complete and routine follow-up of delinquents by means of tabbed, condensed employer card accounts. Coordination with the Field Service and Legal Affairs Section has resulted in prompt action and reduction of delinquent accounts.

FIELD SERVICE

The Field Service Section, under the direction of the chief field adviser, determines the liability of employers under the act, the registering of such employers, payroll auditing in the field, follow-up of delinquencies, special investigations and other field contacts. To November 1, 1938, a total of 39,480 contacts had been made with employers, which included 6,649 audits of payroll records.

RESEARCH AND STATISTICS

The research and statistical unit, under a statistician, has been concerned primarily with analyses of employment, payroll and contribution data by industry and locality; periodic administrative reports measuring the progress of the division's various functions; special research of new problems of administrative character; and maintenance of a reference library. It now operates as a joint unit to service the Unemployment Compensation and Employment Service Divisions. A coordinated research program meeting the statistical needs of the state and of the federal agencies concerned is being developed by the tabulating and study of data on benefit payments and claims for benefits; studies of special character as they relate to seasonality, partial unemployment, merit rating and the labor market.

BENEFITS AND CLAIMS

Administrative activities of the division in 1938 have been concentrated in preparing for the forthcoming benefit program, with the objective of developing a benefit plan which would provide prompt and accurate payments to eligible workers. An intensive study was made of the procedures and experiences of more than twenty-five states paying benefits in 1938.

Basic preparations have included:

1. Coordination and integration of certain employment service and unemployment compensation functions.
2. Development of the benefit payment procedure, rules and regulations, forms, manuals of instructions, etc.
3. Study and selection of office equipment and machinery.
4. In-service training of benefit personnel in the central and local offices.
5. Preparation of adequate local office, itinerant and mail service.
6. Establishment of interstate reciprocal agreements.

LEGAL AFFAIRS

An assistant attorney general appointed by the attorney general of Colorado devotes his full time to the legal affairs of the divisions. This department secures delinquent contributions and reports either by direct contact or legal procedure when other departments have exhausted their powers. Suits are filed to obtain judicial determinations regarding phrases, words, and sections of the act and its constitutionality. This division has made an outstanding national record in the number and success of its important legal decisions. Judgments in the amount of $6,167.60 have been obtained against delinquent employers and $4,818.38 collected.

In addition to actions to collect, the Legal Section has filed a number of cases where the constitutionality of certain sections of the act was in question, and where it was deemed necessary to obtain a judicial determination of certain phrases, words and sections of the act. The following cases have been filed:

Industrial Commission of Colorado vs. Alma Bus Lines, Incorporated

Joinder of Employing Units—Section 19 (f) (4).—The District Court of the City and County of Denver in this case held that the foregoing section was constitutional and that two or more employing units could be joined where a common ownership or control existed. Judgment for the Commission.

Industrial Commission of Colorado vs. Northwestern Mutual Life Insurance Company

Definition of Employment—Section 19 (g), (5), (A), (B), (C). —The District Court of the City and County of Denver held that solicitors of life insurance companies operating on their own time and compensated solely by means of commissions were not in employment within the statutory definition. Judgment for the company. This case is now at issue in the Supreme Court, where an early decision is expected.

Industrial Commission of Colorado vs. Equitable Life Insurance Company of Iowa

Definition of Employment—Section 19 (g), (5), (A), (B), (C). —The District Court of the City and County of Denver in this case held solicitors of life insurance to be employes, contrary to the Northwestern decision above referred to. Judgment for the Commission. This case is in the process of appeal to the Supreme Court.

Industrial Commission of Colorado vs. Great Western Mushroom Company

Agricultural Labor—Section 19 (g), (6), (A).—(Commission Regulation No. 6.)—The District Court of the City and County of

Denver held that employes of the above entitled company were not engaged in agricultural labor, and that contributions were due on wages paid to them. The Supreme Court sustained the trial court and the company is now definitely subject to the act. Judgment for the Commission.

Industrial Commission of Colorado vs. Park Floral Company

Agricultural Labor—Section 19 (g), (6), (A).—(Commission Regulation No. 6.)—The District Court of the City and County of Denver held that the employes of florists were not engaged in agricultural labor, and that the contributions are due on wages paid to them. Judgment for the Commission. This case is now at issue in the Supreme Court.

Industrial Commission of Colorado vs. Heimbecker Brothers

This Statute Dissolution Under Corporation Act—C. S. A. Chapter 41, Section 62.—This case was filed in the District Court of the City and County of Denver, and involves the effect of statutory dissolution under the Corporation Act. Judgment for the Commission.

Industrial Commission of Colorado vs. Excelsior Laundry

This case is filed in the District Court of Mesa county and involves the construction of an alleged partnership agreement. The court took the decision under advisement. Pending.

Industrial Commission of Colorado vs. United Fruit Growers Association

Agricultural Labor—Section 19 (g), (6), (A).—(Commission Regulation No. 6.)—This case is filed in the District Court of Mesa county to determine whether employes of cooperative marketing associations are engaged in agricultural labor. Pending.

LEGISLATIVE AMENDMENTS

The actual development of benefit experience, in the near future, will add much to the division's knowledge of the possible difficulties in practical administration which may indicate the wisdom of any major changes in the act. The division has been analyzing the laws and experiences of states paying benefits in 1938, and has under consideration proposals for simplification of the benefit formula which will lead to greater administrative efficiency.

COLORADO STATE EMPLOYMENT SERVICE

Biennium Ending December 31, 1938

During the biennium the Colorado State Employment Service absorbed the National Reemployment Service, which served fifty counties of the state, and the Colorado State Employment Service now serves the entire sixty-three counties of the state. Maps showing the location of the offices and the territory served are included in this report.

PLACEMENT RECORD

The effectiveness of the Colorado State Employment Service is indicated by Tables I and II, showing employment service placements by months during the biennium, December 1, 1936, to November 30, 1938.

These tables speak for themselves, and indicate that the Employment Service has rendered a great service both to employers and to employes in Colorado. The total number of placements made by the service during this biennium was 102,660. Sixty-eight thousand nine hundred and eight of these were placements in private industry and 33,752 were placements on public works and relief projects.

Although total placements made in 1938 fell below the total for the previous year, it is significant that the total number of private placements in 1938 exceeded the corresponding figure for 1937.

The fact that the Employment Service was able to maintain such an excellent private placement record in 1938 in spite of adverse business conditions was largely due to greater participation in the agricultural field during 1938. Table II shows the extent to which farm placements in 1938 exceeded those made in the previous year. It is interesting to note that in 1937 farm placements constituted about 35 per cent of total private placements, whereas in 1938 almost half of the private placements were made in the agricultural field.

Table I

EMPLOYMENT SERVICE PLACEMENTS BY MONTHS

For the Biennium, December 1, 1936, to November 30, 1938

Year and Month	Total Placements	Private Placements	Placements on Public Works and Relief Projects
Total for biennium	102,660	68,908	33,752
Total for year ending November 30, 1937	56,174	33,667	22,507
December, 1936	3,346	1,436	1,910
January, 1937	2,550	1,489	1,061
February	1,854	1,066	788
March	3,225	1,861	1,364
April	4,320	2,343	1,977
May	6,137	4,127	2,010
June	6,185	3,809	2,376
July	6,575	3,957	2,618
August	6,408	4,121	2,287
September	6,479	3,910	2,569
October	5,612	3,696	1,916
November	3,483	1,852	1,631
Total for year ending November 30, 1938	46,486	35,241	11,245
December, 1937	2,792	1,664	1,128
January, 1938	2,038	984	1,054
February	1,705	1,087	618
March	1,958	1,361	597
April	2,624	1,766	858
May	3,831	2,594	1,237
June	5,818	4,697	1,121
July	5,748	4,976	772
August	6,816	5,729	1,087
September	5,731	4,689	1,042
October	4,932	4,017	915
November	2,493	1,677	816

Total Placement Decrease, 1937 to 1938, 17.2%.

Private Placement Increase, 1937 to 1938, 4.7%.

Public Placement Decrease, 1937 to 1938, 50.0%.

Aside from agricultural placements, Table II shows placement breakdowns by men, women, and veterans. During the biennium about four-fifths of persons placed were men and one-fifth were women. Considering private placements only, the proportion of women placed is about one-third of the total. It has been found that about 70% of the women placed in private industry are placed in occupations in the service field, which includes domestic and institutional service and hotels and restaurants.

The Colorado State Employment Service has a special responsibility toward veterans, and Table II indicates its effectiveness in meeting this responsibility during the biennium covered by this report. During this period a little over 7% of all men placed were veterans.

OTHER ACTIVITIES

Table III shows month to month variations in the active file in new applications and in field visits during the biennium covered by this report. The active file consists of the application cards of those people who are actively seeking work through the Service at a given date. At present it is only a rough index of unemployment.

New applications represent workers who are registering with the Employment Service for the first time. Table III shows that during the biennium a total of 101,245 persons filed applications with the offices of the Employment Service. The number filing applications in 1938 was 52,845, and exceeded the 1937 figure by a little over 4,000. This would indicate, among other things, that more unemployed people are availing themselves of the opportunities afforded by the Employment Service.

A field visit is a call paid by an employment office representative to acquaint an employer with the Service and to solicit his business.

Table II

EMPLOYMENT SERVICE PLACEMENTS BY SEX, VETERAN STATUS, AND AGRICULTURE

December 1, 1936, to November 30, 1938

Month and Year	Men	Women	Veterans	Agricultural Placements
Total for biennium	80,498	22,162	5,923	28,964
Total for year ending November 30, 1937	44,954	11,220	3,411	11,775
December, 1936	2,650	696	269	140
January, 1937	1,853	697	208	147
February	1,261	593	145	87
March	2,406	819	287	270
April	3,480	840	330	418
May	5,154	983	390	1,654
June	5,067	1,118	311	1,486
July	5,359	1,216	341	1,825
August	4,944	1,464	314	1,811
September	5,361	1,118	365	1,667
October	4,733	879	258	1,899
November	2,686	797	193	371
Total for year ending November 30, 1938	35,544	10,942	2,512	17,189
December, 1937	1,963	829	162	253
January, 1938	1,528	510	150	62
February	1,090	615	95	93
March	1,335	623	139	153
April	1,815	809	208	240
May	2,980	851	186	1,056
June	4,462	1,356	262	3,014
July	4,536	1,212	270	3,293
August	5,383	1,433	353	3,683
September	4,560	1,171	258	2,552
October	4,124	808	276	2,519
November	1,768	725	153	271

Table III

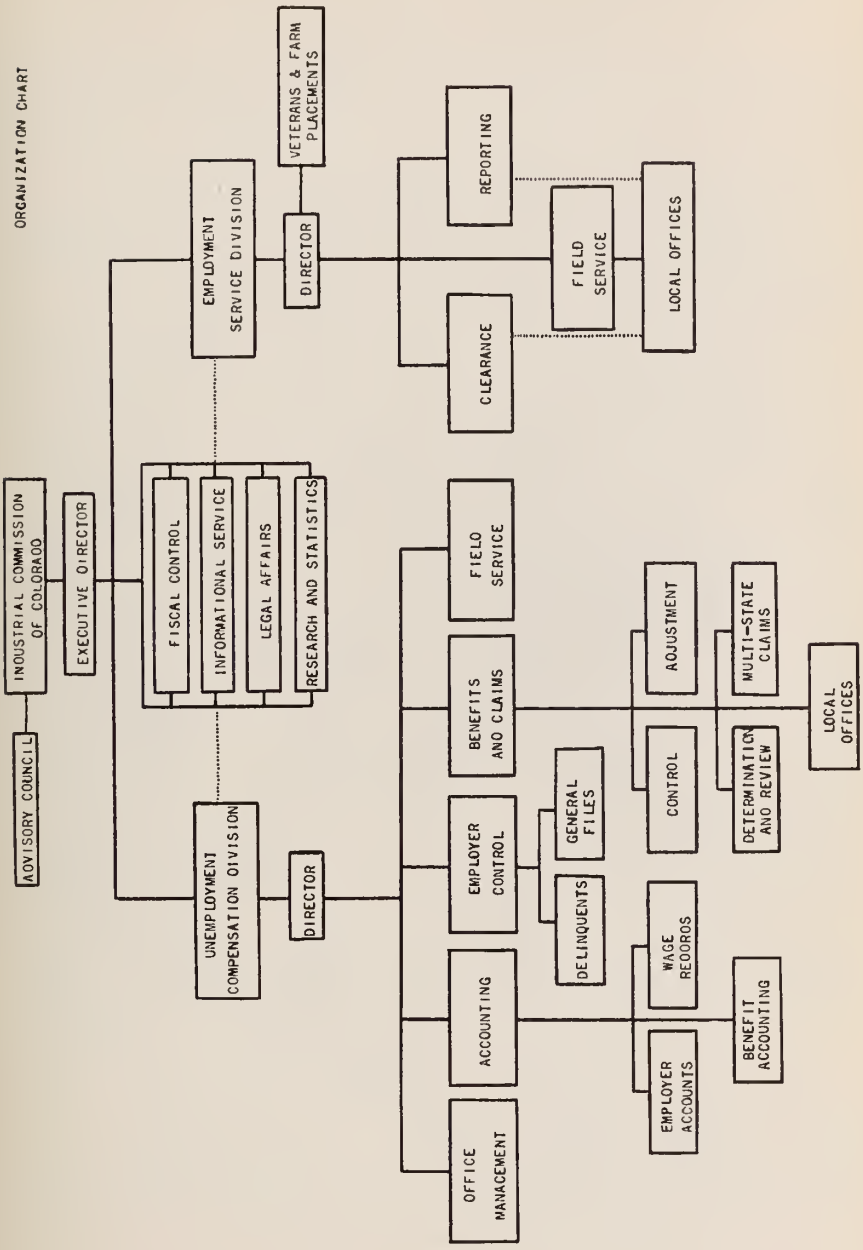
ACTIVE FILE, NEW APPLICATIONS, AND FIELD VISITS

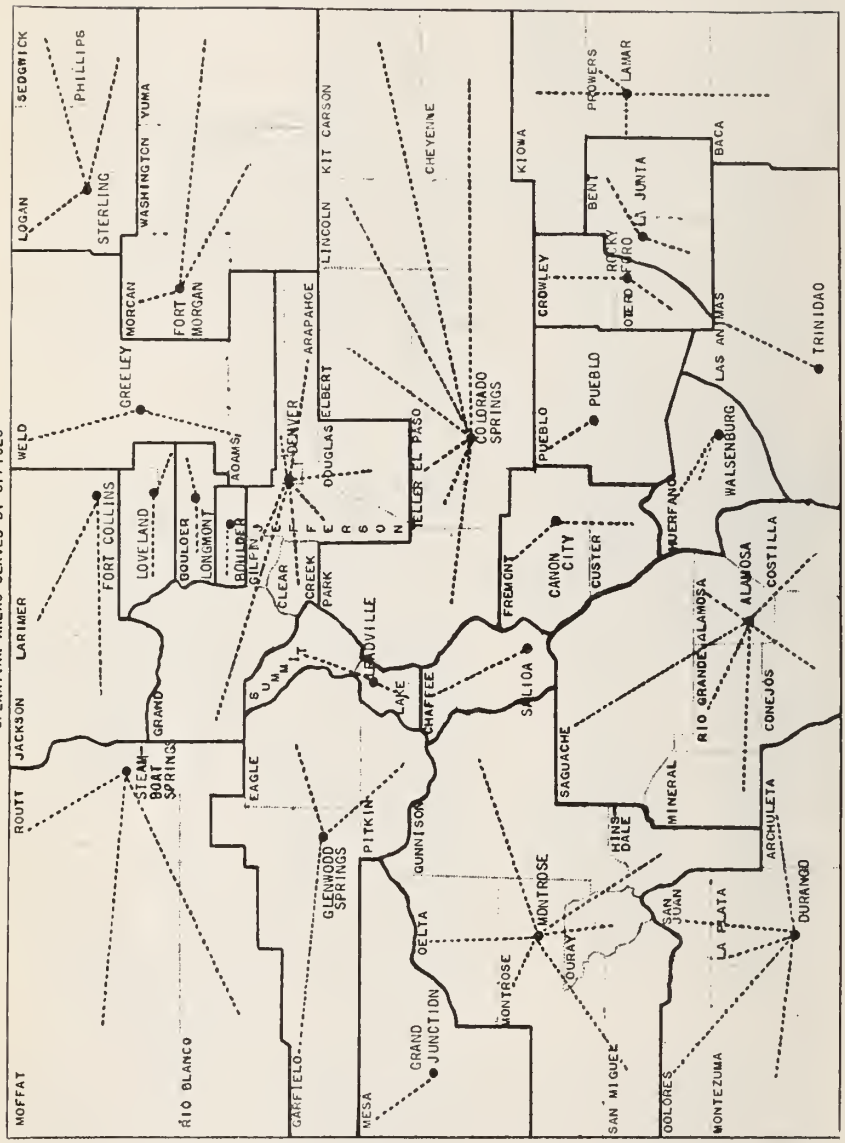
By Months for Biennium, December 1, 1936, to November 30, 1938

Year and Month	Active File*	New Applications	Field Visits
Total for biennium	56,353	101,245	33,137
Total for year ending November 30, 1937	55,299†	48,400	17,162
December, 1936	63,005	4,004	2,205
January, 1937	66,189	3,500	1,535
February	63,209	3,447	1,816
March	58,422	4,243	1,620
April	58,846	3,973	1,616
May	55,336	3,520	1,216
June	54,752	5,122	1,043
July	50,408	4,215	1,050
August	48,415	3,461	1,232
September	47,167	3,839	1,312
October	45,378	4,230	1,226
November	52,461	4,846	1,291
Total for year ending November 30, 1938	57,407†	52,845	15,975
December, 1937	59,026	4,436	793
January, 1938	64,754	4,930	598
February	64,523	4,059	669
March	56,855	4,584	1,133
April	61,566	4,014	875
May	63,695	4,366	1,226
June	58,951	5,425	1,674
July	56,884	4,582	2,432
August	53,225	4,281	2,618
September	48,881	4,410	1,847
October	50,557	3,774	1,239
November	49,965	3,984	871

*Figures for last day of month.
†Average figure.

Field visits play an important part in the task of persuading employers to take advantage of the facilities offered by the Employment Service in meeting their employment requirements. Employment Service representatives made a total number of 33,137 visits to employers during the biennium, December 1, 1936, to November 30, 1938. Most of these contacts were made with employers in private industry.


ORGANIZATION CHART
INDUSTRIAL COMMISSION OF COLORADO
ADVISORY COUNCIL
EXECUTIVE DIRECTOR
FISCAL CONTROL
INFORMATIONAL SERVICE
LEGAL AFFAIRS
RESEARCH AND STATISTICS
EMPLOYMENT SERVICE DIVISION
DIRECTOR
VETERANS & FARM PLACEMENTS
REPORTING
CLEARANCE
FIELD SERVICE
LOCAL OFFICES
UNEMPLOYMENT COMPENSATION DIVISION
DIRECTOR
FIELD SERVICE
BENEFITS AND CLAIMS
EMPLOYER CONTROL
GENERAL FILES
DELINQUENTS
ACCOUNTING
OFFICE MANAGEMENT
EMPLOYER ACCOUNTS
WAGE RECORDS
BENEFIT ACCOUNTING
ADJUSTMENT
CONTROL
DETERMINATION AND REVIEW
MULTI-STATE CLAIMS
LOCAL OFFICES


COLORADO STATE EMPLOYMENT SERVICE
OPERATING AREAS SERVED BY OFFICES
MOFFAT
ROUTT
JACKSON
LARIMER
WELD
LOGAN
SEDGWICK
PHILLIPS
STERLING
GREELEY
MORAN
WASHINGTON
YUMA
FORT MORGAN
FORT COLLINS
LOVELAND
BOULDER
LONGMONT
ADAMS
DENVER
ARAPAHOE
LINCOLN
KIT CARSON
CHEYENNE
DOUGLAS
ELBERT
EL PASO
TELLER
COLORADO SPRINGS
KIOWA
CROWLEY
PUEBLO
BENT
PROWERS
LAMAR
OTERO
ROCKY FORD
LA JUNTA
BACA
LAS ANIMAS
TRINIDAD
WALSENBURG
HUERFANO
FREMONT
CANON CITY
CUSTER
SALIDA
CHAFFEE
LAKE
LEADVILLE
PARK
CLEAR CREEK
GILPIN
BOULDER
GRAND
SUMMIT
EAGLE
STEAMBOAT SPRINGS
RIO BLANCO
GARFIELD
GLENWOOD SPRINGS
MESA
GRAND JUNCTION
PITKIN
GUNNISON
DELTA
MONTROSE
OURAY
SAN MIGUEL
SAGUACHE
HINSDALE
MINERAL
RIO GRANDE
ALAMOSA
CONEJOS
COSTILLA
ARCHULETA
SAN JUAN
LA PLATA
DURANGO
DOLORES
MONTEZUMA

STATE COMPENSATION INSURANCE FUND

INDUSTRIAL COMMISSION OF COLORADO,
State Office Building,
Denver, Colorado.

Gentlemen:

I submit herewith statement showing the financial condition of the State Compensation Insurance Fund as of December 31, 1937, which clearly reflects its healthy condition and growth.

The year 1937, as indicated by the financial statement, was the largest ever enjoyed by the Fund, and while 1938 will show a slight decrease in premiums written, this is directly attributable to a general business recession.

It is interesting to note that since the inception of the Fund, which was August 1, 1915, and up to and including December 31, 1937, we have written $14,878,775.64 in premiums. We have paid losses of $8,484,175.85, and have refunded to our policyholders in the form of dividends $2,523,187.50.

Based upon a differential in rates of 30%, the State Fund in 1937 wrote 56.62% of all the compensation insurance written in this state. If it were not for the rate differential, it would be shown that the State Fund wrote 65% of the total workmen's compensation business written in the State.

In 1937 there were 20,702 accidents reported to the State Fund, as compared to a total of 34,810 filed with the Commission, which represents 59.47% of the total accidents reported by all compensation carriers. For the first eleven months of 1938 there were 16,502 accidents reported as compared with 18,986 reported for the same period in 1937, or a decrease of 2,484.

It is of interest to note that there has been a greater decrease in accidents reported than the decrease shown in premiums written, which indicates very clearly that our safety organization is functioning.

In 1937 there were 45,512 warrants issued in payment of compensation and medical benefits, and we are pleased to report that our average medical paid as compared to compensation paid is 35%, or 2% less than normal for the United States.

Yours very truly,

STATE COMPENSATION INSURANCE FUND,

H. C. WORTMAN, Manager.

STATEMENT OF FINANCIAL CONDITION AS OF DECEMBER 31, 1937

ASSETS

U. S. Government, State of Colorado and General Obligation Bonds of Colorado Municipalities		$4,328,191.85
Registered 6% Warrants of Colorado Counties, Towns and School Districts		17,097.76
Cash on Deposit with State Treasurer		181,932.56
Premiums Less Than 90 Days Due and Less 10% of Premiums of Public Employers		206,003.60
Interest Accrued December 31, 1937		40,499.37
Total Assets		$4,773,725.14

LIABILITIES

Reserve to Pay All Claims to Maturity		$2,559,443.20
Premiums Unearned December 31, 1937		517,380.43
Reserve for Dividends		250,000.00
Total Liabilities		$3,326,823.63
Catastrophe Fund		850,000.00
Surplus		596,901.51
		$4,773,725.14

INCOME

Premiums Written		$1,747,865.54
Interest Received		152,795.58
Miscellaneous		4.96
Salvage Recovery from Third Parties		4,457.17
From Sale and Redemption of Bonds	$ 62,000.00	
Registered Warrants	5,508.33	67,508.33
Total Income		$1,972,631.58
Cash on Hand December 31, 1936	$219,015.28	
Premiums Outstanding December 31, 1936	303,497.57	522,512.85
		$2,495,144.43

DISBURSEMENTS

Compensation and Medical Benefits Paid During Year		$1,154,039.80
Dividends Paid Policyholders		557,876.16
Bills Receivable Charged Off	$ 1,900.00	
Premiums Charged Off	2,575.40	4,475.40
Operating Expense		126,460.57
Bonds and Warrants Purchased:		
Highway Anticipation Warrants	$181,122.38	
Capitol Annex Anticipation Warrants	34,512.69	
Warrants Registered	11,014.16	226,649.23
Total Disbursements		$2,069,501.16
Cash on Hand December 31, 1937	$181,932.56	
Premiums Outstanding December 31, 1937	243,710.71	425,643.27
		$2,495,144.43

INCOME AND DISBURSEMENTS
JANUARY 1 TO NOVEMBER 30, 1938

INCOME

Premiums Written		$1,364,992.25
Interest Received:		
Bonds	$132,540.02	
State Highway Warrants	4,420.00	
Building Anticipation Warrants	1,152.01	
Registered Warrants	672.04	
		138,784.07
From Sale and Redemption of Bonds	$141,000.00	
Building Anticipation Warrants	115,235.97	
Registered Warrants	10,481.92	
		266,717.89
Salvage Recovery Third Party Claims		4,163.30
Cash on Hand December 31, 1937	$181,932.56	
Premiums Outstanding December 31, 1937	243,710.71	
		425,643.27
		$2,200,300.78

DISBURSEMENTS

Compensation and Medical Paid	$1,106,858.34	
Service Tax Paid	4,412.82	
		$1,111,271.16
Dividends to Policyholders		190,976.97
Operating Expense		112,032.69
Investments:		
Building Anticipation Warrants	$ 241,062.26	
Registered Warrants	7,336.54	
		248,398.80
Cash on Hand November 30, 1938	$ 331,902.32	
Premiums Outstanding Nov. 30, 1938	205,718.84	
		537,621.16
		$2,200,300.78

WORKMEN'S COMPENSATION

CLAIM DEPARTMENT

Continued effort has been made during the past two years to improve the service of this department. Hearings in Denver have been held continuously throughout the period and hearings in outlying sections of the State have been held as frequently as the help available and the traveling appropriation permitted.

It is the policy of the Commission to hold hearings in leading industrial centers every sixty to ninety days and in other parts of the State as frequently as possible but not less than twice or three times each year.

Numerous special trips have been made to various parts of the State where it appeared that the delay occasioned by scheduled hearings would work a hardship on any of the parties.

During 1937 one hundred out-of-town dockets were noted for hearing in thirty-nine different towns, during the year 1938 ninety-four dockets were noted for hearing in thirty-eight different towns outside of Denver.

The principal delay in this department is caused by the difficulty of transcribing records both in cases which have been reopened and must be considered by the Commission and in cases where application for review from the Referee's award is made. This delay can only be rectified by supplying the department with an additional Referee and an additional Reporter.

The following table shows a comparison of the work in the claim department for the past six biennia:

	1927-28	1929-30	1931-32	1933-34	1935-36	1937-38
First Reports of Accident..	39,344	48,819	39,672	44,083	54,774	63,171
Claims for Compensation..	11,063	10,617	8,358	8,182	9,782	10,458
Lump Sum Applications..	324	448	513	505	579	831
Hearings Held	3,590	3,118	3,123	2,952	3,265	3,076
Awards Issued	4,798	5,194	5,563	5,112	5,195	6,324

The number of hearings shown above does not take into account all the hearings ordered by the Commission by award or any of the cases by agreement between the parties or summarily without notice.

Attention is directed to the continually increasing number of first reports of accident and claims for compensation handled by this department and to the increasing number of awards entered.

REJECTIONS OF THE WORKMEN'S COMPENSATION ACT BY EMPLOYERS

The number of rejections, by years, is shown below:

Year	Rejections
1921	1
1922	2
1923	5
1924	2
1925	12
1926	12
1927	24
1928	27
1929	46
1930	71
1931	92
1932	213
1933	237
1934	140
1935	115
1936	108
1937	90
Jan. 1, 1938, to November 30, 1938	125

WORKMEN'S COMPENSATION INSURANCE

Premium Income and Losses Paid—Colorado

NET PREMIUM INCOME

Year	Stock Companies	Mutual Companies	State Fund	Yearly Totals
*1915	$ 32,602.56	$ 163,526.58	$ 46,710.00	$ 242,839.14
1916	475,402.36	254,351.63	134,371.41	864,125.40
1917	664,049.89	303,466.36	192,328.45	1,159,844.70
1918	854,239.28	382,528.75	370,593.75	1,607,361.78
1919	818,782.86	313,432.55	267,612.12	1,399,827.53
1920	906,639.75	502,262.10	460,116.11	1,869,017.96
1921	931,622.93	416,087.25	364,009.52	1,711,719.70
1922	590,611.51	330,407.73	339,537.41	1,260,556.65
1923	665,509.93	402,663.69	404,562.16	1,472,735.78
1924	806,751.61	398,077.73	412,733.56	1,617,562.90
1925	1,033,794.56	351,428.79	554,868.86	1,940,092.21
1926	1,031,537.78	348,613.55	605,630.54	1,985,781.87
1927	1,001,375.17	357,852.64	880,400.39	2,239,628.20
1928	965,159.08	420,823.09	676,327.54	2,062,309.71
1929	1,092,230.06	434,515.26	720,568.78	2,247,314.10
1930	1,050,513.00	373,002.00	747,652.00	2,171,167.00
1931	877,422.00	302,816.00	697,955.00	1,878,193.00
1932	583,191.00	234,998.00	614,933.00	1,433,122.00
1933	518,321.00	197,971.00	635,432.00	1,351,724.00
1934	698,422.00	222,349.00	1,071,251.00	1,992,022.00
1935	688,411.00	293,835.00	1,474,421.00	2,456,667.00
1936	847,836.00	353,160.00	1,492,097.00	2,693,093.00
1937	879,099.00	460,158.00	1,747,866.00	3,087,123.00
Totals	$18,013,524.33	$ 7,818,326.70	$14,911,977.60	$40,743,828.63

NET LOSSES PAID

Year	Stock Companies	Mutual Companies	State Fund	Yearly Totals
*1915	$ 1,738.02	$ 2,637.46	$ 2,563.65	$ 6,939.13
1916	128,719.80	23,188.98	28,535.76	180,444.54
1917	191,556.57	58,546.16	42,497.24	292,599.97
1918	243,915.88	74,008.02	51,391.68	369,315.58
1919	294,156.65	98,135.51	86,546.79	478,838.95
1920	356,059.22	111,893.71	128,333.71	596,286.64
1921	389,800.87	130,440.08	168,340.20	688,581.15
1922	385,124.75	141,611.72	178,710.00	705,446.47
1923	499,806.15	134,095.21	201,169.98	835,071.34
1924	528,407.02	134,713.11	246,969.03	910,089.16
1925	567,364.78	139,083.34	279,972.80	986,420.92
1926	596,449.24	139,019.76	310,296.34	1,045,765.34
1927	596,618.80	149,883.31	372,349.08	1,118,851.19
1928	610,412.52	156,431.50	413,826.79	1,180,670.81
1929	618,767.28	180,333.88	484,386.67	1,283,487.83
1930	646,477.00	183,490.00	510,018.00	1,339,985.00
1931	620,509.00	187,744.00	549,219.00	1,357,472.00
1932	486,772.00	165,921.00	540,915.00	1,193,608.00
1933	437,012.00	151,213.00	542,274.00	1,130,499.00
1934	426,975.00	145,498.00	599,829.00	1,172,302.00
1935	389,273.00	160,772.00	716,591.00	1,266,636.00
1936	395,839.00	183,529.00	878,480.00	1,457,848.00
1937	442,311.00	236,985.00	1,149,583.00	1,828,879.00
Totals	$ 9,854,065.55	$ 3,089,173.75	$ 8,482,798.72	$21,426,038.02

*August 1, 1915, to December 31, 1937.

STATISTICS—ACCIDENTS AND CLAIMS, WORKMEN'S COMPENSATION DEPARTMENT

CLASSIFICATION	1915-1916 Aug. 1, '16 to Nov. 30, '16	1917 Dec. 1, '16 to Nov. 30, '17	1918 Dec. 1, '17 to Nov. 30, '18	1919 Dec. 1, '18 to Nov. 30, '19	1920 Dec. 1, '19 to Nov. 30, '20	1921 Dec. 1, '20 to Nov. 30, '21	1922 Dec. 1, '21 to Nov. 30, '22	1923 Dec. 1, '22 to Nov. 30, '23	1924 Dec. 1, '23 to Nov. 30, '24	1925 Dec. 1, '24 to Nov. 30, '25	1926 Dec. 1, '25 to Nov. 30, '26	1927 Dec. 1, '26 to Nov. 30, '27
1. Number of Accidents	16,670	12,780	14,932	11,365	14,279	13,904	12,859	15,862	17,518	18,143	19,797	19,671
Percentage—Claims to Accidents	14.72%	21.37%	24.92%	29.48%	29.26%	28.94%	32.67%	34.64%	32.31%	32.01%	28.21%	29.35%
2. Number of All Claims	2,465	2,732	3,722	3,349	4,179	4,025	4,201	5,307	5,660	5,807	5,584	5,761
A { Male	2,418	2,690	3,609	3,239	3,995	3,884	4,064	5,159	5,512	5,668	5,411	5,575
A { Percentage—All Claims	98.49%	98.46%	96.97%	96.71%	95.59%	96.50%	96.74%	97.21%	97.38%	97.61%	96.90%	96.78%
B { Female	37	42	113	110	184	141	137	148	148	139	173	186
B { Percentage—All Claims	1.51%	1.54%	3.03%	3.29%	4.41%	3.50%	3.26%	2.79%	2.62%	2.39%	3.10%	3.22%
3. Number of Fatal Claims (Deaths)	204	300	202	201	179	151	155	168	140	152	155	180
A { Coal Industries	65	200	66	87	54	46	72	80	34	50	52	56
A { Percentage—Fatal Claims	31.86%	66.66%	32.67%	43.28%	30.16%	30.46%	46.45%	47.62%	24.29%	32.90%	33.55%	31.11%
B { Metal Industries	64	39	47	46	41	24	19	19	10	37	38	37
B { Percentage—Fatal Claims	31.37%	13.00%	23.27%	22.88%	22.91%	15.89%	12.26%	11.31%	7.14%	24.34%	24.02%	20.50%
C { Miscellaneous Industries	76	61	89	68	84	81	64	69	96	65	65	87
C { Percentage—Fatal Claims	30.77%	20.34%	44.06%	33.84%	46.93%	53.65%	41.29%	41.07%	68.57%	42.76%	41.93%	48.33%
4. Number of Non-Fatal Claims	2,261	2,432	3,520	3,148	4,000	3,874	4,046	5,139	5,520	5,655	5,429	5,571
A { Coal Industries	598	622	722	735	975	931	957	1,125	1,149	1,268	1,261	1,309
A { Percentage—Non-Fatal Claims	26.57%	25.57%	20.51%	23.35%	24.40%	24.03%	24.39%	21.89%	20.82%	22.42%	23.23%	23.50%
B { Metal Industries	428	412	506	516	452	383	460	565	343	712	697	781
B { Percentage—Non-Fatal Claims	19.01%	16.95%	14.37%	16.39%	11.30%	9.89%	11.37%	10.99%	6.21%	12.59%	12.84%	14.02%
C { Miscellaneous Industries	1,225	1,398	2,292	1,896	2,572	2,560	2,599	3,449	4,028	3,675	3,471	3,481
C { Percentage—Non-Fatal Claims	54.42%	57.48%	65.12%	60.23%	64.30%	66.08%	64.24%	67.12%	72.97%	64.99%	63.93%	62.48%
5. Awards by Commission	237	424	639	678	263	361	428	505	518	557	572	431
6. Awards by Referee	(*)	(*)	(*)	339	826	1,143	1,316	2,005	2,282	1,879	2,312	1,866
7. Compensation Agreements Approved	2,062	2,242	3,478	3,014	3,692	3,382	3,427	3,865	4,838	4,664	4,670	4,448
8. Amputations	212	175	218	154	131	120	124	139	154	152	178	187
9. Loss of Use	128	57	45	27	20	22	18	23	19	52	56	98
10. Permanent Total	7	6	8	5	7	9	10	30	32	30	25	18
11. Permanent Partial	240	232	232	179	208	166	180	174	167	157	168	147
12. Temporary Total	2,013	2,177	3,066	3,267	3,745	3,661	3,866	4,965	5,169	5,468	5,241	5,405
13. Temporary Partial	58	7	41	22	37	57	38	25	41	31	28	42
14. Facial Disfigurement	8	5	17	15	11	19	34	47	31	21	37	29
15. Blood Poison	41	64	55	47	94	131	67	78	84	59	52	45
16. Wholly Dependent—Fatal Claims	120	181	74	68	58	54	62	68	64	83	80	98
17. Partially Dependent—Fatal Claims	10	14	19	14	22	14	33	29	27	19	27	24
18. No Dependent—Fatal Claims	30	43	8	85	78	72	37	50	36	41	37	50
19. Foreign Dependent—Fatal Claims	32	59	8	12	16	11	23	21	13	9	11	8
20. Compensation Denied	100	33	44	138	156	332	328	552	509	522	472	427
A. Fatal (Death)	19	10	12	32	32	47	57	81	36	41	30	30
B. Non-Fatal	90	28	32	106	124	285	269	471	473	481	442	397
21. Compensation Reduced	7	4	4	10	17	37	18	14	14	9	8	9
22. Average Weekly Wage	---	$20.67	$17.99	$21.29	$25.40	$26.04	$24.09	$25.35	$25.32	$25.02	$24.96	$25.49
23. Average Weekly Rate of Compensation	---	$7.54	$7.71	$8.56	$9.70	$9.76	$9.51	*$10.01	$10.83	$10.74	$10.63	$10.77

CLASSIFICATION	1928 Dec. 1, '27 to Nov. 30, '28	1929 Dec. 1, '28 to Nov. 30, '29	1930 Dec. 1, '29 to Nov. 30, '30	1931 Dec. 1, '30 to Nov. 30, '31	1932 Dec. 1, '31 to Nov. 30, '32	1933 Dec. 1, '32 to Nov. 30, '33	1934 Dec. 1, '33 to Nov. 30, '34	1935 Dec. 1, '34 to Nov. 30, '35	1936 Dec. 1, '35 to Nov. 30, '36	1937 Dec. 1, '36 to Nov. 30, '37	1938 Dec. 1, '37 to Nov. 30, '38	From Organization Aug. 1, '16 to Nov. 30, '38	CLASSIFICATION
1. Number of Accidents	19,773	25,816	22,078	21,132	18,540	18,850	26,233	26,127	29,647	34,609	29,472	458,400	1. Number of Accidents
Percentage—Claims to Accidents	26.86%	21.15%	22.42%	21.30%	20.80%	20.31%	17.25%	18.34%	17.45%	15.29%	16.31%	23.00%	Percentage—Claims to Accidents
2. Number of All Claims	5,312	5,417	5,150	4,502	3,856	3,829	4,353	4,608	5,174	5,652	4,806	105,481	2. Number of All Claims
A { Male	5,090	5,231	4,898	4,303	3,669	3,648	4,159	4,440	4,940	5,409	4,576	101,628	A { Male
A { Percentage—All Claims	95.82%	96.60%	95.11%	95.60%	95.15%	95.27%	95.54%	96.35%	95.48%	95.70%	95.21%	96.35%	A { Percentage—All Claims
B { Female	222	186	252	199	187	181	194	168	234	243	230	3,853	B { Female
B { Percentage—All Claims	4.18%	3.40%	4.89%	4.42%	4.86%	4.73%	4.46%	3.65%	4.52%	4.30%	4.78%	3.65%	B { Percentage—All Claims
3. Number of Fatal Claims (Deaths)	147	177	151	108	116	107	114	137	152	142	110	3,648	3. Number of Fatal Claims (Deaths)
A { Coal Industries	35	48	46	24	28	17	24	27	25	27	28	1,191	A { Coal Industries
A { Percentage—Fatal Claims	23.81%	27.11%	30.46%	22.22%	24.13%	15.89%	21.05%	19.71%	16.45%	19.01%	25.45%	32.65%	A { Percentage—Fatal Claims
B { Metal Industries	21	32	22	15	15	12	20	31	48	41	27	706	B { Metal Industries
B { Percentage—Fatal Claims	14.29%	18.08%	14.57%	13.88%	12.93%	11.22%	17.54%	22.63%	31.58%	28.87%	24.54%	19.35%	B { Percentage—Fatal Claims
C { Miscellaneous Industries	91	97	83	69	73	78	70	79	79	74	55	1,752	C { Miscellaneous Industries
C { Percentage—Fatal Claims	61.90%	54.80%	54.97%	63.88%	62.93%	72.90%	61.40%	57.66%	51.97%	52.11%	50.00%	48.03%	C { Percentage—Fatal Claims
4. Number of Non-Fatal Claims	5,165	5,290	4,999	4,394	3,740	3,722	4,239	4,471	5,022	5,510	4,696	102,740	4. Number of Non-Fatal Claims
A { Coal Industries	1,050	1,074	857	743	706	708	652	600	752	782	672	20,370	A { Coal Industries
A { Percentage—Non-Fatal Claims	20.33%	20.30%	17.15%	16.91%	18.87%	19.02%	15.38%	13.41%	14.97%	14.19%	14.31%	19.83%	A { Percentage—Non-Fatal Claims
B { Metal Industries	526	565	532	308	316	342	494	599	731	711	737	12,146	B { Metal Industries
B { Percentage—Non-Fatal Claims	10.18%	10.68%	10.64%	7.01%	8.44%	9.19%	11.65%	13.39%	14.56%	13.15%	15.69%	11.82%	B { Percentage—Non-Fatal Claims
C { Miscellaneous Industries	3,589	3,651	3,610	3,343	2,718	2,672	3,093	3,182	3,539	3,957	3,287	69,317	C { Miscellaneous Industries
C { Percentage—Non-Fatal Claims	69.49%	69.02%	72.21%	76.07%	72.67%	71.79%	72.96%	71.17%	70.47%	72.86%	70.00%	67.47%	C { Percentage—Non-Fatal Claims
5. Awards by Commission	519	580	633	773	1,081	1,001	842	780	1,002	1,074	1,113	15,016	5. Awards by Commission
6. Awards by Referee	1,932	1,809	2,102	1,031	1,783	1,632	1,637	1,663	1,741	2,187	1,950	34,396	6. Awards by Referee
7. Compensation Agreements Approved	4,418	4,413	4,162	3,564	2,944	2,916	3,512	3,666	4,371	4,775	4,020	86,570	7. Compensation Agreements Approved
8. Amputations	161	138	163	189	105	175	139	199	193	281	160	3,812	8. Amputations
9. Loss of Use	70	115	176	178	126	208	137	209	235	341	258	2,624	9. Loss of Use
10. Permanent Total	23	24	11	10	8	6	8	5	12	6	11	322	10. Permanent Total
11. Permanent Partial	171	185	190	181	220	220	186	296	256	273	241	4,669	11. Permanent Partial
12. Temporary Total	4,971	5,081	4,798	4,207	3,512	3,491	4,239	4,170	4,791	5,107	4,532	96,916	12. Temporary Total
13. Temporary Partial	39	35	24	22	26	31	31	35	33	37	71	504	13. Temporary Partial
14. Facial Disfigurement	24	33	38	45	43	42	43	56	38	60	55	742	14. Facial Disfigurement
15. Blood Poison	61	73	58	61	33	24	33	58	30	61	38	1,351	15. Blood Poison
16. Wholly Dependent—Fatal Claims	90	119	107	65	88	80	79	100	75	75	62	1,905	16. Wholly Dependent—Fatal Claims
17. Partially Dependent—Fatal Claims	19	18	9	10	7	10	11	8	8	14	7	377	17. Partially Dependent—Fatal Claims
18. No Dependent—Fatal Claims	31	47	31	10	18	17	23	15	18	27	22	423	18. No Dependent—Fatal Claims
19. Foreign Dependent—Fatal Claims	7	3	4	7	3	---	3	---	1	1	1	273	19. Foreign Dependent—Fatal Claims
20. Compensation Denied	462	322	374	249	234	212	175	208	198	199	181	6,531	20. Compensation Denied
A. Fatal (Death)	39	31	34	24	10	16	10	27	28	25	23	700	A. Fatal (Death)
B. Non-Fatal	423	291	340	225	218	196	166	181	170	174	158	5,834	B. Non-Fatal
21. Compensation Reduced	7	5	0	7	0	8	7	12	10	11	17	216	21. Compensation Reduced
22. Average Weekly Wage	$24.93	$25.12	$26.10	$24.66	$22.05	$19.24	$18.21	$19.94	$21.44	$25.90	$27.38	$23.19	22. Average Weekly Wage
23. Average Weekly Rate of Compensation	$10.79	$11.08‡	$11.56	$11.00	$10.24	$8.92	$8.55	$8.68	$9.60+	$11.62	$11.95	$10.31	23. Average Weekly Rate of Compensation

(*) No referee provided for in the 1915 and 1917 Workmen's Compensation Act.

‡Effective May 6, 1929, the compensation rate was increased from $12 to $14 per week by the amended law. Prior to that date the average weekly rate of compensation payments was $9.65, and since the new law became effective, $10.96 per week.

‡Effective May 6, 1929, the compensation rate was increased from $12 to $14 per week by the amended law. Prior to that date the average weekly rate of compensation payments was $10.66, and since the amended law became effective, $10.31 per week.

DIGEST OF COLORADO SUPREME COURT DECISIONS

So far as available at the time of preparation, a digest has been made in this report of cases decided since November 30, 1936. Earlier cases will be found in previous reports of the Commission. The index numbers are arbitrarily presented but follow in the main the chronological order in which they have been handed down by the Supreme Court. Index numbers 1 to 87, inclusive, appear in the Ninth Report; 88 to 109, inclusive, in the Tenth Report; 110 to 137, inclusive, in the Eleventh Report; 138 to 159, inclusive, in the Twelfth Report; 160 to 197 inclusive, in the Thirteenth Report; 198 to 238, inclusive, in the Fourteenth Report; 239 to 270, inclusive, appear in this, the Fifteenth Report.

Colorado and Pacific Citations are given when available, and the claim numbers of the cases before the Commission are prefixed by the letters "I. C."

TABLE OF CASES REPORTED

References Are to Index Numbers

REVERSE INDEX

CLASSIFICATION	1915-16 Awards by Com'n	1917 Awards by Com'n	1918 Awards by Com'n	1919 Awards by Com'n	1919 Awards by Referee*	1919 Totals for Year	1920 Awards by Com'n	1920 Awards by Referee	1920 Totals for Year	1921 Awards by Com'n	1921 Awards by Referee	1921 Totals for Year
1. Compensation: Fatal—Granted	62	190	186	124	87	211	11	213	224	11	168	177
—Denied	6	21	19	21	11	32	3	29	32	7	40	47
Non-Fatal—Granted	61	67	146	193	161	354	21	360	381	21	503	524
—Denied	21	26	41	72	36	108	4	130	124	3	282	285
2. Compensation Increase: Fatal—Granted	0	0	0	2	1	3	2	0	2	0	1	1
—Denied	0	0	1	0	0	0	1	0	1	0	0	0
Non-Fatal—Granted	0	0	1	0	4	4	1	9	10	5	40	45
—Denied	0	0	0	0	0	0	0	0	0	0	0	0
3. Compensation Reduced: Fatal—Granted	0	3	3	0	0	0	0	1	1	0	23	23
—Denied	0	2	0	0	0	0	0	1	1	0	3	3
Non-Fatal—Granted	3	2	2	5	11	16	0	7	7	2	12	14
—Denied	0	0	0	1	0	1	1	7	8	0	5	5
4. Lump Sum Settlements: Fatal—Granted	6	19	52	40	0	40	34	0	31	23	0	23
—Denied	15	17	35	32	0	32	28	0	28	40	0	40
Non-Fatal—Granted	20	26	29	65	0	65	51	0	51	50	0	50
—Denied	7	3	10	20	0	29	17	0	17	30	0	30
5. Rehearings: Fatal—Granted	0	4	2	17	0	17	10	0	40	11	0	11
—Denied	1	17	23	10	0	19	28	0	28	28	0	28
Non-Fatal—Granted	3	3	7	16	2	18	16	0	16	33	0	33
—Denied	3	14	18	23	0	23	34	0	34	66	0	66
6. Disfigurement: —Granted	8	0	42	11	5	16	1	7	8	1	13	14
—Denied	1	0	1	0	0	0	0	3	3	0	5	5
7. Miscellaneous	21	20	38	8	21	29	8	69	77	17	53	70
8. Total Awards	237	424	639	678	339	,017	268	826	1,091	361	1,113	1,194

CLASSIFICATION	1922 Awards by Com'n	1922 Awards by Referee	1922 Totals for Year	1923 Awards by Com'n	1923 Awards by Referee	1923 Totals for Year	1924 Awards by Com'n	1924 Awards by Referee	1924 Totals for Year	1925 Awards by Com'n	1925 Awards by Referee	1925 Totals for Year	1926 Awards by Com'n	1926 Awards by Referee	1926 Totals for Year
1. Compensation: Fatal—Granted	33	214	247	45	178	223	36	134	160	31	127	158	23	120	142
—Denied	4	53	57	6	75	81	7	29	36	12	29	41	9	21	30
Non-Fatal—Granted	46	682	728	96	1,102	1,198	166	1,422	1,578	166	1,274	1,440	117	1,279	1,396
—Denied	17	252	269	19	462	471	39	434	473	43	344	387	32	410	412
2. Compensation Increase: Fatal—Granted	2	2	4	0	0	0	1	1	3	3	1	4	2	2	4
—Denied	0	0	0	2	0	2	0	0	0	0	0	0	1	0	1
Non-Fatal—Granted	8	30	38	9	29	38	19	33	52	14	23	37	10	26	36
—Denied	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3. Compensation Reduced: Fatal—Granted	1	5	6	1	1	2	1	6	7	0	0	0	0	8	8
—Denied	0	0	0	0	1	1	0	0	0	0	1	1	0	0	0
Non-Fatal—Granted	2	5	7	1	11	12	3	4	7	1	8	9	0	11	11
—Denied	0	1	1	0	0	0	0	0	0	0	1	1	0	0	0
4. Lump Sum Settlements: Fatal—Granted	27	0	27	27	0	27	23	0	23	29	0	29	31	0	31
—Denied	29	0	29	39	0	39	26	0	26	22	0	22	30	0	30
Non-Fatal—Granted	48	0	48	69	0	69	89	0	89	84	0	84	106	0	106
—Denied	22	0	22	33	0	33	27	0	27	31	0	31	19	0	19
5. Rehearings: Fatal—Granted	10	0	10	7	0	7	6	5	11	4	0	4	2	0	2
—Denied	27	0	27	23	1	24	2	0	2	5	0	5	0	0	0
Non-Fatal—Granted	57	0	57	42	47	89	48	38	86	23	31	54	27	205	232
—Denied	73	0	73	49	0	49	3	0	3	6	0	6	6	0	6
6. Disfigurement: —Granted	2	29	31	3	40	43	4	20	24	1	15	16	4	33	37
—Denied	0	3	3	0	4	4	0	0	0	0	1	1	0	0	0
7. Miscellaneous	20	40	60	34	64	98	29	106	135	82	24	106	164	197	361
8. Total Awards	128	1,316	1,744	505	2,005	2,510	518	2,232	2,750	557	1,879	2,436	572	2,312	2,884

CLASSIFICATION	1927 Awards by Com'n	1927 Awards by Referee	1927 Totals for Year	1928 Awards by Com'n	1928 Awards by Referee	1928 Totals for Year	1929 Awards by Com'n	1929 Awards by Referee	1929 Totals for Year	1930 Awards by Com'n	1930 Awards by Referee	1930 Totals for Year	1931 Awards by Com'n	1931 Awards by Referee	1931 Totals for Year
1. Compensation: Fatal—Granted	19	154	173	26	135	161	18	109	127	11	138	149	20	129	119
—Denied	5	25	30	8	31	39	8	23	31	11	31	42	9	24	33
Non-Fatal—Granted	100	954	1,054	101	960	1,061	93	1,032	1,426	110	1,125	1,235	115	1,006	1,121
—Denied	14	332	346	31	323	354	45	246	291	55	343	398	50	225	275
2. Compensation Increase: Fatal—Granted	0	0	0	0	0	0	0	1	1	2	2	4	1	1	2
—Denied	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1
Non-Fatal—Granted	7	6	13	5	21	26	6	14	20	2	15	17	5	21	26
—Denied	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3. Compensation Reduced: Fatal—Granted	1	4	5	0	0	0	0	2	2	0	0	0	0	2	2
—Denied	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Non-Fatal—Granted	1	3	4	1	1	2	1	2	3	0	0	0	0	4	1
—Denied	1	4	2	0	0	0	1	0	1	0	0	0	0	1	1
4. Lump Sum Settlements: Fatal—Granted	23	0	23	22	0	22	37	0	37	35	0	35	33	0	33
—Denied	15	0	15	19	0	19	25	0	25	22	0	22	22	0	22
Non-Fatal—Granted	75	0	75	109	0	109	110	0	110	123	0	123	134	0	134
—Denied	23	0	23	35	0	38	52	0	52	44	0	44	41	0	11
5. Rehearings: Fatal—Granted	6	13	18	2	9	11	4	10	14	3	10	13	6	11	17
—Denied	5	0	5	3	0	3	2	0	2	2	0	2	5	0	5
Non-Fatal—Granted	30	133	163	36	181	217	40	121	161	67	135	202	83	171	254
—Denied	7	0	7	8	0	8	23	3	26	16	1	17	54	5	59
6. Disfigurement: —Granted	2	27	29	0	24	24	2	31	33	4	38	42	2	55	57
—Denied	0	0	0	0	0	0	0	2	2	0	0	0	0	5	5
7. Miscellaneous	98	214	312	110	297	407	113	273	386	126	264	390	165	270	155
8. Total Awards	431	1,566	2,297	519	1,082	2,501	580	1,869	2,449	633	2,102	2,735	768	1,934	2,699

CLASSIFICATION	1932 Awards by Com'n	1932 Awards by Referee	1932 Totals for Year	1933 Awards by Com'n	1933 Awards by Referee	1933 Totals for Year	1934 Awards by Com'n	1934 Awards by Referee	1934 Totals for Year	1935 Awards by Com'n	1935 Awards by Referee	1935 Totals for Year	1936 Awards by Com'n	1936 Awards by Referee	1936 Totals for Year
1. Compensation: Fatal—Granted	35	76	110	22	85	107	16	86	102	21	110	131	25	126	151
—Denied	9	16	25	18	22	40	10	10	20	11	27	38	14	28	42
Non-Fatal—Granted	163	920	1,083	167	835	992	149	820	969	118	906	1,024	165	945	1,110
—Denied	18	218	266	42	197	239	32	165	197	25	181	206	26	170	196
2. Compensation Increase: Fatal—Granted	0	0	0	0	0	0	1	2	3	0	2	2	0	3	3
—Denied	0	0	0	0	0	0	0	0	0	2	0	2	0	2	2
Non-Fatal—Granted	13	10	23	5	18	23	7	19	26	13	10	23	27	27	51
—Denied	0	0	0	5	12	17	3	9	12	10	2	12	6	7	13
3. Compensation Reduced: Fatal—Granted	0	0	0	0	0	0	0	1	1	0	2	2	0	3	3
—Denied	0	0	0	0	0	0	0	1	1	0	0	0	0	3	3
Non-Fatal—Granted	0	9	9	3	8	11	2	5	7	2	10	12	6	9	14
—Denied	1	1	2	2	1	3	1	1	2	2	0	2	0	4	4
4. Lump Sum Settlements: Fatal—Granted	51	0	54	37	0	37	25	0	25	28	0	28	33	0	33
—Denied	12	0	12	16	0	10	11	0	11	24	0	24	27	0	22
Non-Fatal—Granted	150	0	150	162	0	152	128	0	128	101	0	103	145	0	145
—Denied	67	0	67	85	0	85	51	0	51	52	0	52	73	0	73
5. Rehearings: Fatal—Granted	2	3	5	2	1	3	1	3	4	3	4	7	5	4	9
—Denied	6	0	6	6	0	6	4	1	6	7	2	9	7	6	13
Non-Fatal—Granted	96	264	360	111	129	243	97	268	365	85	128	213	90	111	201
—Denied	54	7	61	105	6	110	106	6	112	98	6	104	98	5	103
6. Disfigurement: —Granted	6	30	36	6	36	42	10	33	43	7	40	47	5	41	46
—Denied	1	0	1	1	2	3	2	1	6	2	5	7	1	5	6
7. Miscellaneous	367	230	597	273	281	504	186	203	389	176	278	404	265	242	197
8. Total Awards	1,081	1,783	2,864	1,081	1,632	2,633	812	1,637	2,479	789	1,663	2,152	1,002	1,711	2,713

CLASSIFICATION	1937 Awards by Com'n	1937 Awards by Referee	1937 Totals for Year	1938 Awards by Com'n	1938 Awards by Referee	1938 Totals for Year	From Organization: Totals All Awards
1. Compensation: Fatal—Granted	12	117	129	16	117	133	3,611
—Denied	5	25	30	13	23	36	807
Non-Fatal—Granted	202	1,284	1,486	149	1,207	1,356	21,479
—Denied	47	181	231	32	168	190	5,819
2. Compensation Increase: Fatal—Granted	0	3	3	1	0	1	19
—Denied	0	2	2	1	0	4	13
Non-Fatal—Granted	14	28	17	10	27	37	391
—Denied	3	2	5	6	4	10	69
3. Compensation Reduced: Fatal—Granted	0	0	0	0	0	0	68
—Denied	0	1	1	0	0	0	13
Non-Fatal—Granted	1	13	17	5	13	18	191
—Denied	0	6	5	0	1	4	17
4. Lump Sum Settlements: Fatal—Granted	13	0	13	41	0	11	716
—Denied	32	0	32	32	0	32	556
Non-Fatal—Granted	217	0	217	255	0	255	2,338
—Denied	104	0	101	107	0	107	968
5. Rehearings: Fatal—Granted	4	8	12	7	3	10	201
—Denied	3	3	6	10	8	18	254
Non-Fatal—Granted	95	115	210	117	73	190	1,107
—Denied	77	51	131	98	37	135	1,168
6. Disfigurement: —Granted	1	39	43	2	45	51	702
—Denied	0	9	9	1	6	7	61
7. Miscellaneous	208	266	473	210	221	431	6,260
8. Total Awards	1,074	2,187	3,261	1,113	1,950	3,063	19,105

*The figures shown in this column cover the seven months from May 1, 1919, to November 30, 1919, as no Referee was provided previous to May 1, 1919.

SECTIONS OF COMPENSATION ACT CITED OR CONSIDERED

Workmen's Compensation Act	Paragraph in Ch. 97 C.S.A., 1935	Index No.
10	289	241-265
15	294	258
15 (b)	294	251-263
15 (c)	294	246
16	295	270
17	296	270
49	328	269
50	329	270
53	332	255
73	352	248-256
76	355	256
77	356	248
80	359	247-257
81	360	259
84	363	250-262-269
87	366	249
97	376	261
98	377	261
101	380	261
103	382	258-264-268-269
110	389	266

SMITH BROOKS PRINTING COMPANY, et al., vs. YOUNG, BRANNAMAN, LEWIS, et al.
103 Colo. ....
Index No. 239 .... P. (2nd) .... Judgment Affirmed
Dated November 18, 1938

En Banc.

YOUNG, Justice.

This cause is before us on writ of error to reverse a judgment of the district court of the City and County of Denver, dismissing plaintiffs' complaint, the plaintiffs electing to stand on their complaint after defendants' demurrer for insufficiency of facts was sustained. The parties appear here in the same order as in the trial court and will be designated as plaintiffs and defendants.

The action was initiated under the Uniform Declaratory Judgments Law, chapter 93, Sec. 78-92 '35 C. S. A., to determine the status of plaintiffs with respect to eligibility to bid for state printing contracts under section 29, article V, of the Colorado Constitution and chapter 130, '35 C. S. A., '37 Supplement, being chapter 214 S. L. 1937.

Section 29 is as follows: "All stationery, printing, paper and fuel used in the legislative and other departments of government shall be furnished, and the printing and binding and distributing of the laws, journals, department reports, and other printing and binding; and the repairing and furnishing the halls and rooms used for the meeting of the general assembly and its committees, shall be performed under contract, to be given to the lowest responsible bidder, below such maximum price and under such regulations as may be prescribed by law. No member or officer of any department of the government shall be in any way interested in any such contract; and all such contracts shall be subject to the approval of the governor and state treasurer."

Section 7, chapter 214, S. L. '37 (Section 72, chapter 130, '35 C. S. A., '37 Supp.), so far as pertinent to the issues here involved reads: "All public printing for the state of Colorado shall be performed under contract, to be given to the lowest responsible bidder, at or below the maximum price and under the regulations herein set forth and under a specific provision that all persons employed by the contractor in the manufacture or furnishing of materials, supplies or articles in the performance of the contract shall observe the prevailing standards of working hours and conditions fixed and prescribed by the Industrial Commission of Colorado with reference thereto, and such contracts shall be made by the state purchasing agent, subject to the approval of the governor and state treasurer, after bids have been submitted to the state purchasing agent; provided, however, that printing to he done for state institutions shall be purchased under the direction of the respective heads of such institutions, in accordance with the rules and regulations established by the state purchasing agent."

The title of the act of which the above section 7, is a part is as follows: "An Act Relating to Public Printing, Providing for Penalties for Violation of the provisions of this Act and Repealing Acts and Parts of Acts in Conflict Herewith."

It is alleged in plaintiffs' complaint that the Industrial Commission fixed and determined the prevailing standard of wages, working hours and conditions as set forth in a schedule attached to plaintiffs' complaint, marked Exhibit "A." It appears by Exhibit "B" that subsequent to such determination the commission held a hearing to determine the prevailing wages, hours of work, and working conditions in the printing industry. Employees, closed shop employers, open shop employers, including plaintiffs, printers outside the city of Denver and the Employing Printers of Denver, Incorporated, were present or represented at the hearing. On this hearing the commission found that the schedule theretofore adopted as the prevailing schedule of wages, hours of work and working conditions was correct. Plaintiffs allege, and the allegation is admitted by the demurrer, that the purchasing agent for the state requires as a prerequisite to the acceptance or consideration of any bid for state printing that the bidder obtain a "clearance" or certificate from the Industrial Commission that in the operation of his, their or its business they are complying with the schedule of wages, hours of work and working conditions found by the commission to prevail in the printing industry. Plaintiffs make no claim that the finding of the commission, as to such matters was not in accordance with the facts, nor do they in any manner question such findings and determination. Members of the commission may have thought, judging from some of the statements in the commission findings, that it was the commission's duty under the act to go further than merely to make findings of fact as to prevailing wages, hours of labor and conditions of work, hut it appears that it conceived such findings to be its first duty and did make them, and, having made them, it has performed the sole duty imposed upon it by the act.

Plaintiffs contend that the act authorizes the commission not to *find,* but to *"fix* and *prescribe,"* the "prevailing standards of working hours and conditions." Prevailing standards of working hours and conditions in the printing industry are existing facts. As such they may be *found* and *determined* and in this sense they are fixed and prescribed. Webster's International Dictionary defines "fix" as: "To make firm, stable, or fast; to secure from displacement; to fasten, * * * Syn. determine, settle, place, set, confirm, limit, delimit.—*Fix Establish define.* To fix as here compared is to give permanence to something, esp. as it already exists." The same authority defines "prescribe": "To lay down authoritatively as a guide, direction or rule of action; to impose

a peremptory order; to dictate; appoint; direct; ordain." When words having different but well recognized shades of meaning are used in a statute they should be given that recognized shade of meaning that makes the statute reasonable and brings it within the constitutional powers of the legislature to enact it. So construed the statute here in question merely authorizes the Industrial Commission to determine and lay down authoritatively as a guide the prevailing standards of wages and hours in the printing industry—a fact necessary to be known in the application of the law as enacted by the legislature. In *Field vs. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294, the United States Supreme Court announced this rule: "The true distinction * * * is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter, no valid objection can be made." In *Sapero vs. State Board*, 90 Colo. 568, 11 P. (2d) 555, this court said "The general assembly may not delegate the power to make a law; but it may delegate power to determine some fact or a state of things upon which the law, as prescribed, depends. *Colorado and Southern Railway Co. vs. State Railroad Commission*, 54 Colo. 64, 84, 129 Pac. 506; *Field vs. Clark*, 143 U. S. 649, 694; 12 Sup. Ct. 495, 36 L. Ed. 294."

The Supreme Court of Pennsylvania in *Locke's Appeal*, 72 Pa. St. 491, 13 Am. Rep. 716, speaking through Mr. Justice Agnew, said: "Then, the true distinction, I conceive, is this: The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

When the prevailing standard of wages and hours are determined factually, section 7 provides in effect that a contract for state printing shall contain a specific provision "that all persons employed by the contractor in the manufacture or furnishing of materials, supplies or articles in the performance of the contract shall observe the prevailing standards of working hours" found and determined by the commission or "fixed and prescribed" by the commission in the sense we have held these words to have been used in the act.

It follows that the prior general compliance with such prevailing standards of working hours and conditions in the conduct of its private business is not a condition precedent to the right to bid on state printing, but that compliance with such standards in carrying out the contract is requisite to a lawful and full performance of any such contract entered into with the state.

That the act provides that the *employees* shall observe the standards of working hours and conditions fixed, rather than that the employer shall comply with them, raises no insurmountable obstacle to enforcement. The employer has it within his power to make it possible that his employees may, and to see that they do, observe them. Section 34 of the act provides that "any person violating any provision of this act as well as any person consenting to such violation, shall be guilty of a misdemeanor." If the employer would enter into a contract authorized by it he must not so act in dealing with his employees as to show conclusively his consent to their violation of it even though they might be willing so to do.

Section 29, article V, of the Constitution does not purport to determine all of the conditions that shall be embodied in the contracts with which it deals. It directs, among other things, that printing "shall be performed under contract *to be given* to the lowest responsible bidder * * * *under such regulations as may be prescribed by law.*" The legislature has prescribed that the work under any such contract shall be performed by employees working under a factually determined schedule of wages and hours. Such requirement is a regulation prescribed by the law. Plaintiffs say that it may not be so prescribed: First, because it involves an unconstitutional delegation of power to the Industrial Commission. We have pointed out that the act rightly construed does nothing more than vest in the commission the power to determine a fact in the light of which when determined the law operates. That such a delegation is proper has been generally recognized by the decisions of this court and by those of other appellate tribunals, some of which we have heretofore cited. Secondly, plaintiffs say that the condition may not be prescribed because it is class legislation, discriminatory, tends to create a monopoly, and is in violation of the right to contract. Plaintiffs have no vested right to perform labor for the state. The Supreme Court of the United States in *Atkin vs. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148, in passing upon the validity of a law providing that all laborers, working men or other persons employed by or on behalf of the state or any of its political subdivisions should work but eight hours per day, laid down a rule in such cases which this court subsequently approved in *Keefe vs. People*, 37 Colo. 317, 87 Pac. 791. In that case we had before us a judgment of conviction for violation of a statute providing: "In all work hereafter undertaken in behalf of the state or any county, township, school district, municipality or incorporated town, it shall be unlawful for any board, officer, agent, or any contractor or sub-contractor thereof to employ any mechanic, workingman or laborer in the prosecution of any such work for more than eight hours a day." In the opinion it is said: "Counsel are agreed that this statute does not fall within the police power of the state. The attorney general concedes that it cannot be sustained as a valid exercise of such power, since it is inhibited by the decision of this court in *In re Morgan*, 26 Colo. 415, and, as that proposition is within the ban of practically all decisions of federal and state courts in

similar cases. If it can be upheld at all, the attorney general says, it must be solely upon the principle that the state may prescribe for itself and its subordinate political subdivisions the conditions upon which all public work shall be performed; and as counties, townships, school districts and municipalities are but mere political subdivisions of the state government, its auxiliary organizations, or agencies, for the purpose of local government, the state, as the principal, may impose upon these agencies precisely the same conditions with respect to the doing of their public work that it can prescribe for itself." The court following the rule announced in *Atkin vs. Kansas, supra*, said: "Mr. Justice Harlan, in the course of his opinion in that case, so concisely and lucidly states the principle upon which legislation of this character is upheld that, without further comment, we cite the following excerpts, as constituting the reasons for sustaining our act:

> * * * "'It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy; and with such considerations the courts have no concern."
>
> "'If it be contended to be the right of every one to dispose of his labor upon such terms as he deems best—as undoubtedly it is—and that, to make it a criminal offense for a contractor for public work to permit or require his employe to perform labor upon that work in excess of eight hours each day, is in derogation of the liberty both of employes and employer, it is sufficient to answer that no employe is entitled, of absolute right and as a part of his liberty to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do.'"

"And, in referring to the fact which was stipulated by the parties in that case, as here, that the work performed by the employe of the defendants was not dangerous to life, limb or health, and labor for more than ten hours was not injurious to him in any way, the court said that such considerations were not controlling, because the decision was based upon the broad ground that the work being of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state to prescribe the conditions under which it will permit work of that kind to be done, and the legislation in question did not infringe upon the personal rights of others." Our act is not discriminatory nor class legislation as we have construed those terms because it has no other effect than to place all bidders for the state's printing on an equality so far as labor costs are concerned, by making that factor entering into all bids that may be submitted constant. In the exercise of its right to contract it may include, as any person exercising his right to contract may do, such term or terms in the contract as it sees fit, unless prohibited from so doing by the Constitution or by enacted laws which remain unrepealed. There has not been called to our attention, and we know of no provision in the Constitution, that prohibits the state as a matter of public policy recognizing the prevailing wage and conditions of labor in any industry as proper to be complied with by any one in that industry who seeks to contract for work required by the state. The question of whether state institutions may properly be exempted from requiring such conditions in their printing contracts is not before us, and we leave that matter for determination until a case arises necessitating its solution, for whether it be determined one way or the other in no wise affects plaintiffs in the instant case.

Plaintiffs contend that section 7 of the act is discriminatory for the further reason that it does not include the same requirement for *all* contracts entered into by the state. That the requirement of compliance with the prevailing wage and conditions of labor schedule is limited to printing contracts only is of no moment. Section 29 of the Constitution, *supra*, deals with only three general classes of supplies to be furnished by contract, namely: (a) Stationery, printing and paper, (b) fuel, (c) repairing and furnishing the halls and rooms used by the general assembly and its committees. Certainly no criticism should be indulged against the legislature because it has not made a broader classification than the Constitution has set forth in section 29. It need not even make one so broad, for we have held that because a state has power to prescribe a regulation for more than one industry this does not invalidate its regulation of one to the exclusion of another non-competitive industry. *Robertson vs. People*, 20 Colo. 279, 38 Pac. 326; *McClelland vs. Denver*, 36 Colo. 486, 86 Pac. 126; *Rosenbaum vs. Denver*, 102 Colo. 530, 81 P. (2nd) 760.

While the foregoing cases arose under acts passed in the exercise or attempted exercise of the police power, we see no essential difference between them and an act that lays down a policy for the state as to what it will recognize as reasonable and just to those who, like the employees of one contracting with it for printing, are not directly parties to the contract, but are necessary instruments in its fulfillment. The late Justice Cardozo, speaking for the court in *Campbell vs. City of New York*, 244 N. Y. 317, 155 N. E. 628, in passing upon a case wherein the right of the state to stipulate in its contracts for payment of a prevailing wage was in issue, said: "If the Constitution does not make it illegal to place this promise in the contract, the plaintiffs may not be heard to insist that the promise shall come out. Their right of action as taxpayers is measured by the statute. * * * The courts do not sit in judg-

ment upon questions of legislative policy or administrative discretion. The taxpayer must point to illegality or fraud. (*Smith vs. Hedges*, 223 N. Y. 176.)"

From the principles we have announced it follows that section 7 of the act is in harmony with and not repugnant to section 29 of article V of the Constitution; that it does not delegate legislative power to the Industrial Commission; that it is not discriminatory; is not class legislation; nor does it invade any rights to contract that plaintiffs have under the Constitution. We hold that compliance with the schedule of wages and hours determined by the commission, as to all work called for by the contract, is requisite for a full and lawful performance of any contract that may be secured under a bid submitted. Since it appears from the allegations of plaintiffs' complaint not only that they do not comply with such schedule in the conduct of their private business which they are not required to do, but also that they will not comply with it as to those of their employees who will be engaged in work in performance of a contract for state printing if secured, the judgment of the trial court dismissing the complaint must be affirmed.

MR. CHIEF JUSTICE BURKE dissenting in part.

MR. JUSTICE HOLLAND not participating.

MR. CHIEF JUSTICE BURKE dissenting:

I think the court's conclusion wrong. This was a suit under the Declaratory Judgments Act to determine a right. The actual existence of a controversy and the infringement of the right, if right there were, are unquestioned. The trial court, however, merely sustained a demurrer for want of facts. That disposition can only be upheld on the theory that the complaint presented nothing for adjudication under the act, a theory first negatived by the pleading itself and now by the court's opinion. The constitutionality of the statute and the existence of the questioned right, on both of which the trial court failed to pass, are now adjudicated by this tribunal. We have thus acted as a trial court instead of limiting our jurisdiction to that review to which we are restricted by the constitution.

I think, irrespective of the correctness of certain conclusions reached on questions of construction, this judgment should be reversed and the cause remanded.

BLACK DIAMOND FUEL CO. vs. FRANK.
99 Colo. 528
I. C. 78890 **64 P. (2nd) 797** **Index No. 240**
Judgment Reversed
See Also 202, 267

En Banc.

HOLLAND, Justice.

August Frank, a claimant under the Workmen's Compensation Act, was employed by the Black Diamond Fuel Company. His claim, filed August 4, 1933, was based upon an alleged injury occurring October 11, 1932, and states that in the course of his employment in the coal mine of his employer he strained himself while helping to lift a mine car. A hearing, with claimant as the only witness testifying, was held before a referee of the Industrial Commission December 20, 1933. By a finding dated January 12, 1934, the referee rejected the claim upon the ground that it was barred by amended section 84 of the Workmen's Compensation Act which provides that the right to compensation shall be barred unless within six months after the injury a notice claiming compensation shall be filed with the commission, the limitation not to apply if compensation has been paid to the claimant. Upon this finding, the commission entered its award rejecting the claim, which action later was affirmed by the district court. Upon review, the judgment of the district court was reversed by this court, and the case remanded to the district court, to enter judgment directing the commission "First to hold a further hearing solely on the issue of how much compensation should be awarded, and to make, on the evidence there taken, a proper award of compensation to the claimant." *Frank vs. Industrial Com.*, 96 Colo. 364, 43 P. (2nd) 158. Thereupon the district court entered its order directing the commission "* * * to hold further hearing or hearings solely on the issue of how much compensation should be awarded to the claimant, the same to be based solely upon evidence taken before such commission or the referee thereof upon the amount of disability that the claimant has sustained as a result of his accidental injuries. * * *."

From the statements of counsel for both claimant and employer, it now appears that in attempting to follow the mandate of this court and the order of the district court based thereon, uncertainty arose as to the extent of the hearing to be conducted. Claimant's counsel contended that the only question to be determined was the amount of compensation his client was entitled to receive and, apparently confident of his position, he offered no further proof of the other questions involved, namely: That the claimed injury occurred in the course of claimant's employment; and that compensation in the way of medical service was paid to him. Claimant further objected to the introduction of evidence on any of these matters by the employer and objected to employer's counsel going into the questions upon cross-examination. Counsel for the employer, faced with the decision of this court, holding that a compensable injury had occurred, although given some latitude in the matter, was not as free to proceed as the occasion required. To what extent this confusion, on the

part of claimant, employer and the commission, is reflected in the present award cannot be estimated.

(1) The only issue presented upon the former review was whether the claim was barred by the statute of limitations, which included the question of whether it was saved from the statutory bar by the payment of compensation, within the statutory period, if such could be said to have been paid by reason of medical services furnished the claimant. This court resolved that question in claimant's favor, upon, as then stated, a prima facie case made by his own testimony. Full opportunity to present these issues was not afforded the parties before the referee, and neither party insisted upon the rights which the statute contemplates and provides in such cases. This situation arose largely, it appears, through a miscomprehension of the procedure to be followed in such matters. The record disclosing such a situation, it is evident that the commission did not have, or at least did not take, the opportunity to fully hear and determine the issues raised, and it follows that this court, in view of the partial evidence introduced, should not have precluded either party from following the issues first presented to a conclusion. This it did, by its holding—which it is claimed by the defendant in error became the law of the case—in effect, that a compensable injury had occurred for which compensation had been paid. The showing made by claimant upon the original hearing was sufficient to have called for a full presentation of the claim and defenses thereto, the result of which should have disclosed: First, whether the injury occurred in the course of employment; second, whether it was compensable; and third, whether the medical treatment received by claimant could properly be held to be the payment of compensation within the meaning of the statute. It follows that this court should have reversed the judgment with directions to the lower court to set aside its judgment and transmit to the commission a statement of the issues not fully presented, staying its proceedings until the commission should hear and determine such issues and return its findings to the court. This would be in accordance with the provisions of section 4476, C. L. '21, which is as follows:

> "If upon trial of such action it shall appear that all issues arising in such action have not theretofore been presented to the commission in the petition filed as provided in this act, or that the commission has not theretofore had an ample opportunity to hear and determine any issues raised in such action, *or has for any reason, not in fact heard and determined the issues raised*, the court shall, before proceeding to render judgment, unless the parties to such action stipulate to the contrary, transmit to the commission a full statement of such issue or issues not adequately considered, and shall stay further proceedings in such action until such issues are heard by the commission and returned to said court. * * *"

Our former decision in *Frank vs. Industrial Commission, supra*, is overruled. What we there said concerning the statute of limitations was correct but premature. That question arises only if it be first determined that there was a compensable injury; hence, on that point, that decision is then controlling only if the evidence upon which our conclusion there rested remains substantially the same. The judgment in the present case is reversed and the cause remanded with instructions to the trial court to set aside its judgment, stay the proceedings and transmit to the Industrial Commission the issues to be considered with directions to fully hear and determine all questions presented, and return its findings on the same to the court for its judgment thereon.

MR. JUSTICE YOUNG concurs in part and dissents in part.

MR. JUSTICE HILLIARD specially concurs.

MR. JUSTICE BOUCK dissents.

MR. JUSTICE BAKKE and MR. JUSTICE KNOUS did not participate in the consideration or disposition of the petition for rehearing herein.

MR. JUSTICE YOUNG, concurring in part and dissenting in part:

I concur in a part of the opinion of Mr. Justice Holland and dissent in part. I think the case should be sent back for a determination of all issues, except that of whether the statute of limitations applies.

As I view the matter, the sole issue before us when the case was before presented was whether the statute of limitations applied. *Frank vs. Industrial Commission*, 96 Colo. 364, 43 P. (2nd) 158. In going beyond that issue and determining that a compensable injury had been sustained, when the commission had not acted upon that question, I think we determined issues not properly before us, and in so doing circumscribed the parties on the second hearing, so that issues there proper for determination were not and could not be acted upon. I now believe it would have been logical and the better practice in the former case to have required the commission to determine whether claimant sustained a compensable injury before determining the issue of whether his claim was or was not barred by the statute of limitations; but since the issue of the statute of limitations was raised and, as I believe, correctly determined, our former opinion on that question should stand as the law of the case and the case should be sent back to determine all other issues involved except that of the statute of limitations.

MR. JUSTICE HILLIARD, specially concurring:

On the theory that *Frank vs. Industrial Commission*, 96 Colo. 364, 43 P. (2d) 158, an earlier review in this same matter, constituted the "law of the case," for which there is Colorado authority, I favored affirmance of the judgment here; but since, notwithstanding my view, the court on this presentation has determined that that decision is not to be regarded as controlling, and moreover has rejected the pronouncement there, my conception of the duty of a member of a bank of judges in such situation has prompted me to further consideration

of the merits. As the result, details forborne, I now think we erred in rendering the decision reported in 96 Colorado; and as the present court opinion requires only that the claimant shall prove his case, not unreasonable in any view, I join therein.

MR. JUSTICE BOUCK, dissenting:

On April 3, 1935, the judgment of the Colorado Supreme Court in the workmen's compensation case of *Frank vs. Industrial Commission*, 96 Colo. 364, 43 P. (2nd) 158, became final.

What the opinion meant and what happened thereafter in the district court and before the Industrial Commission by way of attempted compliance with the judgment will best appear by quoting verbatim from the brief filed in the present proceedings by counsel for the Black Diamond Fuel Company, the claimant's employer (italics in this opinion being mine):

> "Some of the circumstances connected with this case have already been before this court in the Frank case, *supra*, in which a judgment of the district court, affirming an award of the commission denying the claim as barred by the statutes of limitations, was reversed and the cause remanded with directions.
>
> "Only the briefest reference to such part of the record as was before the court on its previous review is believed to be necessary, as an inducement to the narration of later proceedings and to call attention to evidence referred to in testimony at later hearings.
>
> "The claim for compensation asserted in this case is for *disability resulting from an accidental injury*, which this court has held was shown to have been incurred by the claimant, while lifting a mine car, October 11, 1932.
>
> "At the only hearing held prior to the decision of this court above referred to, the claimant was the only witness and the testimony as to the nature of the accident indicated only a muscular strain from lifting —no blow, fall, wounding, or other mishap. * * *
>
> "Upon receipt of the mandate of this court in *Frank vs. Industrial Commission*, *supra*, and in compliance therewith, the district court entered its judgment (ff. 176-181), vacating the award of the commission and ordering the holding of further hearing or hearings on the issue of how much compensation should be awarded the claimant, upon evidence upon the amount of disability he has sustained *as a result of his accidental injuries*. * * *
>
> "Before taking up the separate discussion of the several specific points relied upon for reversal of the judgment of the district court, *a consideration of the law of the case as settled by the decision of this court in Frank vs. Industrial Commission*, 96 Colo. 364, 43 Pac. (2nd) 158, *seems to be in order.*
>
> "The only question presented to the court in that case was, whether the claim for compensation was barred by the statute of limitations or was saved from that fate by the furnishing of medical attention.
>
> "In its opinion, however, *the court went beyond that question and, in addition to holding that the claim was not barred, settled, as the law of the case, the following propositions:*
>
> "1. That the injury of the claimant was compensable.
>
> "2. That the only issue remaining to be determined was how much compensation should be awarded.
>
> "We find no definition of the term compensable injury, but submit that *the first of the above propositions can mean nothing else than that the claimant had received a personal injury under such circumstances as would entitle him, in the event of any disability for more than ten days resulting therefrom, to compensation at the rate fixed by law, based upon his average earnings.* In other words, such 'compensable injury' is only one of the factors necessary to support an award of compensation; the others being physical disability of more than ten days duration and average earnings sufficient to entitle the claimant to the rate awarded.
>
> "This proposition seems self-evident, in view of the Workmen's Compensation Law, and was certainly recognized by the mandate of the court that a hearing be had to determine the amount of compensation to be awarded. This could only mean, to determine *the disability caused by the accidental injury*, and the average weekly wages of the claimant. *Obviously, a determination of the amount of disability sustained by the claimant as the result of his accident includes a determination whether any disability resulted therefrom.*
>
> *"These two issues, of disability resulting from the accidental injury and the average weekly wages of the claimant were the only ones to be determined, and it is the findings upon these two issues, and the award based thereon, that are in question herein."*

The foregoing was obviously a fair and accurate interpretation of the opinion in the first *Frank* case, *supra*. In fact, it seems to me the only reasonable interpretation. Entering upon the hearing held in accordance with the directions of this court, the employer's attorney complied fully with his understanding as expressed by his above quoted words. The commission's referee likewise had a clear comprehension of what was legally required. The record now before us shows that with the active aid of the employer's attorney the referee ably carried out the instructions of the court, promptly overruling objections of the claimant's attorney, who unsuccessfully urged a much broader interpretation of the *Frank* opinion than the one properly given it by his opponent and referee.

Counsel's interpretation was not an afterthought or mere lip service. The record of the hearing itself contains the following:

"I simply call attention," said the employer's attorney, "to the judgment of the district court, directed to the commission, under which this hearing is being held, which is for the purpose of taking testimony to determine the degree of temporary and permanent disability which this man sustained by reason of his accidental injury. Now, *if some of these things are not from an accidental injury, evidently they have to be segregated.* * * * The order of the court, to which I called your Honor's attention, is to determine the disability *due to the accident.* Obviously, *some of these conditions* he has *are not due to the accident.* * * * The only order directed to this commission, out of any court, is that of the district court, entered in compliance with instructions from the Supreme Court, with instructions as to what they should do. * * * I will read the entire paragraph containing the order: 'It is therefore ordered, adjudged and decreed by the court that the entire record in the above entitled case be sent back to the commission, and it is hereby sent back to the commission, which commission is directed to hold further hearing or hearings solely on the issue of how much compensation should be awarded to the claimant, the same to be based solely upon evidence taken before such commission or the referee thereof upon the amount of disability that the claimant has sustained *as a result of his accidental injuries.*' Now, compensation isn't paid for anything but accidental injury.

"Do I gather," asked the referee, addressing the claimant's attorney, *who had objected* to his opponent's correct attitude, "that it is your contention that the commission is not permitted, under these rulings, to go into the cause of the various disabilities of the claimant, but that we have to assume that all of his disabilities are due to accidental injury and find accordingly? *In order to comply with the order of the court, the commission has jurisdiction to hear evidence on the disabilities and to segregate, if necessary, the disabilities due to accident, as established by the Supreme Court, and those due to other causes.* For that reason I will permit Mr. West to go ahead with his examination."

The employer's attorney also stated: "*Whether* (claimant's) *present disability is due to that accident is all we are limiting ourselves to.* * * * There isn't any dispute that he received what the Supreme Court considered an injury sufficient to give him some disability, perhaps, and that *it is compensable if he has any disability.*"

Further testimony was accordingly taken on behalf of the claimant. It was duly limited to the scope we had prescribed, but was freely tested and elaborated by full cross-examination at the hands of skillful counsel, who introduced no witnesses of his own. The issue of the proper compensation for such injury if any as the evidence might show to have resulted from the industrial accident in question was thus duly inquired into, and an award was duly entered by the referee. This award was in due course adopted and approved by the commission. An action brought by the employer in the district court led to a judgment affirming the commission's award and this judgment is before us now for review.

The only contentions raised by the petition for review were (1) that the commission failed to find any disability of the employe to have been the result of accidental injury, (2) that the evidence does not support the commission's findings as to the amount of the claimant's average weekly wages, and (3) that the commission erred in finding the existence and extent of temporary and permanent disability, because those findings are not supported by any evidence of any disability caused by accidental injury. These are also the only issues or contentions covered by the assignment of errors in this court, as they were the only ones presented hy the complaint filed in the district court.

This court has not been given authority either by statute or by rule to disregard the issues actually presented in appellate proceedings and to decide a case on issues of its own making. However, here the majority reaches back to a case finally disposed of more than twenty months ago and now entirely of its own motion retries the issues there when the present record discloses that this court is repealing the doctrine of "the law of the case" which the plaintiff in error unqualifiedly accepted.

In Colorado the principle of "the law of the case" is neither new nor obsolete. See the case of *Lee vs. Stahl* (1889), 13 Colo. 174, 177, 22 Pac. 436, 437, citing with approval the opinion of Mr. Justice Belford in *Union Mining Co. vs. Rocky Mountain National Bank* (1873), 2 Colo. 248, 266, and also similarly citing *Davidson vs. Dallas*, 15 Cal. 75 (which cites approvingly the cases of *Washington Bridge Co. vs. Stewart*, 3 Howard (U. S.) 413, and *Ex parte Sibbald*, 12 Peters (U. S.) 488), and *Table M. T. Co. vs. Strahahan*, 21 Cal. 548.

The principle has since been uniformly reaffirmed. *Trinchera Co. vs. Trinchera Dist.*, 89 Colo. 170, 174, 300 Pac. 614, 615; *Smith vs. Windsor R. & C. Co.*, 88 Colo. 422, 424, 298 Pac. 646, 647; *Farmers Co. vs. Fulton Co.*, 81 Colo. 69, 70, 255 Pac. 449; *Zambakian vs. Leson*, 79 Colo. 350, 354, 246 Pac. 268, 269; *Long vs. People ex rel.*, 33 Colo. 159, 160, 79 Pac. 1132; *Tibbetts vs. Terrill*, 26 Colo. App. 64, 68, 140 Pac. 936, 938; *German American Co. vs. Messenger*, 25 Colo. App. 153, 158, 136 Pac. 478, 480; *First Nat. Bank vs. Manhattan L. Co.*, 21 Colo. App. 256, 257, 267, 120 Pac. 1112 (see court opinion 1112-1113 and Judge Walling's concurring opinion 1115); *Board of Public Works vs. Denver Tel. Co.*, 16 Colo. App. 505, 506, 66 Pac. 676, 677.

The judgment of the Denver District Court approving the award should, I think, have been affirmed as a whole, since that court and the commission carefully followed the directions of this court, and the evidence and findings are obviously sufficient to support the award. I fail to see how, if anything like the same evidence comes before the Industrial Commission at the next hearing, that body can avoid making the same award. There should sometime be an end to litigation. The repetition and duplication of administrative (if not judicial)

action now required by the majority opinion furnish, I fear, a sad commentary on the "summary" nature of the procedure required by the statute in workmen's compensation cases.

For the various reasons stated I respectfully dissent.

INDUSTRIAL COMMISSION vs. WETZ.

100 Colo. 161

I. C. 90383 **66 P. (2nd) 812** **Index No. 241**

Judgment Reversed

In Department.

HOLLAND, Justice.

To reverse a judgment of the district court vacating an award of the Industrial Commission which denied death benefits under the Workmen's Compensation Act this writ is prosecuted. Reference will be made to plaintiffs in error as the commission, the employer and the fund. Defendants in error will be designated as claimants, and the employe as Wetz or deceased.

While employed as a mechanic by the City and County of Denver at its highway shops, Wetz was found dead at his place of work February 15, 1936. February 23 the employer first reported the accident as follows:

> "Describe fully how accident occurred and what employe was doing at the time. Attaching hot-shot battery to Fordson tractor to prepare for starting same. Wetz was found unconscious underneath tractor with his back to the wall.
>
> "State exactly part of person injured and extent of injury. 'Wetz was overcome by carbon monoxide gas.'
>
> "Report made out by John Ford, assistant mechanic."

Denial of liability was filed by the fund February 29 and March 3 claimant's notice and claim was presented, reading in part as follows:

> "Nature of injury caused by accident. Dilated auricle of the heart.
>
> "Cause of death. Over-exertion and electric shock arising out of his employment, and inhalation of carbon monoxide gas."

A referee of the commission, after hearing March 30, made findings upon which was based a denial of compensation. On application for review the commission, April 17, entered its award of denial of the claim. It later ordered a further hearing and after receiving testimony, and on July 23, by a supplemental award, it affirmed the award of April 17 which it then made final.

Wetz was found unconscious a few moments before his death. No eyewitness testified to any facts which would throw direct light upon the cause of death, if it arose out of his employment. There is no dispute as to the factual conditions surrounding the accident. The case rests entirely upon the opinions of doctors who performed an autopsy and upon the testimony of those who gave their opinions based upon the physical condition of the body of deceased disclosed by the autopsy, and as to the conditions surrounding him at the time of his death and the effect such conditions might or might not have had toward producing death. Two of the causes of death set out in the claim, namely, "electric shock arising out of his employment" and "inhalation of carbon monoxide gas," are almost entirely eliminated by the effect of the testimony, and now are abandoned by claimants for that reason. They now depend for support of their claim upon the other stated cause, "over-exertion."

As above stated, Wetz was a mechanic in the city shops. As such he was called upon to do and did mechanical work upon the motor equipment of the highway department. On the morning of his death, at about nine o'clock, he had been directed to go across the street and start a Fordson tractor. The temperature was about zero. Under such weather conditions, it appears that difficulty is encountered in starting the gasoline motors in such equipment, and that what is known as a "hot-shot" battery was commonly used to facilitate the starting. If the usual procedure—that of cranking the motor—fails, the "hot-shot" battery is connected with the coil, the low tension magneto disconnected and the procedure of cranking again tried. If the motor then starts a quick change is made by unhooking the "hot-shot" battery from the coil and hooking the terminals to the low tension magneto while the motor is running. It is in evidence, as well as being common knowledge, that it requires considerable strength and effort to crank a motor such as is used in these road tractors. The garage or shop where the tractor involved in this case was located is about 100 feet long, 75 feet wide and 75 feet high in the center. On the morning in question, after some 50 or 60 trucks had been started and taken out of the garage and the doors immediately closed, the room was heavily charged with the gases escaping from the motors. Wetz had taken a "hot-shot" battery to the tractor and a passing fellow employe saw him standing in front of it as if in position to crank the motor. A few moments later the employe who was to drive the tractor found him sitting on the floor, leaning against the wall in an unconscious condition, his feet and legs under the tractor and the "hot-shot" battery between his legs. Thinking he was sick, the driver called to, and shook him without receiving any response, then immediately ran across the street advising other workmen of the man's condition. He was carried to the nearby office and placed on the floor where members of the police and fire department tried without success to revive him.

There is no evidence that Wetz had cranked the tractor motor or that he performed any other act calling for "over-exertion." All of the testimony concerning his death is undisputed and positive, and is to the effect that it was caused by "dilated auricle of the heart." As to what caused this condition is left in doubt, particularly in view of the fact of an existing heart condition

known as "foramen ovale." In short, without going into the details of the medical testimony, much doubt seemed to exist as to the exact cause of heart failure, and viewing the testimony in the light most favorable to claimant, it must be said that on this point it is conflicting and afforded ample reason for the following paragraphs which are contained in the award of the commission:

> "Claimant contends that her husband's death was the result of over-exertion, electric shock and carbon monoxide poisoning. The evidence is uncontradicted that decedent's death was the result of a right dilation of the heart, and that carbon monoxide poisoning was not a factor. There was no evidence that decedent had received any electric shock even though under certain circumstances, which were not shown to exist, he might have. Neither is there any evidence that decedent at any time exerted himself strenuously or at all.
>
> "The commission finds that from the evidence that decedent's death was the direct result of heart failure, the cause of which could not be ascertained by examining surgeons. Claimant having failed to sustain the burden of proof that her husband's death was either caused or hastened by an accidental injury arising out of and within the course of his employment."

As we have consistently held, the burden is upon a claimant in this class of cases to show by sufficient, substantial evidence, that disability or death was caused by an accident arising out of and in the course of the employment and that it had a direct causal connection therewith. Further, that it must be traceable to a definite source. As before stated, the matter of "over-exertion" is the only question here presented for solution. There is not a syllable of testimony to be found in the record to the effect that deceased "over-exerted" himself in any way. The necessary link connecting heart failure with the employment is not established by the evidence. To make its finding, setting aside the award of the commission, the district court must have based it upon inferences drawn from the evidence, in violation of the established rule that such inferences and conclusions are solely for the commission and not for the courts. *Comstock vs. Bivens,* 78 Colo. 107, 239 Pac. 869. That the district court assumed a state of facts is evident from statements found in its opinion, for example:

> "The record in this case * * * leads to one conclusion only—that the proximate cause of the death of Eugene W. Wetz was over-exertion contributed to by the gaseous fumes and smoke in the garage in which the accident occurred. * * * He was seen attempting to crank this tractor about ten minutes before he was found dead. * * * The lay testimony of what actually happened is conclusive as to the facts."

That several possibilities existed which could have been contributing factors in causing the death of Wetz have made this case troublesome; however, the basis upon which to establish a causal connection between death and the employment must be more than a mere possibility. It cannot be predicated upon conjecture or upon testimony which is merely compatible with the theory of claimant. Such facts as we have, bearing on the question of "over-exertion" as a contributing cause of the heart failure, are controverted, thus leaving the question one of fact for the commission and not one of law for the court.

The judgment of the district court is reversed and the cause remanded with directions to enter judgment affirming the award of the commission.

MR. JUSTICE BURKE, sitting for MR. CHIEF JUSTICE CAMPBELL, and MR. JUSTICE YOUNG concur.

On Rehearing

En Banc.

Judgment affirmed.

YOUNG, Justice.

The defendants in error, mentioned herein as claimants, filed a claim before the Industrial Commission under the Workmen's Compensation Act for death benefits to which they say they are entitled as dependents of one Eugene W. Wetz, whom they allege came to his death as the result of an accident, arising out of and in the course of his employment by the City and County of Denver, his employer. The employer carried insurance with the state insurance fund, designated in this opinion as insurer. Reference also will be made to these parties as defendants. The claimants, being unsuccessful before the commission, instituted an action in the district court to review the findings and award, which court set aside the order of the commission denying death benefits and remanded the case with directions to enter an award in favor of claimants. Defendants prosecute a writ of error to review that judgment.

Due to the peculiarity of the commission's findings and to the fact that the issues may only be determined from the testimony, we deem it advisable to set forth such testimony in some detail in order that the issues be clearly presented and the correctness or incorrectness of the judgment of the trial court determined.

The following facts clearly appear from the record and are undisputed: On the 15th of February, 1936, decedent was working for the City and County of Denver in the highway department. He reported for work at about 7:30 in the morning. About 9:15 the foreman sent him across the street to start a Fordson tractor of the street cleaning department. It was a cold morning, the temperature being approximately zero or slightly under. On that morning from fifty to fifty-five trucks had been started in the building where the tractor was standing; the building was large and had been kept closed except when the doors were opened to permit the egress of trucks. The gas discharged by the motors was heavy and hung close to the floor. Such discharge from the motors

produces some carbon monoxide which is poisonous and a large amount of carbon dioxide, which is not poisonous, but by occupying space in the lungs prevents the entrance of a normal amount of oxygen. The examination of one of the witnesses, who was working in the building, was in part as follows: "What effect did that have on you that particular morning, if any?" A. Well, I absorbed a lot of gas and there was a lot of it that morning and it kind of knocked me out, I don't need a lot of it." Another witness testified that it "knocked him out" when he went into the garage. The foreman who ordered decedent to start the tractor was asked: "What is the first thing you do, that is, if you were sent over to start a Fordson tractor or truck?" He responded as follows: "Well, the first procedure, of course, as we go over there, we take a hot-shot battery to help along in case we can't start it, but we go over it and open up the circuit there, keep the spark retarded, pull the choke and get around and open the throttle a little bit and get around in front and crank it. If we are unable to start it then we take the hot-shot battery. We disconnect the low tension and hook on the hot-shot battery onto the coil, then we go through the same procedure, of course, of cranking." After outlining the foregoing as the customary procedure for starting a tractor the foreman was asked if it required considerable effort to crank one of these tractors and answered in the affirmative. Another witness was asked: "Is it customary for them to attempt to crank the tractor before they connect these hot-shot batteries? That is, for a mechanic to turn it over once or twice to see if it will run before they connect their hot-shot?" He answered: "I would say it would be customary, because it takes some time to connect a hot-shot, and if a man is in a hurry he is going to start it the quickest way possible."

After decedent arrived at the tractor one of the men passing by saw him standing with his left hand on the radiator cap in the position in which a man stands to crank the motor. He did not see decedent actually crank it. This was about ten minutes before he was told that Wetz "was knocked out."

Shortly after decedent had been directed to start the tractor the man who was to take it out found him sitting on the floor by the side of the machine with a hot-shot battery between his legs and with his head lying over on his shoulder; being unable to arouse him he called for assistance and Wetz was carried into an office nearby. A doctor was summoned immediately, who, upon arrival, pronounced the man dead.

Carbon monoxide poisoning as a sufficient independent cause of death, and electric shock from the battery and coils as a contributing cause, are conceded by claimants, in view of the medical testimony, to be eliminated from the case. They now place their reliance on over-exertion, under the conditions shown to exist as the proximate cause of dilatation of the heart and consequent death.

The doctor who performed the autopsy was the only one of the several called as witnesses who saw the conditions thereby disclosed. All the others testified hypothetically. He testified that the examination showed a dilatation of the right auricle of the heart which was caused by something of a sudden nature and of recent origin as evidenced by no degenerative changes in the liver which are always found where such a condition is of long standing; that he found a foramen ovale or opening from the left to the right auricle; that it was covered by a flap on the inside of the left auricle; that such a condition results from a failure of complete closing of a prenatal opening between the two cavities and is found in 25 per cent of all autopsy cases, that the opening was small; that it was surrounded by scar tissue; that there was no evidence of a recent breaking loose of the flap covering the opening; that the flap was on the left auricle side of the opening where the pressure is greater than in the right auricle, thus tending to keep the flap closed; that from his examination the heart muscle grossly appeared to be in good condition; that in his opinion the foramen ovale as he found it was negligible in determining the cause of death; that he did not believe it had anything to do with the death; that it was so well closed that not more than a drop or two of blood ever got through. This doctor further testified that over-exertion could cause the dilatation; that the probability was in favor of the death being caused by over-exertion; that the atmospheric condition could have something to do with it and could alone cause it; that carbon dioxide (carbon monoxide being ruled out as the cause of death by a blood test) present in the air would make it harder to get oxygen and would have a tendency to weaken the heart to some extent; that the breathing of air filled with carbon dioxide and a small amount of carbon monoxide are factors that can be contributory to dilatation of the heart; that sometimes a foramen ovale causes dilatation but not one such as this; that dilatation does not occur without over-exertion; that there was no condition intrinsic in the heart that would cause death. The foregoing was the testimony of the autopsy surgeon based upon his actual examination and upon the deceased's condition as disclosed by the autopsy.

The lay testimony, including that of the widow of deceased, was to the effect that Wetz's health had been good and that he never had complained of any trouble.

Dr. Buck made only an outward examination of the body. His entire testimony with respect to the cause of death was to the effect that 99 per cent of sudden deaths are due to heart trouble and that as to this particular case he could not tell the cause of death from an inspection of the body but would want an autopsy.

Dr. Blanchard's testimony showed merely the delivery by him of a sample of deceased's blood to Dr. Freshman for examination, and the latter's testimony was to the effect that death was not caused by carbon monoxide poisoning.

Dr. Yegge testified that a heart dilatation might develop from a foramen ovale, because under some conditions blood might go through the opening even with a flap over it, if the flap were not adherent, and that he did not believe this one was. Asked as to whether the man died from over-exertion he answered:

"From the testimony this morning I do not believe that I could say whether it was natural causes or over-exertion."

Dr. Burnett testified in effect that patent (unclosed) ovale is a fairly common abnormality and that an enlargement of the right auricle associated with it means a strain on the right side of the heart; that he did not know whether the condition disclosed here in and of itself would cause death, but in view of deceased's previous healthy condition and color, it could have done so, but probably did not; that an undue strain for that individual would be required to cause death, that a heart in the condition this was found to be would not stand as much as a normal heart and might break down under over-exertion; that there was a strain on the right side of the heart or there would have been no dilatation; that it was not his experience that death often occurs as the result of acute dilatation without any evidence of trauma or external violence in people who apparently were previously well; that he had known of patients dying in bed from acute dilatation but they were not apparently well previously; that persons may be suffering from heart disease and not be aware of it themselves and their condition not apparent to laymen; that in his opinion persons who die of acute dilatation with no history of prior attacks or ailments would disclose on examination something other than simple dilatation such as occurred in this case; that an enlargement of the right auricle is to be expected from the presence of a patent foramen ovale if there is sufficient patency and an overload; that it might develop gradually over a period of years; that if it developed gradually the patient usually would be aware of it, but might not be, and that he probably would not be in perfect health throughout the period; that individuals with patent foramen ovale sometimes die suddenly.

The testimony of Dr. Dyde was to the following effect: That the autopsy report did not disclose an adequate cause of death; that is, that the dilatation of the right auricle and the patent foramen ovale did not seem to be a sufficient and adequate cause of death; that dilatation may come suddenly in certain diseases or may develop over a long period of time from strain; that a dilated auricle with no organic disease of any kind would be a congenital defect which would not be brought on by overwork; that he could not say what did cause this death; and when asked if it could be caused from over-exertion his answer was, "like anybody else," but that he could not surmise.

It will be observed that the foregoing medical testimony tends in no way to negative the fact that if exertion were present under the atmospheric conditions obtaining it would be a contributing cause to the dilatation disclosed by the autopsy report.

We think the foregoing presents a situation in which there are circumstances disclosed by the evidence sufficient to prove that the deceased shortly before his death had engaged in cranking the tractor, and there is direct testimony that the motor was cold and that cranking it in such condition requires considerable exertion. The dilatation, under the medical testimony, is adequately explained as resulting from exertion in the existing atmospheric condition concerning which there is no dispute. There was testimony that the dilatation might result from a patent (unclosed) foramen ovale, but there is no testimony that it would result from one that is closed and the positive testimony of the only doctor who saw the condition is that it was closed by a flap on the side of the greater pressure which would tend to keep it closed. All the circumstances were consistent with the fact of deceased having exerted himself to the extent required to crank the tractor. The dilatation, which is not controverted, under competent medical testimony is adequately explained by over-exertion under the atmospheric condition shown to be present and, in the opinion of the autopsy surgeon, by the atmospheric condition alone. That these conditions, if existent, do adequately account for it was not contradicted by any medical testimony.

The claimants were not required to demonstrate the cause of the dilatation, but merely to show its cause by competent evidence. Circumstantial evidence is competent. Even in a criminal case, circumstantial evidence is sufficient to convict, if the jury is convinced by it of defendant's guilt and find the circumstances consistent with guilt and inconsistent with any reasonable hypothesis of innocence. Having introduced competent evidence to prove exertion shortly before death and having shown as a circumstance a dilatation—adequately explained by exertion—the commission, in the discharge of its function under the law, should have considered the evidence and should have made a finding as to the fact that the evidence was competent to prove, namely, as to whether there was exertion. Instead, the commission found "neither is there any evidence that decedent at any time exerted himself strenuously or at all." This is a conclusion of law. As pointed out in *United States F. & G. Co. vs. Industrial Commission*, 96 Colo. 571, 45 P. (2d) 895, "What constitutes evidence is a question of law." An erroneous finding that there is no evidence of exertion, when the record discloses such evidence, is not equivalent to a finding that there was no exertion. The existence or non-existence of exertion are the relevant facts. The duty of finding one or the other of such facts when an issue under the evidence, is mandatory on the commission.

In the light of the uncontroverted circumstances that deceased had always appeared to laymen to be in good health and that he had never complained of ill health, that he was doing work that customarily involved considerable exertion; that he was breathing an atmosphere charged with a small amount of poisonous carbon monoxide and a large amount of carbon dioxide sufficient to affect noticeably two other workmen; that in the light of the uncontroverted testimony of the autopsy surgeon either exertion or the atmospheric condition alone could cause dilatation; in the light also of the uncontroverted fact that dilatation did occur; and in the absence of any testimony of other medical experts as to any other probable causes of dilatation where there is a foramen ovale closed by a flap as deceased's was, we think the trial court was right in holding that as a matter of law there was uncontroverted evidence of a sufficient cause of the dilatation,

namely, either overexertion or a gas laden atmospheric condition, or both. A determination that the evidence is competent and that it is uncontroverted is the determination of questions of law. That it necessarily follows from a determination of propositions of law that on uncontroverted evidence as it stands the commission must find the death was caused by accident, is not an invasion of its fact finding function. This was pointed out by our court in *Skaggs Co. vs. Nixon*, 97 Colo. 314, 50 P. (2d) 55. In that case we used the following language that in principle is applicable to the present case: "We hold, therefore, that the district court was correct in determining that there was competent evidence supporting the claim that Nixon was an employee of the Skaggs Company and that such evidence was uncontroverted. When the court determined these two matters of law, it necessarily followed that the commission, having found that there was no employment when the uncontroverted evidence showed employment, acted in excess of its powers, consequently such finding of fact could not stand. It is contended that the court substituted its finding of fact, that Nixon was an employee of the Skaggs Company, for the finding of the commission, but when the court's ruling is analyzed, the contention appears to be without merit. The commission found the existence of a negative condition—nonemployment. When the court found that there was competent evidence of employment and that it was uncontroverted, it was passing upon questions of law, and not making a finding of fact. The fact of employment followed from the findings of law, but in making findings of law from which conclusions of fact must of necessity follow, the trial court does not thereby usurp the fact finding function of the commission." The opinion in the case of *Carroll vs. Industrial Commission*, 69 Colo. 473, 195 Pac. 1097, while it does not fully set forth the reasoning employed in reaching the conclusion there reached, does not, we believe, lay down any other or different proposition from that stated in the Nixon case.

The direction of the trial court in this case was correct. Having found as a matter of law that there was uncontroverted evidence showing exertion and that exertion, under the circumstances, was an adequate cause of heart dilatation which produced death, and the findings of the commission on uncontroverted evidence clearly showing that such cause arose out of and in the course of the employment, under section 4481, C. L. 1921, it was proper for the district court to order the commission to enter the proper award. Since under the trial court's determination of questions of law it is inescapable that findings of accidental death must be made from uncontroverted evidence the court was acting within its powers and within the letter and spirit of the above section in ordering an award. The making of the findings of fact that necessarily follow from conclusions of law is but incidental to the making of the award under the situation here disclosed.

The judgment of the trial court is affirmed.

MR. JUSTICE BOUCK and MR. JUSTICE HOLLAND, dissent.

MR. JUSTICE HOLLAND, dissenting.

Mindful of the statute under the provisions of which a review of an award of the Industrial Commission in workmen's compensation cases may be had, and which provides that we may summarily review questions of law involved, I will not subscribe to an opinion by which it is evident that this court has constituted itself a fact finding body, particularly when it necessarily must, and did, *assume* a state of facts in order to arrive at the conclusions that follow. This court long has recognized the force and effect of the controlling statutes, and in cases too numerous to mention, has refused to disturb an award of the commission based upon its findings of fact, and since it is my firm conviction that the majority opinion herein has no other effect than a violation of this rule, I respectfully dissent.

As to whether or not there is a finding of fact by the commission which would support its award, in the present case can only be determined from such finding and award. These do not appear in the majority opinion, and their essential parts are as follows:

> "Claimant contends that her husband's death was the result of overexertion, electric shock and carbon monoxide poisoning. The evidence is uncontradicted that decedent's death was the result of a right dilation of the heart, and that carbon monoxide poisoning was not a factor. There was no evidence that decedent had received any electric shock even though under certain circumstances, which were not shown to exist, he might have. Neither is there any evidence that decedent at any time exerted himself strenuously or at all.
>
> "The commission finds that from the evidence that decedent's death was the direct result of heart failure, the cause of which could not be ascertained by examining surgeons. Claimant having failed to sustain the burden of proof that her husband's death was either caused or hastened by an accidental injury arising out of and within the course of his employment. It is ordered the claimant's claim * * * be and the same is hereby denied."

I am wholly unable to follow the reasoning and conclusions of the majority to the effect that there was competent evidence to prove exertion, even circumstantial. By way of illustration, they say that "Even in a criminal case, circumstantial evidence is sufficient to convict, if the jury is convinced by it." The difficulty in the case before us is that the circumstances revealed by the evidence did not convince the commission, whose province is to determine facts, and whose factual findings we cannot disturb. Neither do I understand that the commission did not discharge its function, in that it did not consider the evidence or did not make a finding as to the fact the evidence was competent to prove, that is, as to whether there was exertion as stated in the majority opinion. I believe that is exactly what the commission did, and it so declared and when it said "Neither is there

any evidence that decedent at any time exerted himself strenuously or at all," and when it made this declaration it was considering that very question, namely, exertion. The opinion says, "This is a conclusion of law." It is no more a conclusion of law, than what the opinion says was the duty of the commission, that is, that it should have made a finding as to the fact that the evidence was competent to prove; namely, as to whether there was exertion.

There properly could be no other finding by the commission than that made, if there was no substantial evidence of exertion, and I challenge anyone to discover any such evidence from a search of this record. We have consistently held in cases of this character that there must be sufficient and substantial evidence to establish that the accident arose out of and in the course of the employment, and that it had a direct causal connection therewith. If any inference may be drawn from the evidence, it can only be by the commission, and not by the court. Here the commission made its finding that there was no evidence that decedent exerted himself at all, and if there is to be a splitting of hairs as there has been by the majority in its opinion, there is no reason why the employer or insurer should not sit in at the operation. The only circumstance from which a weak inference of exertion by deceased could be drawn was that he was seen standing in a position as if about to crank the tractor motor. Possibly he did crank it but the establishment of a causal connection between his death and his employment cannot rest upon such possibility, conjecture or circumstance. Moreover, the ultimate question, assuming that an inference of "over-exertion" is permitted to be drawn by the court, rather than by the commission, is whether or not "over-exertion," if present, contributed to the heart failure. On this disputed question, the commission made a direct finding that the claimant had failed to sustain the burden of proof that her husband's death was either caused or hastened by an accidental injury—"over-exertion"—arising out of and within the course of his employment.

Had the commission drawn such an inference from the evidence, as this court now has so inconsistently done, its conclusion on such inference should not be disturbed; but if it weighs the evidence and draws no inference, then it has acted within its province. Summed up, to overthrow the finding of the commission, the majority, to justify its opinion, had to assume from circumstantial evidence, over-exertion. The commission said it did not exist. The majority then takes a further ill-considered step and overthrows the finding of fact by the commission against the claimant, based upon sharply conflicting medical testimony, that the heart condition "foramen ovale" could have caused the heart dilation on the one hand, and that over-exertion could have caused it on the other. If the rule laid down in the majority opinion is to be followed in this jurisdiction, then every disability occurring in the course of employment, irrespective of accidental origin may be included in the list authorizing recovery. I believe the judgment of the lower court should be reversed.

MR. JUSTICE BOUCK concurs in this opinion

MR. JUSTICE BOUCK, dissenting.

1. Under the Workmen's Compensation Act of Colorado ('35, C. S. A., Volume 3, pages 1309-1391, §§ 280-429) the Industrial Commission is the sole fact-finding body in compensation cases. If the commission fails in any instance or in any respect to act on an issue of fact the case must be sent back for its further consideration either upon the facts then before it or with the aid of a further hearing. Section 381, *ibid,* is clear: "If upon trial of such action (that is, one brought in the district court under section 378 by any person in interest who is dissatisfied with a finding order or award of the Industrial Commission) it shall appear that * * * the commission * * * has for any reason, not in fact heard and determined the issues raised, the court shall, before rendering judgment, unless the parties to such action stipulate to the contrary, transmit to the commission a full statement of such issue or issues not adequately considered, and shall stay further proceedings in such action until such issues are heard by the commission and returned to said court."

Our court's solicitude to enforce the above provision and to avoid judicial interference with the commission's exclusive fact-finding function is rather strikingly revealed in the case of *Black Diamond Fuel Co. vs. Frank*, 99 Colo. 528, 64 P. (2d) 797, where the writer, in a dissenting opinion, and the author of the present majority opinion in a partially dissenting opinion, shared and expressed the belief that the majority there were actually making even the universally recognized principle of "the law of the case" improperly yield to such solicitude.

The binding nature of the commission's fact-findings has been declared by this court times without number. See: *Industrial Commission vs. Dorchak*, 97 Colo. 142, 47 P. (2d) 396; *U. S. Co. vs. Industrial Commission*, 96 Colo. 571, 45 P. (2d) 895; *Tavenor vs. Indemnity Co.*, 84 Colo. 521, 272 Pac. 3; *Ellerman vs. Industrial Commission*, 73 Colo. 20, 213 Pac. 120; *Industrial Commission vs. Tanganiello*, 72 Colo. 140, 209 Pac. 903; *Weaver vs. Industrial Commission*, 69 Colo. 507, 194 Pac. 941; and the numerous authorities cited in those cases.

In the *Ellerman* case, *supra*, which in some respects bears a striking resemblance to the case at bar, Mr. Justice Burke declared: "If death was due to 'over-exertion' 'arising out of' the employment and would not have occurred save for such employment, then the 'over-exertion' was an 'accident.' * * * Much as we regret the necessity, it therefore becomes absolutely essential that this cause be remanded to the district court with direction to return it to the commission for additional findings of fact, and that the commission amend its findings by determining whether this death was due to over-exertion."

2. The majority opinion herein does not remand the case for further fact findings by the commission. Instead, it supersedes the commission altogether, even as the trial court did by a finding of its own that there was over-exertion, and an unqualified command to the commission to make an award of compensation. The ground assigned for so doing is this: "An erroneous finding that there

is no evidence of exertion, when the record discloses such evidence, is not equivalent to a finding that there was no exertion." In support of this reasoning a quotation is given from *U. S. Co. vs. Industrial Commission, supra,* as follows: "What constitutes evidence is a question of law." Assuming all this to be true, it necessarily follows that the proper remedy is to send the case back to the commission as fact-finding body to make a finding one way or the other on what this court says is evidence of exertion. Which brings me to the concrete matter of inquiring what the evidence in question was.

3. Time will not permit me to supplement the statement of fact given in the majority opinion or to analyze the evidence as a whole. No direct evidence of unusual or any exertion is in the record. The only evidence that could possibly be considered even circumstantial evidence is given by the witness Gindling.* There is not even circumstantial evidence to prove that if there was over-exertion it was the cause of death. According to some of the medical witnesses the death may have been due to purely natural causes, namely, a patent foramen ovale, which is clearly shown to be a congenital condition. The autopsy physician contradicts himself in a material matter: He testified he made no microscopic examination of the heart muscle but his unverified autopsy report says that he did. The weight of his expert opinion, based upon the same autopsy report on which the other and opposite expert opinions were based is for the fact-finding body to determine, not for any court. Gindling's testimony cannot lawfully constitute conclusive evidence that there was over-exertion and that it must necessarily have caused the dilation of the deceased's heart. To do that we must say the only inference to be drawn is that the employee did crank the tractor and did over-exert himself in so doing. But suppose the witness had testified that he actually saw the cranking and the alleged over-exertion. If a court must accept the evidence of a surviving witness as to what occurred when he and a person since deceased were the only ones present, then we may discard all the rules of evidence and say that the fact-finding body cannot exercise the customary power of judging as to the credibility of a witness and cannot, if it sees fit, reject what such body considers untruthful evidence. Then the most brutal murderer would entitle himself to a directed verdict of not guilty by successfully planning to kill only when a perjuring crony has been smuggled in as the only other living witness. Such of course is not the law.

It sufficiently appears from the foregoing that I am constrained to dissent because of the failure of the court to remand the case through the district court with directions to the commission to make proper findings and report them back to that court.

**Note.* "He was standing right in front of the Fordson. He had one hand on the Fordson. I don't know whether he was cranking it or whether he was going to crank it or just got through, or what. I was in a hurry." Then: "Q. Would you say in observing Mr. Wetz that he was in the position they stand in when they crank a truck? A. Yes." Later: "I know he was leaning on the radiator like that (illustrating)." Can this court say what corroboration or impeachment lay in that dramatization as testimony before the referee?

McNEIL COAL CORP. vs. CORCORAN.
100 Colo. 91
Judgment Affirmed

I. C. 91376 **65 P. (2nd) 1439** **Index No. 242**

In Department.
Per Curiam.
Judgment affirmed without written opinion.

ZELLE vs. INDUSTRIAL COMMISSION AND CLOUSE.
100 Colo. 116

I. C. 92265 **65 P. (2nd) 1429** **Index No. 243**
Judgment Affirmed

In Department.
HILLIARD, Justice.

A proceeding under the Workmen's Compensation Act. The commission awarded compensation and its award was favorably adjudged by the trial court.

It is contended: (1) That claimant was not injured in an accident arising out of and in the course of his employment; (2) that the employer is an "Interstate carrier, engaged solely in interstate commerce," hence not subject to the state compensation act; (3) that the evidence failed to show the employer employed four or more men in his business; (4) that the court should have remanded the proceedings to the commission for further showing and determination.

It appears that plaintiff in error, having a Wyoming license and Colorado permit to that end, but not having a federal permit, operated a number of trucks between Denver and points in Wyoming by means of which he serves a published list of customers by contract, but does not serve the general public; that in the afternoon of a given day, at Denver, he employed claimant, on a weekly wage basis, to drive one of the trucks to and from points in Wyoming; that preparatory to claimant's first trip, new tires were purchased for the truck he was to drive and in the course of their installation by the tire agency, the employer and claimant assisting therein, one of the tires exploded and injured claimant.

1. Considering the general nature of the employment, we cannot think that in engaging with his employer in replacing old tires with new on the truck he was hired to drive, claimant was proceeding other than in the course of his employment. Necessarily, we think, he would be expected to be active in furthering prep-

arations for the trip contemplated in his assignment. The fact that both he and his employer were aiding in the tire installation is consistent with the view that they regarded it as within the course of the employment. We so regard it.

2. In support of the contention that the employer is not subject to the compensation act, C. L. 1921, section 4384, is cited. It reads: "The provisions of this act shall not apply to common carriers engaged in interstate commerce nor to their employes." The answer is that plaintiff in error was not so engaged. A common carrier serves the general public. The truck operator here offered no such program of service—he only served those with whom he had pre-existing contracts. Shortly expressed, he was a "contract carrier." The distinction between the two kinds of service is well known generally, and is recognized by the United States Code. See Title 49 U. S. C. A. Sec. 303, paragraphs (14) and (15). Paragraph 14 reads: "The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of chapter 1 of this title." And paragraph 15 is as follows: "The term 'contract carrier by motor vehicle' means any person not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation." The quoted section of our statutes, claimed to exclude claimant, obviously is without application to the parties here and their relationship.

3. The evidence as to the number of plaintiff in error's employes, while not definite, was of sufficient probative force, we think, to warrant the commission's finding that "he employed four or more employes in the State of Colorado." The absence of denial on his part makes us less reluctant to uphold that finding.

4. All issues arising in the proceeding, as our study reveals, were presented to and determined by the commission. There was no occasion, therefore, for the trial court to re-refer the matter to that body. In such view, C. L. 1921, section 4476, called to our attention, is without point. We perceive no error.

It seems not inappropriate to observe that counsel for plaintiff in error was retained after the evidence had been taken.

Let the judgment be affirmed.

MR. CHIEF JUSTICE BURKE and MR. JUSTICE BAKKE concur.

ELLEMAN vs. INDUSTRIAL COMMISSION.

100 Colo. 120

I. C. 90336 **66 P. (2nd) 323** **Index No. 244**

Judgment Affirmed

In Department.

BAKKE, Justice.

This is a case brought under the Workmen's Compensation Act of this State, and the plaintiff in error is suing for herself and in behalf of Helen Irene, Mary Evelyn, Geneva Louise and Doris Enola, minor daughters. The action is against the Industrial Commission and Jardine and Knight Plumbing and Heating Company, a corporation, the employer, and Associated Indemnity Corporation, insurer. Judgment below was for defendants in error and the claimant assigns error here.

The matter was twice before the district court of El Paso County. The first time, the court below, not being satisfied with the findings of fact of the commission, sent it back for further consideration and upon its coming back to the district court the findings of the commission were affirmed.

The facts are substantially as follows: Wallace M. Elleman had been employed by the Jardine and Knight Plumbing and Heating Company for approximately two years as a truck driver. In the fore part of February, 1936, he made a trip to Yuma, Arizona, from which place he returned to Colorado Springs on February 2, 1936, with a slight cold and quite fatigued. He rested on the following day and returned to work on February 4, 1936.

His employer had a contract to install a boiler in a school house at Edison, Colorado, and on February 3, 1936, it sent men and the boiler and other equipment in a truck, but they were forced to turn back on account of a blizzard. It was imperative that the boiler be in place for the opening of school on the 5th of February. Elleman driving the truck and accompanied by three other fellow employees succeeded in reaching the Edison school on February 4th. They had been instructed to complete the job before returning. They worked that day and night and a part of the following day, a period of approximately thirty hours before the job was complete. Elleman helped the others in assembling the boiler. His particular job consisted largely in helping to cut a hole through an 18-inch concrete wall at a point directly above his head. While doing so he inhaled more or less dust which arose from the cutting of the concrete. In order to effect better ventilation the windows in the basement where they were working were opened. The weather was very cold and the only heat they had was from the torches that they were using in their work.

Elleman returned to Colorado Springs on February 5th and was all worn out and retired without eating. However, he got up and reported for work again on February 6th, but was unable to work for the full day and returned home in the afternoon. A physician, Dr. Loub, was called on February 9th, to whose treatment Elleman did not respond and he died on February 14, 1936, of bronchial pneumonia.

The contention of counsel for plaintiff in error was that there was no evidence upon which the commission and the lower court could base their judgment that the inhalation of the cement dust was not the proximate cause of death.

The death certificate was made out by Dr. M. F. Loub who attended the deceased. He recites that bronchial pneumonia was the principal cause of death, and that the contributing cause of importance was that the deceased "had just worked thirty continuous hours exhausted him," that there was no accident or injury.

Section 990, C. L. 1921 (35 C. S. A., c. 78, sec. 128) provides that such certificate when certified by the proper officer "* * *" shall be prima facie evidence in all courts and places of the facts therein stated."

The contents of a death certificate may not be disposed of by a simple wave of the hand and a statement that it does not mean what it says. The doctor who makes it out certifies as to the correctness of its contents at the time he makes it out, and, where we have a situation, as we do here, that Dr. Loub who made out the certificate in the first instance sought to explain away the legal effect of what he had certified to, the referee and commission were justified in considering that circumstance carefully. Dr. Loub had been the Elleman family physician for seven or eight years and he admitted that the deceased might have had a slight touch of grippe on his return from Arizona.

It was not prejudicial error to ask Dr. Winternitz, a medical expert, whether death was the result of an accident based upon his examination of the death certificate alone. It is reasonable that such an expert can make certain deductions from the contents of a death certificate, and in this case it was at least corroborative testimony. *Bickes vs. Travelers Ins. Co.*, 87 Colo. 297, 287 Pac. 859.

Mrs. Elleman admitted on direct examination that her husband was tired from the recent trip and that "he probably had a slight cold, but not much."

Whatever caused Elleman's death took place in the early part of February, a season when death from pneumonia is not uncommon. The commission had a right to take that into consideration.

This is not a case where the evidence in support of the judgment is so weak as to amount to no evidence. Citing *Rosenkranz vs. Industrial Commission*, 83 Colo. 123, 262 Pac. 1014. There was sufficient competent evidence to support the findings. That being true it is not within the province of this court to disturb the judgment. *Industrial Commission vs. Hammond*, 77 Colo. 414, 236 Pac. 1006; *Industrial Commission vs. Robinson*, 85 Colo. 279, 275 Pac. 903; *Colorado Fuel & Iron Company vs. Industrial Commission*, 85 Colo. 237, 275 Pac. 910; *Employers' Mutual Ins. Co. vs. Industrial Commission*, 83 Colo. 315, 265 Pac. 99, and *Industrial Commission vs. Diveley*, 88 Colo. 190, 294 Pac. 532.

The judgment is affirmed.

MR. CHIEF JUSTICE BURKE and MR. JUSTICE HILLIARD concur.

ALLEN vs. GADBOIS.

100 Colo. 141

I. C. 74090 **66 P. (2nd) 331** **Index No. 245**

Judgment Reversed

In Department.

HOLLAND, Justice.

This is a Workmen's Compensation case, and we refer to plaintiffs in error as plaintiffs, and the defendants in error as claimant and the commission, respectively.

Claimant suffered a conceded compensable injury March 5, 1932, serious in nature, consisting of multiple fractures of the pelvis and accompanying injuries in that region. Claim was made for compensation, liability was admitted, and on evidence presented before a referee of the commission on two hearings, an award was entered June 1, 1933, based on the finding that temporary total disability ended January 1, 1933, and permanent disability of five per cent as a working unit existed. This award was accepted and the compensation awarded thereon paid in full. On claimant's petition for review, filed August 13, 1934, further proceedings were ordered, resulting in four hearings, the last on November 2, 1934, following which the commission, December 5, 1934, found that claimant had failed to show error, mistake or change of condition; that his disability was no greater than originally found, and award was entered accordingly. This award was made final December 14, 1934, after petition for review was denied. Nearly a year later, November 18, 1935, on claimant's petition, the commission ordered a further hearing to determine if there was error, mistake or change in condition. Three hearings followed, and May 13, 1936, the commission again entered a supplemental award, finding claimant had not established any change in condition, error or mistake.

Thus the commission had, for four years, consistently concluded that claimant had failed to establish any error, mistake or change in condition; however, on his petition for rehearing, filed June 11, 1936, and without a hearing or evidence, the commission, August 14, 1936, entered an award, parts of which are as follows:

> "The commission now finds from the evidence that on prior reviews, it improperly weighed the evidence herein and that its order of May 13th, 1936, was in error and should be vacated, set aside and held for naught.
>
> "The commission now finds that as a result of said injury, claimant is disabled by reason of a psycho neurosis together with genito-urinary complications to the extent of 40 per cent as a working unit. Claimant's age is 43 years. His expectation of life is 35.99 years."

On this award additional compensation was ordered for permanent partial disability in the sum of $3,640. In an action duly instituted in the district court, this award was affirmed, and this judgment of affirmance is here presented for review.

While specific errors relating to the insufficiency of the evidence to support the findings are assigned, we prefer to consider and determine the case upon the assignment that the court erred in failing to hold that the findings made by the commission do not support the award.

In Workmen's Compensation cases the sufficiency of a finding must appear upon its face, and, as we have often held, reasons for findings are mandatory. *Sherratt vs. Fuel Co.*, 94 Colo. 269, 30 P. (2d) 270; *Rocky Mountain Fuel Co. vs. Canivez*, 96 Colo. 198, 40 P. (2d) 618; *Rocky Mountain Co. vs. Sherratt*, 96 Colo. 463, 45 P. (2d) 643. In the latter case, we said that the statement, "that reasons for findings are mandatory * * * applies to errors as well as changed conditions," and added that "mere change of mind with no statement of sufficient reasons therefor, is no compliance with the law."

The finding above quoted, of which complaint now is made, "that on prior reviews, it improperly weighed the evidence, * * *" would be a sufficient statement of a conclusion upon which to grant a rehearing, and on such rehearing—if the same conclusion persisted—to change the award, there being a sufficient statement of reasons for the change, but to enter the award above set out upon the simple statement that the evidence had been improperly weighed on prior reviews, and to do so without additional hearing, or evidence, and this upon the heels of consistent contrary findings, establishes with crystal clearness that the prohibited "change of mind" without stated reasons, occurred. To approve such procedure would permit alternating changes of awards with high frequency, and without end, during the life or existence of the parties to the controversy. Litigation must reach its terminus. We therefore reiterate with confirming approval, what we announced on this subject in the cases above cited, and express the hope that future restatements will not be necessary.

The judgment is reversed and the cause remanded with directions to the district court to send the case back to the commission for such proceedings as may follow in the light of this opinion.

MR. CHIEF JUSTICE BURKE and MR. JUSTICE KNOUS concur.

WOOD vs. INDUSTRIAL COMMISSION et al.
100 Colo 209
I. C. 92231 **66 P. (2nd) 806** **Index No. 246**
Judgment Affirmed

En Banc.

BAKKE, Justice.

This is an action brought under the Workmen's Compensation Act.

From the record it appears that Arthur R. Wood, a glazier, was employed to put window panes in an elevator under construction in Adams County; that he was working at this task on July 2, 1936, and that during the afternoon on said date was found dead. He had been working on a scaffold about two feet high. The coroner being called was unable to find any actual cause of death, such as a fracture or a definite fall, and without holding an autopsy made a return on the death certificate that death was due to heart trouble, and that the contributing cause of death was heat exhaustion and heat stroke.

J. T. McDowell was the general contractor in charge of the construction of said elevator, and McMurtry Manufacturing Company had contracted to do the glazing, but on account of the job being a non-union job, it was unable to carry out its contract and the decedent was induced to take over the glazing of the building. McDowell claimed that the McMurtry Manufacturing Company was the employer of decedent and McMurtry Manufacturing Company contended that McDowell was the employer, but in view of the conclusions that the court has reached in this case it does not become necessary for us to determine who the actual employer was. The commission found that Wood was employed by McDowell and the action was dismissed as against the McMurtry Manufacturing Company which makes no appearance here.

The testimony shows that it was a very hot day, but there was no statement as to what the actual temperature was.

Plaintiffs in error, being the widow and minor child of the decedent, filed their claim before the Industrial Commission. The matter was duly heard before the referee and the award of the commission was to the effect that: (1) The decedent's death was due to heart failure and not due to accidental injury. (2) The claimants failed to establish any accidental injury to the decedent within the meaning of the Compensation Act.

A petition for review was denied. The plaintiffs in error then filed their complaint in the district court, which in turn affirmed the finding of the commission and award, whereupon plaintiffs in error sued out their writ of error to this court.

Under the well recognized rule, it is therefore only necessary for this court to determine whether or not there was sufficient competent evidence upon which the findings of fact by the commission can be supported.

The commission found, as above stated, that the decedent died from heart failure. The record discloses that decedent's wife when testifying on cross-examination admitted that her husband had heart trouble, but said that it had never hothered him. Claimants also admitted that the decedent had a life insurance contract which provided for double indemnity in case of accidental death, and that the said double indemnity had not been paid. The decedent's mother testified that he had a serious attack of rheumatism when he was a boy and that he had suffered two heart attacks following the rheumatism. The undisputed evidence

was also that the deceased was very obese. The cause of death as given on the death certificate was chronic valvular mitral disease. Dr. J. W. Wells, county coroner of Adams county, who signed the death certificate, also described the cause of death as dilatation of the heart and that the contributing cause was no doubt heat exhaustion and heat stroke.

Dr. Wells also testified that the decedent had apparently started his work on the east side of the building where he worked in the morning sun; that he worked on the south sometime during the noon hour and was working on the west side of the building in the afternoon. It is admitted that it was a very hot day, but nothing to indicate that it was any hotter around the building where the decedent was working than elsewhere in the community.

The only other medical testimony was that offered by Dr. L. W. Soland who stated that while the decedent had no organic heart trouble that "his obese condition during the hot weather could have a great deal of bearing on something of this sort." Dr. Wells further testified that the decedent might have died suddenly any time, anywhere.

A search of the Workmen's Compensation cases in this state discloses none where claim has been made for compensation based on death or injury from sunstroke. A review of the cases from other jurisdictions indicate that such injury or death is compensable where there is no question about injury or death being caused by sunstroke, but where there is evidence of other contributing factors the general rule is as follows: "The mere fact of sunstroke does not constitute a death resulting therefrom an 'accident' within the statute, and harm resulting from a heat stroke is compensable only where the heat stroke is the direct and superinducing cause of the harm." 71 C. J. 625.

We feel that there was sufficient competent evidence upon which the commission based their finding that the decedent died of heart failure.

Counsel for plaintiffs in error rely strongly upon the case of *Carroll vs. The Industrial Commission*, 69 Colo. 473, 195 Pac. 1097. However, that case is substantially different from the one here under consideration. In that case the decedent was working at hard physical labor in an inclosed building where the air was laden with dust as a result of handling hay, alfalfa, meal and machinery, and it is apparent that the decedent came to his death because of inability to breathe properly whereby his heart condition was aggravated to the extent of causing his death. The court in that case found no difficulty in establishing the causal relationship between his employment and his death. In the instant case, however, there is no testimony that the working conditions were unusual for that season of the year and there is no evidence of any exertion. We see no particular similarity between that case and this one. As the court said in that case, "the dust laden condition of the air was the cause and the fatal attack of heart failure was the result."

We have carefully reviewed the heat and sunstroke cases in the notes in 20 A. L. R. 42; 53 A. L. R. 1085; 61 A. L. R. 1197; 73 A. L. R. 516 and L. R. A. 1918F, 936, and in none of these cases do we find any situation sufficiently analogous to the instant one that would justify us in setting aside the award of the commission in this case. The burden was upon the claimant to establish the causal relation between the alleged sunstroke and the death of her husband by competent evidence. At no stage of the proceedings herein did that burden shift, and she failed to sustain it.

Judgment affirmed.

HALLACK AND HOWARD LUMBER CO. vs. BAGLY.

100 Colo. 402

I. C. 89263 **68 P. (2nd) 442** **Index No. 247**

Judgment Affirmed

In Department.

BAKKE, Justice.

This is a proceeding under the Workmen's Compensation Act in which plaintiffs in error are seeking to reverse a judgment of the lower court which affirmed an award of compensation by the Industrial Commission to the defendant in error, Martin M. Bagly. The Lumber Company as the employer and the Casualty Company as the insurer, were respondents below. Defendant in error Bagly was the claimant.

Bagly was injured on the 28th of October, 1935, while working in the shop of the Lumber Company. He and a fellow employe were operating a rip saw when a board being handled by the latter apparently was caught by the saw and thrust against Bagly, striking him in the left groin. His being struck by the board did not knock him down, but he turned around and sat down a moment. He then went outside and sat down for ten or fifteen minutes suffering considerable pain. It was all he could do to walk down the stairway.

It appears that Bagly had had abdominal trouble before which resulted in an operation for hernia in 1930. His contention here is that his being struck by the board caused a new hernia slightly below where the old one had been.

He received medical attention on the same day that he was injured from Doctors Blanchard and Packard who apparently found no hernia at that time, but did find a definite tenderness over the left groin. He continued to have pain and it was subsequently discovered that he did have hernia.

The referee found that the hernia was due to the accident of October 28th and that the appearance of the hernia was accompanied by pain, which finding was subsequently affirmed by the Industrial Commission and later by the district court.

To dispose of this matter it is only necessary to determine whether the requirements of Section 359, c. 97, p. 1356, vol. 3, '35 C. S. A. (sec. 80 W. C. A.)

have been met. This section provides: "An employe in order to be entitled to compensation for hernia must clearly prove: first, that its appearance was accompanied by pain; second, that it was immediately preceded by some accidental strain sufferred in the course of the employment."

Also whether or not the conditions laid down by this court in *Central Surety & Ins. Corp. vs. Industrial Commission*, 84 Colo. 481, at 484, 271 P. 617, have been met. The rule laid down in that case was as follows: "Hernia is a protrusion of any viscus or tissue through an abnormal opening in the cavity in which it is normally confined. * * * We must also note that the statute requires not the hernia, but the appearance of the hernia, to be accompanied by pain. Webster's New International Dictionary gives the following definitions: 'appearance, 1, act of appearing.' 'Appear, 1, to come or be in sight; to be in view, to become visible.' * * * 4. To become visible or clear to the apprehension of the mind; to be known as a subject of observation or comprehension, or as a thing proved; to be obvious or manifest."

The award is being attacked here because there was no external evidence of the rupture on the same day that the accident happened, but the claimant testified that the injury developed into a rupture. Then the question naturally arises—was the commission justified in making the inference that the accident caused the hernia.

The testimony is conflicting as to when the hernia was ascertainable by the doctors. The inference drawn by the commission that the hernia was caused by the accident was a reasonable one and we have held that the outward evidences of an injury need not become immediately apparent. It is sufficient if the injury complained of was set in motion or caused by the accidental injury becoming apparent in a reasonable time. *Century Surety & Ins. Corp. vs. Industrial Commission, supra*, p. 491; *Reed vs. The Mass. Bonding & Ins. Co.*, 98 Colo. 257, at 260, 57 P. (2d) 697.

It was apparently evident to someone that there was a possibility of a hernia at the date of the accident, because the employer in filling out his report with the commission on the 13th of November stated in response to the question, "describe fully how accident occurred and what employe was doing at the time," that he "was bumped in right groin with small board—maybe slight rupture," and Bagly's statement was that the accident caused a slight hernia.

Counsel for plaintiffs in error contends that because the attorney general argues in his brief that the injury in this cause would be compensable because of an accident arising out of claimant's employment, it constitutes an abandonment of the hernia as a basis for compensation. Such is not the law. If the facts established are sufficient to cover two causes of action the court might so treat the complaint. Citing *Sullivan vs. Valiquette*, 66 Colo. 170, 180 P. 91; *Bradbury vs. Brooks*, 82 Colo. 133, at 136, 257 P. 359.

The worst that can be said about the evidence in the case was that it was conflicting, but there was sufficient competent evidence upon which the commission could and did base its findings, and since, under the Workmen's Compensation Act this court is precluded from disturbing findings based upon sufficient evidence, the judgment will be affirmed.

MR. CHIEF JUSTICE BURKE and MR. JUSTICE HILLIARD concur.

RIO GRANDE MOTOR WAY, INC. ET AL. vs. DE MERSCHMAN.

100 Colo. 421

I. C. 72314 **68 P. (2nd) 446** **Index No. 248**

Judgment Affirmed

In Department.

BURKE, Chief Justice.

These parties are hereinafter referred to as follows: The Rio Grande Motor Way, Inc., as the corporation; The Travelers Insurance Company, as the Insurance company; Albert DeMerschman, as claimant; and the Industrial Commission of Colorado as the commission.

This is a Workmen's Compensation case. Claimant was master mechanic for the corporation, whose industrial insurance was carried by the Insurance company, at a salary of approximately $250.00 per month. He was injured November 2, 1931, in an accident arising out of and in the course of that employment. He filed with the commission his claim under the Workmen's Compensation Act, applicable to all parties hereto. From the beginning to the end of hearings, awards, and supplemental awards, he maintained, and the commission found, that he was totally and permanently disabled. To set aside the final award the corporation and the Insurance company brought this action in the district court. The court affirmed the award, and to review that judgment this writ is prosecuted. No contention is here made that claimant is not permanently disabled but it is stoutly maintained that his disability is not total. Such is the sole question of moment before us.

There is no substantial conflict in the evidence. Claimant's injury was caused by an explosion which deluged him with flaming gasoline. He is afflicted with deep and extensive adhesions due to burns. Various physicians estimated his disability at 65 per cent to total. One expressed the rather speculative opinion that "permanent disability could be brought down to 35 or 40 per cent, probably, by plastic surgery." Claimant has no special training, skill, or fitness for other than auto mechanical work. He testified he was burned so deeply about his shoulders "it is impossible for the skin to grow back over them and they are left in a bleeding condition most of the time." "My arms are bound down to my side and I can't move them enough to perform any kind of work." His brother is, and was at the time of the accident, president and general manager of the corporation. Thinking

"it would be a good thing for him to do something in more or less of a supervisory capacity," he gave him such employment at $175 per month, which his board of directors ordered reduced to $125. This employment appears to arise solely from the corporation's recognition of a "moral responsibility," plus the influence of its president, claimant's brother. It is undisputed that the job was "created" in response thereto. We think the conclusion inevitable that it has no relation to earning power, that it is in fact charitable, a mere gratuity, which in all probability would vanish with the death, disability, or discharge of the brother, leaving claimant mere flotsam on the industrial sea. At most, under such circumstances, the matter rests in the commission's discretion, of which we discover no abuse.

Whether degree of disability be determined from general impairment, or impairment of capacity to perform specific work, or both, depends upon the facts of each case, and thereto the commission is vested with the "widest possible discretion."

Globe Indemnity Co. vs. Industrial Commission, 67 Colo. 526; 186 Pac. 522.

An injured workman is not to be denied a finding of total and permanent disability because not the victim "of helpless paralysis reducing bodily functions to the minimum essential for the maintenance of a mere spark of life." And though "able to obtain occasional employment under rare conditions and at small remuneration" (the equivalent of precarious employment at half salary through family influence, as a matter of charity, or the recognition of a moral responsibility, or as a mere gratuity) one may still "be totally disabled for all practical purposes of competing for remunerative employment in any general field of human endeavor."

N. Y. Ind. Co. vs. Industrial Commission, 86 Colo. 364; 281 Pac. 740.

Neither are we impressed with the contention of plaintiffs in error that Sec. 352, chap. 97, p. 1349, vol. 3, '35, C. S. A. (Sec. 4447, C. L. 1921) governs. This is based upon the theory that claimant's injury is limited to the loss of the use of his arms. The evidence, however, shows that it goes much beyond that. Were it otherwise we have heretofore answered the argument.

Leyden L. Co. vs. Buddy, 98 Colo. 452; 56 Pac. (2d) 52.

The judgment is affirmed.

MR. JUSTICE HILLIARD and MR. JUSTICE BAKKE concur.

KING vs. O. P. BAUR CONFECTIONERY CO.

100 Colo. 528

I. C. 84376 **68 P. (2nd) 909** **Index No. 249**

Judgment Reversed

In Department.

KNOUS, Justice.

The parties here are in the same position as in the court below and we shall refer to them as plaintiff and defendant. Plaintiff, on November 9, 1934, while employed by the American District Telegraph Company, to whom we shall hereafter refer as the employer, in the course of checking certain apparatus of his employer, on the premises of the defendant, fell into an unguarded ashpit thereon and received critical burns. He was immediately taken to a hospital for treatment. Plaintiff and his employer were both subject to the provisions of the Workmen's Compensation Act, and pursuant to the requirements of this act, in apt time the employer reported the accident to the Industrial Commission. Thereafter the employer prepared the plaintiff's wage history on the form prescribed by the commission, which form was presented to the plaintiff for his signature, and signed by him. This wage history, together with an admission of liability, signed by the employer and the employer's insurance carrier, Hartford Accident and Indemnity Company, were filed with the commission on November 22, 1934. The admission of liability was forthwith stamped: "Approved, subject to further claim according to law," and initialed by the statistician for the Industrial Commission. Pursuant to the admission of liability the insurance carrier paid to the plaintiff the sum of $12.97 per week, being 50% of the average weekly wage shown by the wage history. These payments commenced as of November 19, 1934, and continued until May 6, 1935, and were regularly received and receipted for by the plaintiff. The insurance carrier also paid all medical and hospital bills contracted in connection with plaintiff's injury in the total sum of $688.80. On May 9, 1935, the plaintiff wrote a letter to the Industrial Commission stating that it was his intention to pursue his remedy against the defendant and that notice of his intention was given to the commission in accordance with the provisions of the act and particularly Sec. 4461, C. L. 1921. On May 10, the commission, through one of its referees, upon the basis of plaintiff's letter, wrote to the insurance carrier as follows: "We are advised that the claimant is electing to pursue his remedy against the third party. We are closing this case." No further action was taken by the Industrial Commission, no further payments were made by the insurance carrier, and the plaintiff at no time filed a claim for compensation with the Industrial Commission. On June 26, 1935, the plaintiff commenced this action for damages in tort against the defendant. On the trial of the cause the court directed a verdict for the defendant upon its motion on the ground that under the provisions of Sec. 4461, *supra*, any cause of action the plaintiff might have against the defendant, by operation of law, had been assigned to the insurance carrier and thereby the plaintiff had no right to maintain this action in his own name and right.

Under the pleadings and a stipulation of the parties as to the essential facts, the correctness of the ruling of the trial court is the only question to be determined.

Section 4461, supra, in so far as it is material here, reads as follows:

"If an employe entitled to compensation under this act be injured or killed by the negligence or wrong of another not in the same employ, such injured employe or in the case of death, his dependents, shall before filing any claim under this act, elect in writing whether to take compensation under this act or to pursue his remedy against such other. Such election shall be evidence in such manner as the commission may by rule or regulation prescribe. If such injured employe, or in case of death, his dependents, elect to take compensation under this act, the awarding of compensation shall operate as and be an assignment of the cause of action against such other to the industrial commission of Colorado if compensation be payable from the state compensation insurance fund, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation; * * *"

Before the claim of a compensable employe against a third person is assigned by operation of law to the insurance carrier under the provisions of Sec. 4461, *supra*, there must first have been an election in writing by the employe to the effect that he will take compensation under the act, and secondly, the awarding of compensation to him. The defendant contends that the acts of the plaintiff in signing the wage history form, accepting and receipting for the payments made by the insurance carrier, constituted an election on his part to come under the act and that the approval of the admission of liability on the basis of the wage history furnished by the employer and signed by the plaintiff constituted an awarding of compensation within the meaning of the statute, and thereby effectuated a complete assignment of the alleged cause of action to the insurance carrier.

The defendant also asserts that by receiving and receipting for the payments mentioned the plaintiff is estopped to deny that the action of the commission in approving the admission of liability was not an awarding of compensation.

In the consideration of these questions it must be borne in mind that a different situation exists here, especially with reference to election and estoppel, than would be the case where an injured employe sought to enforce his common law liability against his employer after the transactions here disclosed with the Industrial Commission and insurance carrier had transpired. As the matter stands the defendant is a third party to the proceeding. This distinction is well pointed out by Mr. Justice Hilliard, who delivered the opinion of this court in the case of *Froid vs. Knowles*, 95 Colo. 223, 26 Pac. (2d) 156, in the following words, page 226:

"What plaintiff received from or through his employer resulted from relation; what he seeks from defendant is based on the latter's alleged fault. To the Workmen's Compensation Act, the purpose of which is 'to determine, define and prescribe the relations between employer and employe,' defendant was as a stranger. 'An outsider does not share the burden of the act, imposed upon the employer, and he is entitled to none of its benefits.' *Hotel Equipment Co. vs. Liddell*, 32 Ga. App. 590, 124 S. E. 92."

The general rule on this subject is stated in 71 C. J., p. 1547, Sec. 5187, as follows:

"Where the act provides that the injured workman shall elect whether to take under the act or to seek a remedy against a person not in the same employ whose negligence was the cause of the injury and that such election shall be in advance of suit. The provision for election in advance of suit is for the benefit of the state in the administration of the accident fund, and not for the benefit of the third person, * * *."

Numerous cases have been decided by courts of last resort on questions of the procedure to be followed in the enforcement of third party liability but the statutes of the various states differ so widely in their terms and provisions that the decisions based upon such statutes are not greatly helpful to us in the interpretation of the Colorado act.

The parties, however, are seemingly in concurrence on the proposition, as the statute clearly indicates, that the "awarding of compensation" is the effective force which assigns the cause of action by operation of law. The determination, therefore, of the question of whether or not there was here in fact an awarding of compensation is necessarily decisive. As we have indicated, the act of a statistician of the Industrial Commission in approving the admission of liability, which was accompanied by the wage history signed by the plaintiff, is relied upon by the defendant as amounting to the awarding of compensation. It is certain that this informal approval does not constitute such a final award of the commission as would be subject to review by a court. The defendant concedes this but claims that the above mentioned action of the statistician under Rule 11 of the Commission, created a condition whereby the insurance carrier was bound to continue the payments unless relieved from this responsibility by a further order of the commission. Notwithstanding this we do not believe that these circumstances amount to an "awarding of compensation" as contemplated by Sec. 4461, *supra*. The rules of procedure of the Industrial Commission as adopted and promulgated under authority of the Workmen's Compensation Act (Rule 11) recognize three different situations under which compensation is to be paid. First, by admission; second, by order; or third, by award. The case here is clearly one where liability was established by admission as distinguished from cases where the liability was imposed by order or award and might be defined more correctly as a "voluntary paying of compensation" rather than as an "awarding of compensation."

The right of election insured to an injured employe who may have a cause of action in tort against a third party undoubtedly contemplates the opportunity for deliberation followed by some affirmative action on his part

before he can be said to have elected to take compensation. The only act contributed by the plaintiff to the alleged award of compensation in this case was the signing of the wage claim which had been prepared and was tendered to him apparently either by his employer or by the insurance carrier. Under Rule 10 of the Industrial Commission it is required that "admission of liability for compensation must be accompanied by or contain a statement showing the basis of computing the average weekly wage." So it could be said that in signing this form the plaintiff was not affirmatively pressing his claim for compensation but was assisting his employer and the insurance carrier in doing the thing the law required them to do.

Rule 13 of the Industrial Commission adopted pursuant to the express provisions of Sec. 4461, *supra*, in relation to what shall constitute the election therein given, provides, in part:

> "The filing of any claim by a claimant under the Compensation Act as provided by Section 87, in those cases where the employe is injured or killed by the negligence or wrong of another, * * * shall constitute the written election of the claimant to take compensation under the Compensation Law."

Certainly the acts of the plaintiff cannot be construed as constituting the filing of a claim for compensation under the rule nor be considered the written election contemplated by the statute itself.

Where no award of compensation has been made, as we have determined the fact to be here, an action by the injured employe against a third party is not precluded by the receipt of payments from the employer or the insurance carrier. This seems to be the general rule in states where the operative agency in the assignment of a cause of action is the awarding of compensation, as is the case in Colorado.

71 C. J., p. 1543, Section 1582;
Godfrey vs. Brooklyn Edison Co., 187 N. Y. S. 263;
Sifkowitz vs. International Ry. Co., 249 N. Y. 565, 164 N. E. 585;
Hodges vs. Bewley Truesdale C. Co., Inc., 247 N. Y. S. 414.

Neither does the mere acceptance of medical, surgical or hospital aid by the employe constitute an election to take compensation.

71 C. J., p. 1545, Sec. 1584;
Wahlberg vs. Bowen, 229 Mass. 335, 118 N. E. 645;
Harloff vs. Merwin, 172 Wis. 30, 177 N. W. 913.

Of interest in this connection is the case of *Liston vs. Hicks*, 277 N. Y. S. 19. There the injured employe did not claim compensation but his employer filed a report of the accident with the commission. The commission sent a blank form of claim for compensation to the employe who signed the form and returned it, and later received a check for compensation which he cashed. Subsequently, without notice to the employe, a hearing was had and the commission made a formal award. After this award was entered the employe sought a rehearing at which he learned for the first time that he had a right of action against the third person for causing his injuries. He thereupon offered to return the compensation and the commission rescinded the award and remitted the employe to his remedy against a third person. Under a statute similar to ours the reviewing court held that the employe had not elected to take compensation and was not divested of his cause of action against the third party.

Likewise, we are satisfied, that whatever may be the situation as between the plaintiff and his employer and the insurance carrier, no question of estoppel arises as between the plaintiff and the third party defendant.

Cases of the character of the *Independence Coffee and Spice Co. vs. Taylor*, 97 Colo. 242, 48 Pac. (2nd) 798, to the effect that a completed bona fide settlement between the employer or insurance carrier and the injured employe, informally approved by the commission, is equivalent to an award or judgment reached upon evidence, have no bearing in the case at bar, since there is no evidence here of any arrangement equivalent to a final settlement. Furthermore, the case mentioned is between the employer and insurance carrier and the employe.

Neither do we believe the New York cases of *Lunn vs. Andrews*, 274 N. Y. S. 432, or *Breital vs. Hinderstein*, 258 N. Y. S. 237, 236 App. Div. 203, are helpful to the defendant. In the first case there was a definite and formal award of compensation made by the commission and the reviewing court simply held that this award acted as an assignment of the cause of action of the employe against a third party and the estoppel was applied because of the fact of such award. In the *Breital vs. Hinderstein* case, *supra*, the injured employe sought, first, to enforce his common law right against a third person, and thereafter discontinued this action and claimed compensation. It was held that the election evidenced by bringing suit was binding upon the plaintiff and he could not later assert his right for compensation. To the same effect is the case of *Industrial Commission vs. Schaefer Realty Co.*, 98 Colo. 445, 56 Pac. (2nd) 51. The judgment is accordingly reversed.

MR. CHIEF JUSTICE BURKE and MR. JUSTICE HOLLAND concur.

GARDEN FARM DAIRY vs. DORCHAK.
102 Colo. 36
I. C. 77433 **76 P. (2nd) 743** **Index No. 250**
Judgment Affirmed

In Department.
BAKKE, Justice.

This case is under the Workmen's Compensation Law of Colorado, which was on a previous occasion before this court for consideration, and is reported in 97 Colo., p. 142, 47 P. (2nd) 396, (*Industrial Commission vs. Dorchak*). The

facts giving rise to the litigation are sufficiently set forth therein to avoid necessity of repetition here.

The case was remanded to the district court for further proceedings in accordance with the opinion.

A part of the proceedings required of the district court was that it should again refer the matter to the Industrial Commission, and that said commission should determine and set out its findings as to:

"(a) Whether there was a preexisting diseased condition; (b) what that diseased condition was; and (c) whether it was aggravated by the occurrence shown in evidence and relied upon as an accidental injury."

Industrial Commission vs. Dorchak, supra, p. 148.

Pursuant to said opinion the matter was again considered by the Industrial Commission, which on the twenty-fifth day of February, A. D. 1936, reversed itself and entered its supplemental award, which, omitting the formal portions, reads as follows:

"In the above entitled cause, the commission having reviewed the entire file herein, including the order of the district court, and the further testimony taken herein and being now fully advised in the premises finds:

"That the claimant sustained an accident arising out of and in the course of his employment September 3, 1932. The accident occurred while he was unloading milk from a truck to a dock. At that time he slipped on some garbage in the alley and fell backward with a case of milk bottles on his chest and stomach. He continued to work until October 4, 1932, at which time he was compelled to quit work. His average weekly wages were $15.34.

"The claimant is at the present time suffering from multiple sclerosis, which is a disease that is subject to intermissions and recurrences. There is conflicting evidence between the neurologists as to whether the multiple sclerosis preexisted the accident. However, until that time he had been a well man in good condition and able to work steadily. After the accident he continued to work through the day. He was sick and vomited that night. However, he continued to work until October 4, 1932, at which time he became paralyzed. He was treated on September 7, 1932, by Dr. Leo L. Spears and associates, and on November 28, 1932, Dr. L. Clark Hepp made an examination of the claimant's spinal fluid.

"The commission further finds that the previous awards of this commission were based upon error and mistake. The commission finds that the claimant was disabled 25 per cent as a working unit by reason of his accident, and that such disability has existed since October 4, 1932, such disability being due to aggravation of the condition of multiple sclerosis.

"It Is Therefore Ordered: That the respondents above named pay compensation to the claimant at $7.67 per week beginning October 4, 1932, and continuing monthly thereafter until the full sum of $3,522.76 is paid.

"And This Commission does hereby retain jurisdiction of this claim until the same is finally and fully closed.

"In Witness Whereof, the Industrial Commission of Colorado has caused these presents to be duly executed this twenty-fifth day of February, A. D. 1936."

Which said award was, after further proceedings, reaffirmed in the commission's supplemental award of the sixteenth day of March, A. D. 1936, which, omitting the formal portions, reads as follows:

"In the above entitled cause, the commission having reviewed the entire file and particularly their award of February 25, 1936, as prayed by the claimant's petition for review filed herein March 11, 1936, and being now fully advised in the premises, finds:

"That the award of this commission dated February 25, 1936, is correct and should be affirmed as the final award of this commission.

"It Is Therefore Ordered: That the award of this commission dated February 25, 1936, be, and the same is hereby affirmed and approved as the final award of this commission.

"And This Commission does hereby retain jurisdiction of this claim until the same is finally and fully closed.

"In Witness Whereof, the Industrial Commission of Colorado has caused these presents to be duly executed this sixteenth day of March, A. D. 1936."

Subsequently, the matter was again taken before the district court in the City and County of Denver, which court, on the first of February, 1937, affirmed the above awards of the commission, and it is to reverse that judgment that the matter is now before us again on writ of error.

There are several assignments of error, but they can all be disposed of by answering the following questions: (1) Were the instructions of the court, set out on page 148 in 97 Colo., complied with? (2) Did the commission exceed its jurisdiction in reversing its position? (3) Was there sufficient competent evidence to support the supplemental awards of the commission? (4) Was defendant in error's claim barred by the statute of limitations?

There was one cross assignment of error which we shall consider, to the effect that the commission erred in not finding that the claimant was totally and permanently disabled.

1. In disposing of the first interrogatory we simply recite: (a) That the commission found a preexisting diseased condition. (b) That the preexisting

diseased condition was multiple sclerosis (creeping palsy). (c) That said pre-existing diseased condition was aggravated by the occurrence in evidence relied upon as an accidental injury.

2. Did the commission exceed its jurisdiction in reversing its position on the award? We think not. It is at once apparent that in order to carry out the request of this court in its former opinion that it was necessary for the commission to hear further testimony, and it was not only proper, but necessary under the circumstances, for the commission to reverse itself on the awards in the face of the preponderance of evidence indicating that claimant's condition was aggravated by his fall.

The commission frankly acknowledged its error in the first award, and we feel that its action is in accord with Sec. 389, c. 97, Vol. 3, '35 C. S. A., which provides *inter alia* that the commission may, "upon its own motion * * * make an award ending, diminishing, maintaining or increasing the compensation previously awarded * * *." And particularly would that be true in this case, where it was directed by this court and the district court to "reopen the above entitled cause for such other and further proceedings as it may deem proper," in order to ascertain whether there was aggravation to claimant's condition as the result of the accident which would render same compensable. *Industrial Commission vs. Dorchak, supra,* p. 147. See also *Rocky Mountain Fuel Co. vs. Canivez,* 96 Colo. 198, 40 P. (2nd) 618, and *Century Indemnity Co. vs. Klipfel,* 99 Colo. 213, 61 P. (2nd) 842.

3. Responding to the third interrogatory as to the sufficiency of the evidence to justify the supplemental awards of the commission, we say, as we have said on occasions too numerous to mention, that findings of the commission on conflicting evidence will not be disturbed upon review where there is sufficient competent evidence to sustain the award. Unfortunately, in this case the commission found itself in a situation where the testimony of the medical experts was not as precise and positive as it is in a majority of compensation cases, but the preponderance of the evidence disclosed by the record indicates that the medical experts who testified were of the opinion that Dorchak's physical condition was aggravated by his fall and its attendant circumstances.

4. Was defendant in error's claim barred by the statute of limitations? The attempt on the part of the plaintiffs in error to raise the statute of limitations at this time is without merit. Rule No. 15 of the commission provides:

> "Notice of contest shall be filed by the employer or his insurance carrier in duplicate, as provided by law, and shall set forth the several grounds of contest. If such notice of contest is not so filed, the employer or his insurance carrier will not be permitted to introduce any evidence."

Since contest on the ground of the statute of limitations was not set forth in compliance with that rule, and no evidence being admissible upon the point, there was no issue upon which a finding could be made by the commission, it is not available as a defense here.

Considering briefly the defendant in error's assignment that the court erred in sustaining the finding of the commission that the claimant was "disabled 25 per cent as a working unit by reason of his accident," and not totally and permanently disabled, we say that it is within the province of the commission to determine the partial disability, and its finding on that score will not be disturbed. (*Century Indemnity Co. vs. Klipfel, supra,* where a finding of a 10 per cent permanent disability was sustained.)

We find no error in the record which would justify us in disturbing the supplemental awards of the commission and their approval by the district court. The judgment is accordingly affirmed.

MR. CHIEF JUSTICE BURKE and MR. JUSTICE HILLIARD concur.

On Rehearing

Judgment reversed.

En Banc.

YOUNG, Justice.

This is a proceeding under the Workmen's Compensation Act. The judgment of the district court sustained an award of the Industrial Commission in favor of the claimant, and the employer and the insurance carrier bring the cause here by writ of error to reverse the judgment. Heretofore an opinion was handed down in department affirming the judgment of the district court. A petition for rehearing being granted, the cause was again briefed, and it now is before us for further consideration.

In our present view of the case we may assume that the finding of the commission, that claimant sustained a compensable injury on September 3, 1932, is supported by the evidence. Claimant did not file his claim for compensation until March 13, 1933. Having notified his employer, the Garden Farm Dairy, about the middle of February, 1933, that he claimed compensation, the employer filed a report of the accident with the commission February 17, 1933, and two days later the insurance carrier filed a denial of liability setting forth the grounds upon which the claim would be contested. At the first hearing, when the claimant testified that September 3rd was the date of his alleged accidental injury, based upon such testimony and the record as to the date of filing the claim, the attorney for the employer and insurance carrier moved to dismiss on the ground that the claim was not filed within six months as provided by the Workmen's Compensation Act, and therefore was barred by the statute. The referee of the commission denied the motion and the hearing proceeded on the merits. At all subsequent stages of the proceedings the employer and the insurance carrier consistently maintained that the claim was barred by the statute, which reads in part as follows:

"The commission shall have jurisdiction at all times to hear and determine and make findings and awards on all cases of injury for which compensation or benefits are provided in this article. The right to compensation and benefits, as provided by this article, shall be barred unless within six months after the injury, or within one year after death resulting therefrom, a notice claiming compensation shall be filed with the commission. This limitation shall not apply to any claimant to whom compensation has been paid."

'35 C. S. A., Vol. 3, c. 97, Sec. 363.

Claimant contends, and the employer and insurance carrier admit, that the statute may be waived. Claimant contends further that it was waived, which contention is denied by the employer and the insurance carrier.

Claimant relies upon the facts that the employer and the insurance carrier, within the six months period, had knowledge of claimant's intention to claim compensation; that before the expiration of that period they filed a denial of liability, setting forth the grounds upon which they would contest the claim on the merits; that they never filed any supplemental notice of contest setting forth the ground that the claim was not filed in time; and that during the six months' period the insurance carrier procured a physician and surgeon to examine claimant, who, it appears, neither gave nor suggested any treatment.

The instant case is, in some respects, similar to *Kettering Mercantile Co. vs. Fox*, 77 Colo. 90, 234 Pac. 464, and *Greeley Co. vs. Thomas*, 87 Colo. 486, 288 Pac. 1051, but a careful reading of these cases discloses that both involve facts not present in the case now before us. The situation upon which reliance is placed by claimant as amounting to a waiver of the limiting statute, from an evidentiary standpoint, is far weaker on the question of intention to waive the statute, than the situations in the cases cited. There is no evidence contained in the record here of an express waiver by the employer or the insurance carrier. The facts disclosed by the evidence and record are consistent with their intention to rely upon the statute and inconsistent with an intention not to so rely. The employer and carrier are not estopped to invoke its provisions. No statements or conduct by either are disclosed upon which claimant might have relied and by reason of which reliance he failed to file his claim in time.

We think there is no showing of a payment of compensation which removes the bar of the statute. To hold that a mere examination of a claimant by a physician and surgeon employed by the insurance carrier, without treatment, is a furnishing of medical services in the sense that it constitutes payment of compensation which removes the bar of the statute, would force employers and insurance carriers to deny liability in all cases; because if they sought to obtain information through medical examination upon which to admit or deny liability, they would open the way for the filing of claims against them without any limitations as to time.

The judgment is reversed.

SKAGGS CO. vs. NIXON.
101 Colo. 203
I. C. 74320 **72 P. (2nd) 1102** **Index No. 251**
See Also No. 218
Judgment Affirmed

En Banc.

YOUNG, Justice.

This cause is before us on writ of error to reverse a judgment of the district court sustaining the finding of the Industrial Commission, and an award based thereon, that John Nixon sustained accidental injuries while performing services arising out of and in the course of his employment by the O. P. Skaggs Company, a corporation. The O. P. Skaggs Company and the American Mutual Liability Insurance Company, a corporation, are plaintiffs in error and will be designated as the Skaggs Company and insurer, respectively. The Industrial Commission and John C. Nixon, defendants in error, will be herein mentioned as the commission and claimant. The multitude of assignments of error, ninety-two in number, covering twenty-one typewritten pages, fairly present the question of whether the evidence is sufficient to support the commission's finding and award.

This case was before us on a former occasion and the decision previously rendered (*Skaggs Co. vs. Nixon*, 97 Colo. 314, 50 P. (2nd) 55) should be read in connection with this opinion. The case was remanded to the district court with instructions to send it back to the commission for definite findings on the question of whether claimant at the time of the accident was performing services arising out of and in the course of his employment. The commission after taking additional testimony answered the question in the affirmative, and the district court has approved its findings. If there is evidence to support them they are binding on us.

The evidence discloses that Nixon was employed by the Skaggs company to render services, legal in character, and also perform work that might be classed as executive in its nature, not requiring legal training. Such work involved advice as to business policies and methods to be adopted and pursued. It was stipulated in the contract of employment that claimant was to be paid $50 a month for his services. Such business as could be transacted by him in or from his law office, maintained in Greeley, was to be done there. Such as required his presence in Denver was to be performed in Denver and he was to come to the latter city without additional compensation or expense to the Skaggs company. He was to give the company the first call on his time and

the evidence discloses that he did so. In December, 1931, claimant was requested to come to Denver for a conference and in response to that request he traveled there by automobile solely for that purpose and attended to no other business. On this occasion he was given two important contracts by O. P. Skaggs, the president of the company, to take with him to Greeley and upon which he was to render an opinion after he had examined them. As he was returning to Greeley, and near Brighton, he had an automobile accident resulting in the injuries and disability for which compensation was awarded.

We are of the opinion that the accident arose out of and in the course of claimant's employment, and while so holding, are cognizant of the general rule stated in *Industrial Commission vs. Anderson*, 69 Colo. 147, 169 Pac. 135, that:

> "By the great weight of authority it appears, in the absence of special circumstances bringing the accident within the scope of the employment, that no compensation is recoverable by a workman who is injured while on his way to or from his work."

In that opinion the following is quoted with approval from *De Constantin vs. Public Service Commission*, 75 W. Va. 32, 83 S. E. 88, L. R. A. 1916A, 329:

> "If the place at which the injury occurred is brought within the contract of employment, by the requirement of its use by the employe, so that he has no discretion or choice as to his mode or manner of coming to work, such place and its use seem logically to become elements or factors in the employment, and the injury thus arises out of the employment and is incurred in the course thereof. But, on the contrary, if the employe, at the time of the injury, has gone beyond the premises of the employer, or has not reached them, and chosen his own place or mode of travel, the injury does not arise out of his employment, nor is it within the scope thereof."

We think the controlling principle is set out in the opinion in the Anderson case in these words:

> "Under this section it is necessary that both the service being performed and the injury sustained shall arise out of and in the course of the employment. The intent is to make the industry responsible for industrial accidents only, and not those resulting from hazards common to all. *In re McCarthy* (Ohio), 7 N. C. C. A. 417, *Ohio Ind. Com. No. 59526; Worden vs. Commonwealth Power Company* (Mich.), 4 N. C. C. A. 853; *Hopkins vs. Mich. Sugar Company*, 184 Mich. 87, 150 N. W. 325, L. R. A. 1916A, 310; *Hills vs. Blair*, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 414."

If the accident occurs while the employe is doing something which the employer has directed and under the contract of employment may require the employe to do, we think that while the employe is doing it he fairly may be said to be acting in the course of his employment, and if he is doing the thing directed to be done, as required, or, if the manner of its doing is not specified, in a manner that is within the limits of a reasonable discretion on the part of the employe, then a resulting accident arises out of the employment and may fairly be said to be the result of a hazard incident to it. In *Security State Bank of Sterling vs. Propst*, 99 Colo. 67, 59 P. (2d) 798, quoting in part from a former decision of this court, we said:

> "If at the time of the injury the deceased was doing what he expressly or impliedly was directed by his superiors to do—and we have held that he was—and the latter were vested with the authority to give him directions, then he was acting within the course of his employment. In *Comstock vs. Bivens*, 78 Colo. 107, 239 Pac. 869, we said: '1 Honnold on Workmen's Compensation, section 114, says where an employe is doing something which, though not strictly in the line of his obligatory duty, is still doing something incidental to his work, and while doing the same is injured, the accident causing injury may properly be held to arise out of and in the course of employment, and he will be entitled to compensation'."

The employment in the case here under consideration was based on a mutual recognition of the fact that claimant was located at Greeley. It impliedly recognized that such of his work as was done in Denver required him to come from Greeley to Denver. While it was not specified that he should come by automobile, under modern conditions his doing so was the adoption of a reasonable mode of transportation. We hold in *Comstock vs. Bivens*, 78 Colo. 107, 239 Pac. 869, that an employe has some latitude in determining the manner in which he will carry on his employer's work.

We think in this case sufficient special circumstances appear to take it out of the general rule, that injuries sustained in going to or from work carried on at a special place and within specified hours are not compensable, as not arising out of and in the course of the employment. The exception to the rule is recognized in *Industrial Commission vs. Anderson, supra*. The instant case is analagous to one in which an employer directs an employe to leave one place during working hours and go to another place on the same job and while complying with such direction he is injured. If it be said that the injury here occurred on the return from carrying out the employer's orders, the answer is that the return was a necessary incident to a compliance with the order to come, and that the hazards of both coming and returning are alike incident to a compliance with the employer's direction. In *Comstock vs. Bivens, supra*, we said:

> "When Comstock delivered the mail to the postmistress on the evening of the day when the accident occurred he could not indefinitely

leave his automobile in the public highway or make of the same a place of storage. It was necessary for him to put it in his garage or some place on his own or rented premises. While there is no direct evidence as to what Comstock's intentions were in driving from the postoffice to his home, his course was what he usually pursued after delivering the mail. He was found lying near the car and had taken the rifle from the automobile in the place where he usually carried it on his trips and apparently intended to put it away in his house when it was discharged. The car being the instrument or facility that he used in performing his work of carrying the mail, it is a fair inference from the testimony that he was preparing to store, or was engaged in storing, his automobile for the night at the time the accident occurred. This is analogous to what occurs, for example, when a carpenter, who quits work at the end of the day on a house which he is building, goes across a street or to some other nearby place to store his tools for the night. We think that Comstock was doing the work for which he was employed when this accident occurred and it arose out of and in the course of his employment."

In *Industrial Commission vs. Pueblo Auto Co.*, 71 Colo. 424, 207 Pac. 479, we held that the death of an automobile salesman killed during a robbery, the object of the robbers being to secure his car, when he was returning home from seeing a customer to whom he had sold an automobile, was an accident arising out of and in the course of his employment. In that case we said:

"While it has been stated that these laws cover only dangers which might have been anticipated, yet the cases generally hold that if, after the injury, it can be seen that the injury was incurred because of the employment, it need not be such as to have been anticipated. We think that is the better rule."

In a lightning case, *Aetna Life Ins. Co. vs. Industrial Commission*, 81 Colo. 233, 254 Pac. 995, Mr. Chief Justice Burke in a specially concurring opinion, used the following language:

"When one in the course of his employment is reasonably required to be at a particular place at a particular time and there meets with an accident, although one which any other person then and there present would have met with irrespective of his employment, that accident is one 'arising out of' the employment of the person so injured."

In *London vs. McCoy*, 97 Colo. 13, 45 P. (2nd) 900, we held, as stated in the syllabus, that:

"Where an employe, in carrying out the instructions of his employer, visited the home of another to contact a man whom it was necessary for him to see, and while there suffered a murderous assault by an insane man resulting in his death, compensation was properly allowed his dependents, the accident being one 'arising out of his employment'."

In the light of the foregoing authorities we are of the opinion that the evidence before the commission is sufficient to support its finding that the accident causing claimant's injuries arose out of and in the course of his employment. We are bound by such finding. The judgment of the district court is affirmed.

MR. JUSTICE BOUCK not participating.

AMERICAN MINING CO. vs. ZUPET.

101 Colo. 238

I. C. 75672 **72 P. (2nd) 281** **Index No. 252**

Judgment Reversed

In Department.

HOLLAND, Justice.

Defendant in error, Martin Zupet, came before the Industrial Commission claiming compensation for injuries "caused by an accident arising out of and in the course of his employment" with plaintiff in error, the American Mining Company, August 29, 1932. The injury, as he alleges, was sustained while he was breaking rock with an iron or steel striking his face and eyes, becoming imbedded therein, and particularly injuring his eyes, ears and head. In his amended notice and claim for compensation filed May 31, 1933, he states his disability as "Total practical occupational or working use and disability of right eye and substantially so even now of left eye and now about 50 per cent loss of hearing in right ear and about 80 per cent loss of and as to the left ear, and these disabilities gradually increasing." Upon hearing held August 4, 1933, the referee found, September 15, 1933, that claimant's injury was caused by a foreign body in the right eye and that the permanent disability consisted of total loss of the right eye; none to the left eye, and upon computation of average weekly wages, the Industrial Commission, October 25, 1933, entered its award upon the referee's finding, that: "Temporary total disability terminated on November 11, 1932. Permanent disability consists of total loss of vision of the right eye. * * * that the claimant suffered no degree of permanent disability to the left eye by reason of said accident, 'and it awarded claimant' $11.32 per week from October 4, 1932, to November 10, 1932, inclusive, as compensation for temporary total disability; and at the same rate thereafter for 104 weeks, as compensation for permanent partial disability; plus the payment of medical expense incurred within four months following the accident." Subse-

quently, claimant applied for a rehearing because, as he alleged, he had been denied compensation for the loss of hearing and other ill effects resulting from the accident. February 16, 1934, the Industrial Commission refused to reopen and reconsider the case.

Thereafter petitions for review and refusal of the commission to reopen the case are disclosed by the record. A detailed review of these various proceedings would serve no useful purpose, it being sufficient to state that the commission finally, on November 20, 1936, ordered the case reopened to determine whether or not there had been any error, mistake or change in condition. After notice, a hearing was held, further testimony and evidence submitted, and on March 25, 1937, the commission entered its supplemental award as follows:

> "In the above entitled cause, the commission having reviewed the entire file including the further testimony taken herein pursuant to the order of this commission dated November 20, 1936, and being now fully advised in the premises, finds:
>
> "That the claimant has failed to make any showing of error, mistake or change in condition. The commission is further advised that the claimant's disability in so far as the same appears to be greater than that established by the award of this commission dated October 25, 1933, is not chargeable to his injury of August 29, 1932. The commission further finds that the claimant has been fully compensated for the injury sustained in his accident of August 29, 1932, and that he has failed to establish any error or mistake on the part of this commission or any change in his condition in so far as the same resulted from accidental injury.
>
> "It Is Therefore Ordered: That the claimant's application for further compensation be and the same hereby is denied and that his claim for further compensation over and above that which he has already been paid be and the same hereby is denied."

This was affirmed as a final award on April 17, 1937. Claimant filed his complaint in the district court of the City and County of Denver May 7, 1937, to vacate the award of the Industrial Commission, trial resulting in a judgment in his favor, reversing the award of the commission and directing it to enter a proper award. The American Mining Company, State Compensation Insurance Fund and the Industrial Commission of Colorado, now plaintiffs in error, seek a reversal of that judgment.

The trial court at considerable length, in a written opinion, reviewed the evidence, commented upon the exhibits and nature of the testimony, and elaborately expressed its views as to the nature of the testimony and evidence. It made no finding of any error or mistake on the part of the commission or in the record, but flatly disagreed with the commission's findings as to the effect of the evidence before that body, and substituted its own finding for the commission's finding and award. On this review no other question is presented.

A reading of the entire record and files discloses sufficient competent evidence upon which the commission properly could make the award set aside by the district court. To detail or comment upon this evidence, which seemed to influence the trial court, would unduly lengthen this opinion. If the conclusions of the trial court were not in harmony with those reached by the commission, nevertheless it was not at liberty to exceed its jurisdiction and over-reach the limitations on its powers in cases of this character and it was not acting within its authority in disregarding the effect of the evidence as determined by the commission and holding that compensation was due claimant as a matter of law. The matter of determining the probative effect of evidence in such cases, where there is a conflict, still remains exclusively with the commission where there is evidence for its consideration or from which it could draw a reasonable inference. In numerous cases we have said that the Workmen's Compensation Act precludes courts from passing upon the evidence in such cases and we have refused to change awards of the commission which were supported by the evidence, even though we, like the district court in this case, may have reached a conclusion differing from that of the fact finding body.

The judgment of the district court is therefore reversed and the cause remanded with directions to affirm the final award of the Industrial Commission.

MR. CHIEF JUSTICE BURKE, MR. JUSTICE HILLIARD and MR. JUSTICE BAKKE concur.

COMETA vs. INDUSTRIAL COMMISSION.
101 Colo. 466
I. C. 62811 **73 P. (2nd) 1408** **Index No. 253**
Judgment Affirmed

En Banc.

Judgment affirmed without written opinion.

LONDON GOLD MINES vs. CUSTER.
101 Colo. 477
I. C. 94767 **74 P. (2nd) 679** **Index No. 254**
Judgment Reversed

In Department.

BURKE, Chief Justice.

This is a workmen's compensation case. These parties are hereinafter referred to in order as the mines company, the commission, the fund, and Custer.

Custer was employed by the mines company. Alleging an injury in an accident arising out of and in the course of that employment he filed his claim

with the commission. To review a final adverse decision there he went to the district court, whose judgment reversed the commission. To review that judgment the mines company, the commission and the fund prosecute this writ.

Custer was employed as a master mechanic at Alma, whose altitude is something over 10,000 feet. He performed a full day's work June 6, 1936, and after his evening meal he returned to the office for the purpose of signing up "time cards," necessitating a walk up a "pretty steep" grade for about 350 feet. A few moments after his arrival he became unconscious and the following day was brought to a Denver hospital where he remained for about four weeks. It is undisputed that he is totally disabled by partial paralysis of his right side, primarily due to some injury to his brain; either a thrombosis or a ruptured blood vessel; he claims probably the latter primarily caused by his climb and the resulting exhaustion while necessarily going to his work. Plaintiffs in error claim, and the commission found, that his trouble was a cerebral thrombosis resulting from secondary polycythemia, and not from accident or external injury.

It is undisputed that Custer was suffering from secondary polycythemia, a disease of the blood and blood vessels, caused, or greatly aggravated, by life and labor at high altitudes. Three months prior to his collapse he had been examined by a physician, his condition made known to him, and he was advised to leave the altitude in which he was working and come down, at least, to Denver. Ignoring this he returned to his work at Alma with the result above mentioned.

Dr. Sears testified there was nothing in Custer's employment to cause his disease to develop. Dr. Cunningham testified that, whether a ruptured blood vessel or thrombosis, "I cannot see its connection with an industrial accident. When an artery is ready to rupture it does it. I do not think the ordinary things you go through with in life have anything to do with an artery when it is ready to break. It is apt to happen at any time, day or night." Dr. Blumel testified, "I think it is a thrombosis of the left internal caratoid artery. I would regard the thrombosis as a result of physical illness and not the result of an accident. I do not think it (walking up the hill) had any bearing upon it; he might have collapsed walking down hill, or not walking at all." Asked if the exertion might have accelerated the attack he answered, "If it is a hemorrhage of the brain I think it is possible, yes; if thrombosis I would say, no." Asked his opinion of the result if Custer had gone to bed instead of returning to work he said, "I think it would have happened anyway." Dr. Yegge testified, "I think the man had a thrombosis. I believe it would have occurred regardless of what he was doing."

There is, of course, some evidence from which the commission might have drawn other conclusions. If it had decided that the injury was due to a ruptured blood vessel in the brain, and that the rupture was primarily caused by over-exertion, we doubt if we could have interfered with such a finding, although the record clearly indicates it would have been contrary to the preponderance of the evidence. Enough, however, has been set forth to demonstrate that the finding of thrombosis, with no industrial connection, is amply supported.

We are not unmindful of *Ellerman vs. Industrial Commission*, 73 Colo. 20, 213 Pac. 120, and other similar authorities relied upon by counsel for Custer. But, because of marked distinctions in evidence, they contain nothing to support this judgment. For instance, in the Ellerman case we held the findings insufficient, returning it to the commission for completion, with the direction, "If over-exertion as the cause of death has not been established by a preponderance of the evidence, the commission will find that death was not due thereto." It will be observed that this award is supported, not overthrown, by that authority.

This is clearly a case of disputed facts, found by the commission on conflicting evidence, and with that finding the courts are powerless to interfere.

The judgment is accordingly reversed and the cause remanded with directions to the district court to affirm the award.

MR. JUSTICE HILLIARD, MR. JUSTICE BAKKE and MR. JUSTICE HOLLAND concur.

EMPIRE ZINC CO. vs. INDUSTRIAL COMMISSION and HOLDEN.
102 Colo. 26
I. C. 92054 **77 P. (2nd) 130** **Index No. 255**
Judgment Affirmed

In Department.

HOLLAND, Justice.

Elizabeth Holden, one of the defendants in error as a minor sister, made claim as a dependent to the Industrial Commission, another defendant in error, on account of the injury and death of her brother, John Holden, while in the employ of the Empire Zinc Company, plaintiff in error. Her claim was allowed and an award made thereon by the commission and upon review was affirmed by the district court of Eagle county. The employer assigns error to the judgment of the district court and will be referred to herein as the company, the Industrial Commission as the commission, Elizabeth Holden as claimant and John Holden as deceased.

Deceased, age 30 and single, was injured June 27, 1936, while employed by the company, and died as a result of the injury on the same day. A detailed chronological statement of the proceedings following is unnecessary, it being sufficient to state that there is no dispute concerning the nature of the accident or the liability arising therefrom; but the company questions the sufficiency of the claim, and proof thereof submitted on behalf of claimant as a dependent,

and makes some minor objections as to the amount of the award, which, it argues, is based upon an incorrect wage history.

On the date of the injury, and at the time of his death, deceased had been employed by the company for approximately eight months from November 7, 1935, for which period he had received $893.09. Prior to November, 1935, he was working on his father's farm. The exact nature of his contract of employment is not altogether clear; however, it appears that he was assisting his father, who seemed to be distressed financially with the indebtedness in connection with the farm, and other expenses, and who, after a lingering illness, died shortly prior to the injury and death of deceased. The mother of deceased also had died during the period of his employment with the company. Claimant, a member of the family, was seventeen years of age and in high school during the time deceased was on his father's farm, and up to within about a month prior to his injury and death. It is not questioned that a commendable struggle on the part of the family, including deceased, had been in progress in an effort to keep claimant in high school until graduation, and that during her final school year, ending May 22, 1936, the principal part of the burden had fallen upon, and been assumed by, deceased. The record is quite clear that he had furnished money out of his earnings received from the company for her room and board and other expenses under a promise that he would "see her through high school." It appears that a bill for her maintenance for two months and a half, rendered to deceased, had not been paid. Claimant was graduated May 22, a little over a month before the injury to, and death of, deceased. She made her claim on the basis of being wholly dependent upon him, and the commission so finding, made its final award, ordering the company to pay her $50.56 per month beginning June 27, 1936, and continuing until the sum of $3,640.63 is paid, or until dependency is terminated.

Section 53 of the Workmen's Compensation Act (S. L. '19, p. 720), as amended, now appears as Section 332, Chapter 97, at page 1341, Volume 3, '35 C. S. A., and so far as pertinent here, is as follows:

> "Other dependents—Temporary dependency. Children eighteen years of age or over, husband, mother, father, grandmother, grandfather, sister, brother or grandchild, who were wholly or partially supported by the deceased employe at the time immediately prior thereto, shall be considered his actual dependents."

The fact, which appears, that claimant from the time of her graduation, May 22, until the death of deceased, was employed and making scant provision for herself, gives rise to the company's arguments that at the time of the injury to, and death of, her brother she was not a dependent within the meaning of the statute. It is the contention of claimant that not only was she dependent upon deceased, but that he had promised to assist her in obtaining training which would enable her to become a nurse.

Claimant, being a sister of deceased, there is no presumption of her dependency, and the burden was upon her to establish such dependency as would bring her within the provisions of the statute. The promise or undertaking of deceased to assist her through high school had been fulfilled more than thirty days prior to the date upon which the fixing of her dependency must rest. The company insists that the admitted dependency therefore existing had terminated before the death of deceased. This contention would have its appeal, if the failure of deceased to make contributions to claimant during the short period intervening before his death would negative her dependency. But dependency is not always to be so determined; it must rest upon the prevailing facts and conditions of each particular case. The making of financial contributions is certainly physical evidence of the recognition of dependency by the contributor, but the dependency nevertheless could exist, be relied upon by the dependent, and have been acknowledged by deceased without any actual money payment, which could have been prevented by some cause operating against his will. There is evidence to support claimant's contention that deceased had promised to assist her in obtaining training which would fit her to become a nurse. That she relied upon this expectation of help is not controverted. Judging from his acknowledged assumption of the burden during all the time of his employment, it is only fair to presume that deceased had led claimant to expect and depend upon his brotherly bounty for the future, and this together with the other attending circumstances made her all that the word implies, a dependent, within the meaning of the statute. The evidence discloses reasonable grounds for such expectancy on her part, and the *anticipation by her of a continuation of the already established status of dependency, without a suggestion of its termination, is the true guide in determining whether or not she was in fact a dependent.* The purpose of the Workmen's Compensation Act is to provide, in part at least, for a restoration to her, of that which she lost through the death of the one on whom she had been given reason to, and did, depend for support. A different construction would defeat the very purpose and reason for the existence of the statute.

The facts justify and support the award of the commission, and the judgment sustaining it therefore is affirmed.

MR. CHIEF JUSTICE BURKE, MR. JUSTICE HILLIARD and MR. JUSTICE BAKKE concur.

PLATT-ROGERS, INC. vs. INDUSTRIAL COMMISSION and ELDER
101 Colo. 458
I. C. 87930 **74 P. (2nd) 673** **Index No. 256**
Judgment Affirmed

En Banc.

BOUCK, Justice.

This case arises under the Workmen's Compensation Act and involves a district court judgment sustaining a compensation award which the Industrial Commission had made in favor of John Elder, an employe of Platt-Rogers, Inc. The employer and its insurance carrier ask for review and reversal.

A single issue is presented for our consideration, the assignment of error being as follows:

> "The plaintiffs in error do hereby allege and assign that the Industrial Commission of Colorado and the District Court of the City and County of Denver erred in finding that John Elder * * * was totally industrially blind, for the reason that both * * * erred in law in that they failed to determine the vision of the said John Elder with the correction obtainable by the use of glasses, but instead based their respective decisions as to the extent of disability on uncorrected vision."

It is earnestly argued that the evidence failed to bring the case within the following section, numbered 76 in the act ('35 C. S. A., ch. 97, Sec. 355, volume 3), under which the commission purported to act:

> "* * * If the employe has previously lost vision of one eye and loses the vision of the remaining eye, he shall receive compensation for 312 weeks * * *"

The contention is that the commission ought to have proceeded instead under section 73 of the act ('35 C. S. A., ch. 97, Sec. 352), which reads thus:

> "In case an injury results in a loss set forth in the following schedule, the injured employe shall, in addition to compensation to be paid for temporary disability, receive compensation for the period as specified, to-wit: * * * Total blindness of one eye, 104 weeks * * * (f) Where an injury causes the loss of use or partial loss of use of any member or members specified in the foregoing schedule, the commission may determine the disability suffered and the amount of compensation to be awarded, by awarding compensation which shall bear such relation to the amount stated in the above schedule for the loss of a member or members as the disabilities bear to the loss produced by the injuries named in the schedule and such amount shall be in addition to compensation for temporary disability, or the commission may award compensation under the permanent partial disability section of this statute as the commission in its discretion may determine from the particular facts in each case."

Counsel for the plaintiffs in error, in a commendable effort to eliminate uncontroverted matters, expressly admit that under the principle laid down by us in *Employers Mutual Insurance Company vs. Industrial Commission*, 70 Colo. 228, 199 Pac. 482, "the fact that an employe may have remaining five percent or eight percent or possibly even ten percent of the vision in an injured eye does not preclude the finding of total loss of vision in that eye." The ground on which we there arrived at our decision was the fact that "the amount of vision now remaining is of no value from a working standpoint."

Counsel are undoubtedly right in saying that section 76 of the act does not apply but section 73 does if, either in the injured eye or in the eye not injured by the industrial accident, there should be anything short of a total loss of vision. Here, however, comes the controversy between employer and employe, because the plaintiffs in error strongly insist that the vision must be measured with the aid of corrective glasses, while the defendants in error strenuously oppose this view.

We do not say that there might not be a state of facts which would make such correction an important factor in determining the question whether under such state of facts the reduction of loss by the use of glasses is sufficient to remove a case out of the class of total industrial loss. But it would not be in consonance with the declared liberal nature of our Workmen's Compensation Act for us to indulge in a presumption that, without more, the corrective glasses would render the employe partially efficient as an industrial worker when without corrective glasses there would be a total industrial loss. To reverse the judgment in this case would improperly create such a presumption; for we search the present record in vain for substantial evidence tending to show that the aforesaid correction would in any appreciable degree enhance the working power of the particular employe beyond what it is without the correction.

It is true that the case of *Kelley vs. Prouty*, 54 Ida. 225, 30 P. (2nd) 769, seems to hold the contrary by deciding that in calculating the amount of vision the improvement by the use of corrective glasses must be taken into account. Nevertheless, it will be observed that there the record contained evidence directly bearing upon the connection such improvement, on the one hand, and on the other hand the particular work done or capable of being done by the claimant and the specific effect of corrective glasses in connection therewith. Such evidence does not appear here.

Moreover, there seem to be two lines of authority, one of which is represented by the Idaho case just cited, the other by the case of *Masoner vs. Wilson & Co.*, 141 Kan. 882, 44 P. (2nd) 265, which latter favors the view that the amount of vision should be calculated irrespective of what it would scientifically be rated by applying corrective glasses. This case expressly criticizes the Idaho opinion,

which itself overruled or explained away the supposedly contrary holding in a previous decision of the same court, *McDonald vs. State Treasurer*, 52 Ida. 535, 16 P. (2nd) 988. Whether the two views can be reconciled, or whether a sounder view lies somewhere between the two, we need not now decide. What we do decide is that the record before us is not sufficient to require the rejection of the commission's conclusion, drawn from the evidence before it, that the employe Elder is industrially blind in the injured right eye, and that he had a total loss of vision in the left eye before the accident, within the reasonable meaning of section 76 of our Workmen's Compensation Act. There was an adequate amount of substantial evidence before the commission to sustain its award, and the district court was right in approving it.

Judgment affirmed.

INDUSTRIAL COMMISSION vs. VALDEZ.
101 Colo. 482
I. C. 87816 **74 P. (2nd) 710** **Index No. 257**
Judgment Reversed

In Department.

BURKE, Chief Justice.

This is a workmen's compensation case. The parties here, in order, are hereinafter referred to as the commission, the fund, the employer, and claimant.

Claimant is afflicted with hernia which he contends is the result of an accident arising out of and in the course of his employment. The commission found that he failed to establish that fact. The district court, holding otherwise, reversed the commission. To review that judgment plaintiffs prosecute this writ. Such is the sole question before us.

> "An employe in order to be entitled to compensation for hernia must clearly prove: first, that its appearance was accompanied by pain; second, that it was immediately preceded by some accidental strain suffered in the course of the employment."
> Sec. 359, chap. 97, '35 C. S. A.

> "Inferences and conclusions to be drawn from the evidence in workmen's compensation cases, are for the commission and not for the courts."

Comstock vs. Bivens, 78 Colo. 107 (syllabus); 239 Pac. 869.

> "In numerous cases we have said that the Workmen's Compensation Act precludes courts from passing upon the evidence in such cases and we have refused to change awards of the commission which were supported by the evidence, even though we, like the district court in this case, may have reached a conclusion differing from that of the fact finding body."

American Mining Co. vs. Zupet, 101 Colo. 238; 72 Pac. (2nd) 281.

The commission found, *inter alia*:

> "Claimant failed to establish that the hernia condition, from which he was suffering, was the result of any accidental injury."

There was medical evidence to the effect that claimant had a "potential hernia", in other words was so constituted that the affliction might be brought on by a very trifling circumstance. Thus is presented the kind of case at which the statute above quoted was especially aimed and which requires the utmost care, and often a very keen discrimination, on the part of the commission. Claimant alone testified that at the time alleged he slipped and immediately experienced a sharp pain on his right side. Other workmen near him were not called. One was called who testified that promptly thereafter claimant complained to him. Later in the day he reported to his foreman but said nothing about slipping. The following day he consulted Dr. Noonan but failed to give him these facts. The alleged accident occurred May 27. June 6, following, he again consulted Dr. Noonan for the purpose of getting transferred to lighter work, but still failed to report the condition he now claims. His only explanation is, "I was going to tell him but how I overlooked that, I don't know, * * *." June 24th he consulted two other physicians who told him he was ruptured. Neither of these appeared as witnesses. His claim was not filed until August 26, following. On October 3, he again consulted Dr. Noonan in an attempt to get the doctor to say that he had reported his condition in his earlier conferences. Dr. Noonan was a witness at the hearing and claimant's scheme, and the doctor's attitude toward it, are sufficiently illustrated by one or two phrases from the latter's testimony, i. e.: "He said he told me June 6 that he had a rupture, and I said * * * Don't you try to poke anything down my throat like that and don't lie to me * * *. 'Tim you are lying and you know it' and he admitted it; and then the thing quieted down."

Further quotation from the evidence is unnecessary. From the foregoing it clearly appears that the inference that the commission apparently drew that this claim was not made in good faith and hence claimant had not sustained the burden imposed upon him by the statute is amply supported by the record. The commission saw and heard these witnesses and it is not for the courts, deprived of that advantage to question their conclusions.

The judgment is reversed and the cause remanded to the district court with instructions to affirm the award.

MR. JUSTICE HILLIARD, MR. JUSTICE BAKKE, and MR. JUSTICE HOLLAND concur.

HALLENBECK vs. BUTLER.
101 Colo. 486
I. C. 96241 **74 P. (2nd) 708** **Index No. 258**
Judgment Affirmed

In Department.

HOLLAND, Justice.

Butler, the defendant in error, an employe of Hallenbeck, plaintiff in error, filed with the Industrial Commission a claim, which it now appears, is limited largely to payment of medical services for the treatment of his eyes rendered necessary, as it is alleged, by either an "injury" to his eyes or an "occupational disease" as may be determined under the Workmen's Compensation Act. Reference will be made to him herein as claimant, and since it will be unnecessary to refer to any of the plaintiffs in error, other than Hallenbeck and the Industrial Commission, the former will be mentioned by name and the latter as the commission.

The commission found against claimant, and upon his petition for review in the district court, it was ordered to vacate its award, and proceed to carry out a judgment entered in favor of claimant. This writ of error is prosecuted to review that judgment.

The claim as filed shows that "approximately February 25, 1937" while claimant was "cleaning up grease and dirt in the shop, some of this grit flew in (his) right eye." The employer's report and the evidence disclose that claimant was employed as shop foreman by Hallenbeck, a road contractor, and had been in his service about seven years. From this shop, a brick building with cement floors, supplies are sent out to contractors on jobs, and in it trucks and "outfits" are repaired. Claimant acted as warehouseman and helper on the repair work. He cleaned off equipment preparatory to repairing and painting it, concerning which he testified:

> "We clean with a putty knife or a sharp chisel, scraping, and it flies off so that sometimes it will get in your eyes and you just don't get your eyes shut quick enough to evade it."

The claimant, and Dr. Marcove who treated him, were the only witnesses testifying at the hearing. So far as the question of disability is concerned, there is no showing or claim of either temporary or permanent disability. The claimant never ceased work, but his condition required medical services for which he makes claim but we find nothing in the record as to the amount.

The testimony of the physician is to the effect that claimant gave him a history of his employment and attending conditions, and stated that he had "received some foreign bodies in his eyes," and that "he worked in a place where he got a lot of dust and dirt and grease in that eye and it has been over a period of several months that he got these foreign bodies." There was no history of a definite accident, and the doctor, in response to the question: "It would be a rather long process to bring it about?" answered, "Yes, it is. It is a prolonged chronic sort of a thing." Further testifying he stated:

> "It has been developing over three or four weeks at least; I think it is of the nature of an occupational disease."

The doctor previously had testified that he first saw the claimant on March 29, at which time he was suffering from an inflamed and swollen condition of the upper lid of the right eye, and that "there were four or five large abscesses in the upper lid and one large one on the lower lid"; that these abscesses had become inflamed and infected; that he removed them; that "these abscesses are caused by infections in the little glands in the lid and these can become infected by the foreign bodies getting in the eyes."

The claimant in his testimony did not fix any definite date, but stated that on three or four occasions just prior to February 25th, he got an excessive amount of dirt and grease in his eyes from cleaning the equipment; that February 25 was when he noticed that the inflamed condition of his eyes became acute; that he had had similar experiences at various times during the seven years of his employment, but that his eyes never before had become infected; that nothing unusual happened on February 25 other than that he got a little more dust and dirt in his eyes on that day; and from that time on his eyes became more inflamed and commenced to trouble him.

On this testimony, a referee of the commission found that no accidental injury had been sustained within the meaning of the Workmen's Compensation Act; "that the condition which became acute on or about February 25th was the result of accumulation of foreign matter in the affected eyelid over a period of considerable time; that if claimant's condition can be attributed to his employment such condition is in the nature of an occupational disease and not the result of accidental injury." On these findings the claim was denied and the commission made the award final. The question before us does not involve interference with findings of fact by the commission, but presents for determination the proper meaning of certain terms of the compensation act when applied to the facts. It, of course, is settled law that if claimant's condition was the result of an "occupational disease" he cannot recover; consequently, if he is awarded compensation, it must be upon a determination that because an unusual amount of the foreign substance entered his eye on the approximated date, the result was, in effect, an accidental injury. It is not disputed that he had followed the same occupation, at the same place, for a period of about seven years, during which time foreign substances had frequently entered his eyes without causing inflamation or infection. It also is undisputed that an excessive or unusual amount of dirt and grease did enter his eyes at the time fixed by him as the beginning of his trouble. Whatever he might have been occupied in doing at this time, he was subjected to unusual and excessive exposure. It seems reasonable that what

happened on February 25th, as shown by the evidence, could have happened on the first day of his employment, because it is clear that an unusual amount of deleterious substances which carried infection, entered his eye. It further is disclosed by the record that on previous occasions, probably less amounts entered his eyes without carrying infection, therefore, he could not expect the infection which developed on this day to be the natural result of his employment nor could it be said that it was known to be incident to his employment. In other words, the fact that dust and other foreign substances were constantly present and were characteristic of his particular occupation does not of itself make the condition an occupational disease, because the presence of such foreign substances over a period of seven years had never before brought an infection; but the substance which entered his eye at the time fixed, did carry infectuous matter resulting in the injury. On this question, we believe the ruling in the case of *Industrial Commission vs. Ule*, 97 Colo. 253, 48 P. (2nd) 803, is applicable. The same may be said of the cases of *Columbine Laundry Co. vs. Industrial Commission*, 73 Colo. 397, 215 Pac. 870, and *United States Fidelity and Guaranty Co. vs. Industrial Commission*, 76 Colo. 241, 230 Pac. 624.

Without further discussion, we are inclined to the view that when a physical condition arises, such as in the case before us, which was induced by an unusual or excessive exposure at a time reasonably definite, that such condition was unexpected and occasioned by an accident, the accident being in the fact that the particular substance entering the claimant's eye at the time fixed was germ laden; that it was accidental that that particular kind of substance entered his eye on that date. We should not be misled by a general conclusion of the medical attendant to the effect that this injury, induced by accident, set up a condition described by him as being in the "nature of an occupational disease." It cannot be questioned that the result was unexpected by claimant because it never had before occurred under like conditions in his experience extending over a period of seven years.

For the reasons above expressed, the judgment is affirmed.

MR. CHIEF JUSTICE BURKE, MR. JUSTICE HILLIARD and MR. JUSTICE BAKKE concur.

NATIONAL LUMBER AND CREOSOTING CO. vs. KELLY.

101 Colo. 535

I. C. 57731 **75 P. (2nd) 144** **Index No. 259**

See Also 238

Judgment Affirmed

In Department.

BAKKE, Justice.

This is a workmen's compensation case, which was before us on a previous occasion. The former opinion is reported in 99 Colo. 442, 63 P. (2nd) 456, and the concluding paragraph reads as follows:

> "The judgment is reversed and the cause remanded to the district court with directions that it send the case back to the commission, instructing it to reopen the case and receive such competent testimony as may be offered upon which it shall make such award, if any, as it may feel the evidence warrants, and to be so specified in the findings and award."

In compliance with the above instructions the case was reopened, competent testimony was received, findings were made and compensation for total disability awarded. The findings and award were approved by the district court, and it is to review that judgment that the case is again before us.

The former record recites that the claimant was injured in a runaway accident, resulting in a severe fracture of the skull which subsequently necessitated the removal of a part of it, leaving an opening therein one-half inch wide and three-fourths of an inch long. The commission found that the physical and mental reactions attendant upon the skull fracture totally disabled the claimant, and fixed the award accordingly.

Plaintiffs in error acknowledge that in the final award of the commission of June 25, 1937, findings were made upon the issues before it, but they are now contending that the findings are not supported by the evidence.

Eleven assignments of error are made, only four of which we deem it necessary to consider in disposing of this matter: (1) That the commission abused its discretion in not compelling the claimant at this time to submit to a further test for syphilis by an analysis of his spinal fluid, as requested and demanded by plaintiffs in error, and their physician; (2) that the commission erred in not finding that part of the claimant's disability was due to his failure to submit to prompt operative treatment following his injury; (3) that the findings of the commission do not support the award, in that "fear and anxiety" do not constitute a lawful or proper basis for an award of compensation; (4) that the commission did not make any specific findings, or give specific reasons for its change of mind in increasing claimant's disability from twenty-five percent to total disability.

1. We are of the opinion that the commission did not abuse its discretion in refusing to compel the claimant to submit to further spinal tests to determine the presence of neuro-syphilis, in accordance with section 360, chapter 97, volume 3, '35 C. S. A. (Paragraph 4455 C. L. 1921), which reads in part as follows:

> "* * * If any employe shall persist in any unsanitary or injurious practice which tends to imperil or retard his recovery or shall refuse to submit to such medical or surgical treatment as is reasonably essen-

tial to promote his recovery, the commission may, *in its discretion*, reduce or suspend the compensation of any such injured employe. * * *" (Italics are mine.)

It will be noted that this statute specifically gives the commission discretion in matters of this kind, and those seeking to attack the result must show that it abused its discretion.

It may be true that claimant had syphilis prior to his injury in October, 1928, but since that time he has had treatment for that disease at the Mayo Clinic. Part of the medical testimony on this issue was as follows:

"I do not believe that syphilis is a factor in the disability. When I examined the claimant in February, 1929, I found the Wassermann test to be negative on the blood and spinal fluid. In my opinion the presence of active syphilis is precluded by the negative reaction on these tests. * * *" Further: "I didn't re-examine the spinal fluid, in view of the fact that I read several tests of the spinal fluid, the cell count, the colloidal gold chloride, Wassermann test, and the globin test, and all of those were normal, so I feel quite sure that the brain is healthy, so far as a question of syphilis is concerned." Further: "* * * the spinal fluid was normal to every test, not only the Wassermann test, but several other tests."

The above is part of the testimony of one of the medical experts called by the plaintiffs in error. It is fortified by the testimony of other competent medical experts. To say that the commission abused its discretion in not compelling the claimant to submit to further spinal tests for syphilis in the face of this testimony, is to say that the commission had no discretion.

The commission's finding on this phase of the case is as follows:

"There is ample evidence that there is in this case no clinical evidence of syphilis."

Plaintiffs in error complain that this is not a finding that there was no syphilis, and particularly that this was no finding of neuro-syphilis. None of the medical testimony stated positively that the claimant's condition, or a major part thereof, was due to a previous syphilitic condition.

2. There may have been a relationship between the delay in the operative treatment of the claimant's head injury and his subsequent total disability, but under the circumstances in this case it may not be held against the claimant, because he acted on the advice of his physician. Even as to that relationship, there was a conflict in the testimony, and we see no occasion to disturb the commission's finding that the delay in operative treatment of claimant's head injury did not contribute to his present total disability.

3. To nullify the commission's right to take into consideration claimant's *fear* and *anxiety* as a proper basis of award of compensation is to deny claimant's right to establish the existence of a very real injury. Fear and anxiety constitute as great an influence on human behavior and health as is known to either psychology or medicine, and in this case was not merely a subjective mental symptom. To hold that the claimant's mental attitude is not directly affected by the hole in his head, would be to deny something which is common knowledge. Pain, excitement and shock have been considered in these cases. 71 C. J. 634. Plaintiffs in error cite no case holding that fear and anxiety may not be considered, hence we may assume that there are none. There was no error in the commission's finding in this regard.

4. It is obvious that the commission's award in 1930 was based upon the claimant's condition at that time, when the commission properly found upon competent testimony, not disputed by the plaintiffs in error here, that the claimant was only partially and temporarily disabled, and apparently there was hope that such temporary disability would vanish. But subsequent years proved that claimant's condition grew progressively worse, until at the final hearing in June, 1936, the commission again found, upon competent evidence, that he then was totally disabled. The findings of the commission take up practically three pages of single-spaced, typewritten material, and are among the most complete that have come to our attention. Nowhere have we held that all the conclusions of a fact finding body must be recorded or that they must recite all of the evidence upon which the findings or conclusions are based. The findings here, in compliance with the instructions of this court are complete and comprehensive. 99 Colo. 442, 63 P. (2nd) 456.

It may be noted in passing that the claimant is approaching the age of threescore years. It has been nine years since he was injured. Some of his difficulties may be directly attributable to himself, others to his advisers, but litigation must end some time, and, after considering the carefully prepared opinion of the trial court, we are not disposed to disturb its judgment.

Let the judgment be affirmed.

MR. CHIEF JUSTICE BURKE, MR. JUSTICE HILLIARD and MR. JUSTICE HOLLAND concur.

MARTIN vs. INDUSTRIAL COMMISSION.
101 Colo. 540
I. C. 65124 **74 P. (2nd) 1243** **Index No. 260**
Judgment Affirmed

In Department.

HOLLAND, Justice.

In this workmen's compensation case, plaintiff in error says that,

"The sole and only question that arises on this appeal is, whether or not, plaintiff is entitled to compensation benefits for total temporary

disability during part or all of a period beginning January, 1936, to March 11, 1937."

The commission found and awarded, that he was not so entitled to benefits, but was entitled to compensation at the rate of $10.93 from March 11, 1937, during temporary total disability. This award was affirmed upon trial in the district court, and plaintiff seeks reversal here. There is no occasion to refer to any of the parties other than plaintiff in error, who will be mentioned as claimant, and the Industrial Commission, hereinafter called the commission.

It is not necessary to relate the case history leading up to the issue presented, it being sufficient to say that claimant received a compensable injury March 21, 1930, and a claim for compensation based thereon, culminated on September 15, 1931, in an award for temporary total disability from April 1, 1930, to September 14, 1931, and thereafter for 83.4 weeks for permanent disability resulting from sixty per cent loss of the use of his right leg at the knee. Twice, following this award, claimant petitioned for reopening of the case, alleging change in condition as ground for further compensation. The first hearing resulted in a finding on August 28, 1933, that there had been no showing of a change in condition, and a denial of the claim. On the second petition, two hearings were had, November 4, 1935, and December 18, 1935, again terminating in a denial of further compensation by an award made final January 13, 1936.

March 19, 1937, claimant again petitioned for further hearing, which was ordered and held April 21, 1937, testimony being taken, the commission on May 27, 1937, entered the following award:

"That the claimant sustained an injury in his right leg in an accident arising out of and in the course of his employment on March 21, 1930. He quit work immediately. He was able to return to work on September 15, 1931, with a sixty per cent loss of use of the right leg measured at the knee. Since that time claimant's condition has become progressively worse until March 11, 1937, when he became again temporarily and totally disabled. Since March 11, 1937, he has been and now is receiving further medical care. Compensation for the first period of temporary total disability and for permanent partial disability as heretofore found to exist has been paid in full. Claimant's average weekly wages were $21.85.

"It is, therefore, ordered: That respondents pay compensation to the claimant at the rate of $10.93 per week from March 11, 1937, during temporary total disability."

Claimant contends that the award is contrary to the undisputed evidence, which, he says, "shows conclusively that he was totally temporarily disabled from January, 1936, to March 11, 1937, and thereafter." The commission asserts that the award is based not only upon conflicting testimony, but that it is supported by the preponderance thereof as well. At the hearing, two physicians and claimant testified. Claimant testified that during the last six months his condition had gotten worse; that he went to the hospital March 11, 1937, for treatment and had not been able to work since leaving there, April 19, 1937.

Dr. Condon first examined claimant on March 9, 1937, and found osteomyelitis (infection of the bone marrow, and a progressive disease) present, and claimant was temporarily totally disabled. Dr. Spicer, who had attended claimant during all the time here involved, furnished the testimony upon which claimant now relies, when he said, "I think he has been temporarily totally disabled since 1935." The effect of this statement, made April 21, 1937, is minimized by the doctor's further testimony given at the same time, to the effect that he did not believe the osteomyelitis was present when he examined the claimant in October, 1935; that he had examined the claimant off and on since that time and that his condition had been about the same until about six months before, when it seemed to have gotten worse; that at the present time he feels that the claimant had osteomyelitis; that when this acute condition set in was the first real change he had noticed in claimant's condition from the time of the previous award made in 1935. This seems inconsistent with the statement that claimant had been temporarily totally disabled since 1935.

Full compensation had been paid for claimant's disability prior to March 11, 1937, as found and awarded. It is perfectly clear from the testimony that March 11, 1937, is the only definite date that could be fixed as the beginning of the present total disability. It was upon that date that claimant went to the hospital for treatment and he has been totally disabled since that time. It was approximately that time when his present trouble was diagnosed. This is contrary to claimant's contention, based upon Dr. Spicer's statement, that claimant had been totally disabled since 1935. These record facts supply an ample basis for the commission's finding and award, as made, and in our opinion, a different finding would have been improper. So grounded, this award by the fact finding body, as in all like cases, cannot be disturbed upon review.

The judgment is therefore affirmed.

MR. CHIEF JUSTICE BURKE, MR. JUSTICE HILLIARD and MR. JUSTICE BAKKE concur.

INDUSTRIAL COMMISSION vs. MARTINEZ.
102 Colo. 31
I. C. 87318 **77 P. (2nd) 646** **Index No. 261**
Judgment Reversed

En Banc.

BURKE, Chief Justice.

This is a workmen's compensation case. The foregoing parties are referred to, in order, as the commission, the fund, the coal company, and the claimants; and Leo Martinez, formerly husband of Millie H. Martinez, as the deceased.

Deceased was employed by the coal company whose compensation insurance was carried by the fund. He met his death as the result of an accident arising out of and in the course of his employment. Claimants filed with the commission whose referee found in their favor, basing his award on an average weekly wage of $19.11. On petition for review the commission itself fixed the same amount. Claimants took the cause to the district court where the award was modified on the basis of an average weekly wage of $22.73. To review that judgment this writ is prosecuted. The total award of the commission was $2985.94, which the district court increased to $3545.67.

The judgment must be reversed because the district court never had jurisdiction.

> "No action, proceeding or suit to set aside, vacate or amend any finding, order or award of the commission, or to enjoin the enforcement thereof, shall be brought unless the plaintiff shall have first applied to the commission for a review as herein provided * * *." Sec. 377, chap. 97, '35 C. S. A.

The foregoing section is mandatory.

French vs. Industrial Commission, 85 Colo. 173; 274 Pac. 742.

This point was not raised below but since it is jurisdictional that is immaterial.

3 C. J. p. 755 par. 652.

Baker vs. Denver Tramway Co., 72 Colo. 233; 210 Pac. 845.

The only review here had, or sought, was a review of the award of the referee, not the commission. The very purpose of the statute is that errors or oversights may thus be brought to the attention of the commission itself, which has the sole power to make a final award. Counsel for claimants simply takes the position that "a petition to the *commission* asking that it review the findings of the *referee* is all that is necessary" and cites no authorities. We are unable to agree with him.

Carlson vs. Industrial Commission, 79 Colo. 124; 244 Pac. 68.
Passini vs. Industrial Commission, 64 Colo. 349; 171 Pac. 369.
Zuver vs. Industrial Commission, 80 Colo. 429; 252 Pac. 360.
Midget Mining Co. vs. Industrial Commission, 69 Colo. 218; 193 Pac. 493.

> "It is clear that the district court could acquire no jurisdiction over the subject matter unless the fact appeared in the record that the petitioner had made application to the commission for a rehearing."

Stacks vs. Industrial Commission, 65 Colo. 20, 23; 170 Pac. 588.

The complaint must allege the filing of a petition for review provided by statute, otherwise the court acquires no jurisdiction and the point may be raised by demurrer.

Brady vs. Industrial Commission, 80 Colo. 62; 249 Pac. 6.

Errors not specified in the petition for review can not be considered by the courts.

London Co. vs. Sauer, 92 Colo. 565; 22 Pac. (2nd) 624.

Hence, irrespective of allegations of complaint or answer, the petition must appear in the record.

No "answer of the commission," as that term is usually employed, is known to our court proceeding to review such an award. The statute provides that the commission shall—

> "make return to said court of *all* documents and papers on file in the matter and *all* testimony taken therein, and certified copies of *all* its findings, orders and awards, *which return shall be deemed its answer to said complaint,*" Sec. 380, chap. 97, '35 C. S. A.

Hence if the petition for review, which is jurisdictional, does not appear in the commission's return then lack of jurisdiction affirmatively appears from the pleadings themselves.

The judgment is accordingly reversed and the cause remanded with directions to dismiss at claimants' costs.

MR. JUSTICE KNOUS and MR. JUSTICE HOLLAND concur in the conclusion.

MR JUSTICE BOUCK dissents.

MR. JUSTICE KNOUS specially concurring:

Under the plain wording of our statute, section 377, chapter 97 C. S. A. '35, and numerous decisions of this court cited in the principal opinion, it is definitely certain that an action in the District Court to review an award of the Industrial Commission is futile where the claimant has failed to avail himself of his right to petition for a review by the commission. In such cases there can be nothing before the District Court for determination. From the record in the present case it is evident that no petition for review was filed with the commission, consequently a reversal of the cause necessarily follows, and to this extent I concur in the majority opinion.

However, the record of the Industrial Commission before us clearly indicates that the notice of the award of the commission required to be given the claimant by section 276, chapter 97 C. S. A. '35, is deficient in that the affidavit purporting to show its mailing bears a date previous to the day upon which the findings of fact and award involved were made by the commission. Section 276, *supra,* in providing for the filing of a petition of review provides:

> "Such petition must be filed within fifteen days after the * * * award of the commission * * *. All parties in interest shall be given due notice of the entry * * * any award of the commission, and said period of fifteen days shall begin to run only after such notice * * *."

Therefore, if no notice is given, or the attempted notice is insufficient, as is here indicated, the specified time within which the petition for review must be filed does not run against any party to the proceeding. Under these circumstances I believe that the judgment should be reversed with directions requiring the commission to give proper notice of the award to claimant, and affording her the statutory time thereafter to file a petition for review with the right to have its action reviewed by the District Court in case its determination should be adverse to her.

The claimant has filed no cross-assignments of error raising the question of this defective notice and while under our ordinary procedure the matter would not be considered, under Rule 35 it may be. The question of the jurisdiction of the District Court, arising from the failure of the claimant to file a petition of review, was not raised there, but nevertheless has been adopted as the controlling factor by this court in reversing the judgment. It seems only fair, where this strict jurisdictional principle is made to apply, that the court in the discretion accorded it also should give consideration to other equally defective steps of procedure before the commission, in an effort to open the way to the claimant for the review contemplated by the Workmen's Compensation Act. Such action would be in harmony with the often previously expressed views of this court in giving a liberal construction to the act, so as to accomplish its beneficent purpose. *Central Company vs. Industrial Commission,* 84 Colo. 481, 271 Pac. 617.

I am authorized to say that Mr. Justice Holland concurs in the views here expressed.

MR. JUSTICE BOUCK, dissenting:

By way of constructive criticism of the majority opinion herein I respectfully submit that the law and the facts of the case at bar call for an opinion substantially as follows:

"This is a case arising under the Workmen's Compensation Act. Claimants brought an action in the district court, complaining that the uncontradicted evidence called for compensation in a larger sum than the last awards of the referee and the Industrial Commission granted. That court entered judgment remanding the case to the commission with instructions to increase the award.

"A brief history of the proceedings is essential. Claimants are a widow and three small children, dependents of the employe Leo Martinez, who was killed by an industrial accident. Liability was admitted, a hearing had, and a referee's award became the award of the commission by failure to file a petition for review. Thereafter the referee held another hearing, which like the first was participated in by all the parties, and he entered a supplemental award of compensation in an increased amount. Claimants having filed with the commission a petition for review, the matter automatically stood referred to the commission. The latter took no further evidence. It merely reviewed the file, which of course included both the entire evidence taken and the petition for review, and thereupon entered a supplemental award of exactly the same tenor as the supplemental award of the referee. The petition for review specifically set forth certain individual items which it was claimed had been overlooked, and the transcript of evidence and the exhibits clearly show that they were not allowed by either referee of the commission, though the evidence concerning these omitted items was not contradicted in any way. The commission file contains no other petition for review, nor does it affirmatively show that such a petition was or was not filed.

"Each of the asignments of error has been carefully considered. The arguments in support thereof are without merit.

"The only other contention now urged in this court is that the district court lacked jurisdiction of the subject matter because the claimants failed to file a petition for review within fifteen days after the last award was made by the Industrial Commission. It is not necessary for us to consider this point, inasmuch as the plaintiffs in error, that is, the employer corporation, its insurance carrier, and the Industrial Commission, each and all not only raised no such point in the district court by demurrer or otherwise, joined issue on the merits, and tried the case below without any contention that jurisdiction was lacking, or that the complaint was insufficient, *but actually have not assigned any error whatever in regard to the lack of a petition for review.*

"Rule 32 of this court reads thus:

"'Plaintiff in error shall assign errors in writing at the time of filing the record and each error shall be separately alleged and particularly specified * * *.'

"This rule has hitherto been rather strictly enforced by this court, not only where an assignment of error is wholly lacking, as here, but in cases where the assignment of error was not specific. *London O. G. M. Co. vs. Dempsey,* 100 Colo. 156, 66 P. (2nd) 327; *Smookler vs. Nicoll Bros. Oil,* 100 Colo. 587, 69 P. (2d) 306; *Buchanan vs. Burgess,* 99 Colo. 307, 62 P. (2nd) 465; *Ray vs. People,* 99 Colo. 387, 62 P. (2nd) 1168; *Denver vs. Schmid,* 98 Colo. 321, 52 P. (2nd) 388; *Gibson vs. Neikirk,* 98 Colo. 389, 56 P. (2nd) 487; *Chico C. I. Co. vs. Colorado Portland Cement Company,* 97 Colo. 541, 51 P. (2nd) 591; *Moffat Coal Co. vs. Cometa,* 97 Colo. 573, 51 P. (2nd) 593 (a workmen's compensation case); *Sharer vs. People,* 96 Colo. 483, 44 P. (2nd) 914; *Oman vs. Mishler,* 92 Colo. 479, 22 P. (2nd) 132; *Cunningham vs. Snelling,* 91 Colo. 454, 15 P. (2nd) 713; *Scofield vs. Scofield,* 89 Colo. 409, 3 P. (2nd) 794; *Kingdom of Gilpin Mines vs. McNeill,* 88 Colo. 44, 291 Pac. 779; *Daiss*

vs. Hanes, 85 Colo. 397, 277 Pac. 5; *Conner vs. Sullivan*, 84 Colo. 572, 272 Pac. 623; *Bohe vs. Scott*, 83 Colo. 374, 265 Pac. 694; *J. I. Case Threshing Machine Co. vs. Paeker*, 81 Colo. 195, 254 Pac. 779.

"Rule 33 is as follows:

"'Counsel will be confined to a discussion of the errors stated, but *the court may, in its discretion*, notice any other error appearing of record.'

"In direct violation of these rules, counsel for plaintiffs in error have discussed at length in their brief the point on which they thus failed to assign error.

"In the absence of anything which, under the principles heretofore announced by this court, could reasonably justify or excuse this court in affirmatively assisting the plaintiffs in error by supplying the unexplained omission, we leave them in the situation for which they themselves are alone responsible. We decline to relieve the plaintiffs in error of the burden placed upon them by our rules; otherwise we might well be suspected of turning the court into an advocate on behalf of the plaintiffs in error, in order to defeat what in the light of the uncontradicted evidence the record before us indicates is a just claim for an award of larger compensation. We are still under the well recognized and often expressed duty to construe the Workmen's Compensation Act liberally in order to carry out its beneficent purpose. *Lindner Co. vs. Industrial Commission*, 99 Colo. 143, 148, 60 P. (2nd) 924; *Danielson vs. Industrial Commission*, 96 Colo. 522, 526, 44 P. (2nd) 1011; *Central Co. vs. Industrial Commission*, 84 Colo. 481, 484, 271 Pac. 617; *Employers' Co. vs. Industrial Commission*, 65 Colo. 283, 288, 176 Pac. 314; *Karoly vs. Industrial Commission*, 65 Colo. 239, 243, 176 Pac. 284; *Industrial Commission vs. Johnson*, 64 Colo. 461, 464, 172 Pac. 422.

"Those cases where assignments of error have been either wholly lacking or insufficient, but where this court has affirmatively acted on the alleged errors, are few in number and present exceptions to the strict rule only because of circumstances not apparent in the present record. None of these cases seems to be a workmen's compensation case.

"The judgment of the district court will accordingly be affirmed, remanding the case to the Industrial Commission for determination of such increased compensation, if any, as may be warranted by the evidence. Of course the commission will in its discretion have the right to order a further hearing for additional evidence regarding the wage history of the deceased employe.

"Judgment Affirmed."

I cannot believe that this court will persist in its newly acquired illiberal attitude, as expressed for the first time in the present majority opinion, of lending its gratuitous assistance to the adversaries of compensation claimants, when on the record these are as already shown entitled to its utmost aid and protection because of the principle of liberal construction hitherto uniformly proclaimed and enforced by this court in compensation cases, exemplified by the cases cited above. I challenge anybody to cite a single one of our decisions to the contrary. If doubts exist, they are to be resolved in favor of the claimants; and, where the rules and the law confer discretion upon this court to relieve or not to relieve a plaintiff in error employer of the consequences of his own violation of the rules, the liberal-construction principle, as well as judicial fairness and impartiality, demands at the very least the court's refraining from volunteered action of its own to defeat a claimant.

It is my conviction that this court in its majority opinion has overlooked or misapprehended several points, among others, namely:

1. By abusing the court's discretion to consider or not to consider alleged errors not covered by any of the assignments of error herein, as shown in the supposititious court opinion presented and recommended above;

2. By assuming that the cases cited in the majority opinion are decisive of the present case, when as a matter of fact in each of those cases the issue of failure to file with the Industrial Commission a petition for review was directly raised and considered in the district court and was covered by an assignment of error filed in this court, whereas in the case at bar the issue was not so raised, considered, or covered by assignment of error; in which cases so cited, when a demurrer was sustained, the plaintiff invariably *declined to plead over*, thus dispensing in those cases with the necessity of litigating the issues of fact, while in the case at bar the issues of fact were not even suggested by the defendants below, though there was a duty to try those issues in the district court or not at all (*The People vs. County Court*, 68 Colo. 420, 190 Pac. 425; *Miller vs. Weston*, 67 Colo. 534, 536, 189 Pac. 610, 611 (Where jurisdiction depends upon a question of fact, it must be taken advantage of in apt time and in the right manner); *Callbreath vs. District Court*, 30 Colo. 486, 487, 71 Pac. 387; *Empire Co. vs. Miller*, 24 Colo. App. 464, 469, 135 Pac. 127, 129);

3. By apparently assuming that the record of the district court herein shows a failure to file a petition for review merely because the commission's file (or record) now fails to contain such a petition; the court overlooking the fact that no statement as to such failure appears therein and that the Workmen's Compensation Act does not ascribe such an overwhelming effect to an omission, but constitutes the "record" simply the *answer* of the commission, thus plainly giving the effect of a pleading, not the effect of the record of a court of record, which latter frequently imports absolute verity; the court further overlooking the fact that the commission "record" disproves on its face the notion that the file of an administrative body of the government like the commission, composed

of laymen, must necessarily be vested with an infallibility which is inconceivable, the evidence of incompleteness and error being manifest on its face, such for example as that the certificate of the commission's secretary is not under oath, and that the affidavit as to service of the notice of the commission's last award was made—as solemnly declared in the jurat by the person administering the oath—on March 13, 1936, whereas the mailing sworn to is stated to have been done on March 14, the next day, when the award was actually made, a contradiction and intrinsic impossibility which destroys the basis on which the majority opinion rests, for the reason that until an award is followed by proper notice the time for filing a petition for review does not begin to run;

4. By apparently assuming that, if the particular petition for review does not appear in the loosely fastened pile of papers, none of which bears a file mark of the district court, then an action commenced in such court must necessarily be thrown out; whereas it is respectfully submitted that the issue whether a petition for review has or has not been properly filed, and the issue whether or not a notice of award was properly sent so as to start the running of the time for filing a petition, and the issue whether or not the plaintiffs in error were estopped from, or had waived, the filing of the petition, all involve *questions of fact* which cannot be determined without giving an interested party his day in court with an opportunity of a full judicial hearing (Compare: *Adams County Court vs. People*, 48 Colo. 539, 540, 111 Pac. 86; *Ramer vs. Smith*, 4 Colo. App. 434, 437, 36 Pac. 302, 303); it being further respectfully submitted that a similar right of judicial hearing attaches in connection with the legal issue whether or not a plaintiff in error must, by pleading, affirmatively raise the question, as to prematureness of the action, resulting from failure to give a proper notice of award, and whether or not, by trying the case on its merits without raising the question, he waives it, the authorities saying that he does (1 C. J., "Actions," page 1152, Sec. 398, 399); issues of fact having to be tried in the district court, obviously the Supreme Court cannot try them, having in compensation cases merely the power of summary review as to legal questions; it being well to remember that, while objections to the jurisdiction and to alleged insufficiency of a complaint *may be raised* at any time, those objections will be *sustained* only when the circumstances call for such action;

5. By assuming that rights acquired under a mandatory statute cannot be waived or lost, for it is mandatory provisions—not *directory* ones—that are usually involved in questions of waiver and estoppel;

6. By failing to recognize that the provision for filing a petition for review is analogous to provisions of other states for the giving of notice of appeal in workmen's compensation cases and should, as in those states, be deemed capable of being waived when the parties have proceeded to trial on the merits;

7. By failing to distinguish between lack of jurisdiction due to the fact that the particular court can never try the particular kind of case, or that the person presiding is not a properly designated judge, or that the case is not within the maximum or minimum pecuniary limit, or that there is some other organic defect, on the one hand, and the omission of a preliminary step in the circumstances claimed here, on the other;

8. By overlooking other propositions of law which I may discuss at a later day.

For the various reasons above given, I dissent.

On petition for rehearing the foregoing opinion is modified, as follows:

It also clearly appears from the record that the notice of award required by section 376, chapter 97, C. S. A. '35, is deficient in that the affidavit of mailing bears a date prior to that of the award. Said section provides:

> "Such petition must be filed within fifteen days after the * * * award of the commission * * *. All parties in interest shall be given due notice of the entry of * * * any award of the commission, and said period of fifteen days shall begin to run only after such notice * * *."

Therefore, where no notice, or an insufficient notice, is given, the time within which the petition for review must be filed does not run.

The specially concurring opinion is withdrawn. Judgment is reversed and the cause remanded with directions to the district court to refer the matter to the commission with instructions to give proper notice of the award in conformity with the statute. Thereafter the parties may proceed as they are advised.

En banc, all the Justices concurring herein.

INDUSTRIAL COMMISSION vs. CARPENTER.

102 Colo. 22

I. C. 96330 **76 P. (2nd) 418** **Index No. 262**

Judgment Reversed with Direction

En Banc.

BOUCK, Justice.

This case arises under the Workmen's Compensation Act. The Industrial Commission dismissed the defendant in error Carpenter's claim for compensation on the ground that he was guilty of laches in instituting proceedings before the commission. Claimant duly carried the matter to the district court, which entered judgment remanding the case to the commission with instructions to enter an award of compensation. We are asked to reverse this judgment.

The claimant, employed as a patrolman by the Police Department of the City and County of Denver, was injured while attempting to make an arrest on

April 25, 1927. He suffered total disability during the ensuing eighteen days, for which time his full salary was paid him as usual. Thereupon he resumed and continued his work as a member of the police force, being retired on March 16, 1937. The Police Department did not report the injury to the insurance carrier or to the commission; neither did the claimant. No claim for compensation or medical benefits was filed by the claimant until after his retirement from the service. The assertion of the claim was thus delayed for nearly ten years, though the Workmen's Compensation Act declares that a claim must be filed within a period of six months after the injury. '35 C. S. A., volume 3, chapter 97, section 363.

Among the defenses, the employer and the insurance carrier set up that of laches. It is on this ground that the commission dismissed the claim, saying:

> "The commission further finds that in delaying the filing of his claim for a period of approximately ten years, claimant is guilty of extreme laches and that to permit him or any other claimant to delay the pursuance of his rights for such a long period of time opens the door wide to fraud. Such delay renders the insurance company absolutely helpless in employing such measures as might mitigate the disability or effect a cure. If such claims are allowed to stand carriers have no basis upon which to fix compensation insurance dividends, they being based on loss experience for the preceding five year period. Nor can they intelligently set up loss reserves.
>
> "The commission is, therefore, of the opinion and so finds that claimant's claim for compensation for a permanent partial disability should be denied and dismissed because of laches."

Undoubtedly this reasoning, on its face, is exceedingly cogent. It is our opinion, however, that under the state of facts here appearing this defense as such is not available in the light of the act itself. The proceedings thereunder are purely statutory and not equivalent to a suit in equity. Whether a state of facts may sometime hereafter exist justifying the interposition of this or an analogous defense, we need not now decide. The question of permitting the defense of laches or something analogous thereto in a purely statutory proceeding is a question of legislative policy which probably can be answered only by express act of the General Assembly. The courts are not allowed to indulge in judicial legislation.

With the issue of laches eliminated, we nevertheless cannot definitely dispose of the case at its present stage. The commission, for instance, has not determined by its findings whether or not the alleged injury was due to an accident which arose out of and in the course of claimant's employment. These are essential facts. Nor has the commission determined by its findings whether or not the regular monthly salary paid claimant for his eighteen days' absence from his duties was by way of compensation for the injury. The rules, regulations, and general practice of the Police Department may conceivably have required or permitted the payment of salaries to its members during such absences, regardless of the question whether there was an injury compensable under the Workmen's Compensation Act. If so, then in the present case it could not be said that the salary thus paid was compensation for the injury itself. In that event the delay, in filing with the commission the notice claiming compensation, for longer than the prescribed limitation period of six months would be fatal.

For failure to make the necessary findings on the points mentioned, the judgment of the district court, which, as already stated, instructed the commission to proceed with an award of compensation, must be reversed. In the interests of a full and fair trial, the case will be remanded to the district court with directions to instruct the Industrial Commission to vacate its order, to proceed to consider the evidence—with the right on the part of the commission, if it sees fit, first to order an additional hearing for the taking of further evidence on the matters indicated or any others germane to the issues—and to make proper findings upon all the evidence in the present record and all such additional evidence, if any.

Should the commission, after due hearing, find that the injury was due to an accident which arose out of and in the course of claimant's employment, and that the salary was paid as compensation for the injury and not otherwise, then the commission will award proper compensation; but, if the evidence should not be sufficient to enable the commission to make any one or more of such findings, then the claim will be denied.

Judgment reversed with directions.

MR. JUSTICE HOLLAND not participating.

INDUSTRIAL COMMISSION vs. MURPHY.

102 Colo. 59

I. C. 95348 **76 P. (2nd) 741** **Index No. 263**

Judgment Reversed

In Department.

BURKE, Chief Justice.

This is a workmen's compensation case. The parties are hereinafter referred to in order as the commission, the fund, the company and Murphy. The sole question presented is, Did the injury complained of arise out of and in the course of the employment?

The company mines gold about two miles from Empire, which is a short distance above Idaho Springs. It has nothing to sell, no stock to dispose of,

nothing to advertise. O'Dell was a stockholder and its secretary and manager, and Gammon, not a stockholder, was assistant treasurer. Murphy, twenty-seven years old, was employed as a sampler and assistant survey man. One of the miners, as spokesman for others, represented to Gammon that the "boys" would like to have a baseball team to play on Sundays because they were without recreation. Gammon recommended the project to O'Dell who thought it would "be a good thing for the morale of the men," and offered, for the company, to "match dollar for dollar" on the expense of organization. Action was accordingly taken at a total expense of $305. No further contributions were made nor obligations incurred by the company. Gate receipts of games were applied on expense and the shortage was covered by contributions. To this end O'Dell personally contributed about $300 and Gammon about $40. The team was known by the company name but no one was obliged to play or attend the games and no man was ever employed or discharged because of baseball. Four or five of the players were generally men not employed by the company. On the suggestion of Gammon, (who arranged the schedule of games but received no compensation from the company for his baseball activities) aequieseed in by the players, Murphy was acting as manager. August 2, 9, and 16, (Sundays) but few men were working. Murphy worked August 1, 2, 3, 4, 5, and 6, but not August 7, 8, or 9. On August 9 (Sunday) the team went to Colorado Springs to play. Six only of the players were employes of the company. On such trips the players furnished their own transportation. On this day Murphy took three of them in an automobile belonging to the company, which he borrowed from O'Dell for the purpose. O'Dell, out of his own personal funds, advanced hotel bills in Colorado Springs and gave Murphy money for gasoline. On the return trip the Murphy car collided with another in Vernon canon about 11:00 P. M. and Murphy was permanently injured. He filed his claim with the commission, whose referee made an award in his favor. This the commission reversed. The district court reversed the commission and ordered an award in favor of Murphy. To review that judgment this writ is prosecuted.

There are few conflicts in the evidence and most of those apparent can be reconciled. In any event the commission was at liberty to find the foregoing. If this were all the inevitable conclusion would be that the district court's judgment was wholly unsupported. Murphy's theory, however, is that his baseball activities were the result of company pressure exerted through O'Dell, but since the latter denied it we must assume the commission found against it. Moreover, say counsel for Murphy, these baseball games were sponsored by the company for the purpose of maintaining the morale of the employes and keeping them satisfied; that with the knowledge and approval of the company they had become a settled custom, hence an injury arising out of them exhibits a causal relation to the employment and is compensable. Several cases are cited but we think with one exception, and possibly the authorities therein referred to, they throw no light on the question. That case is *Conklin vs. Kansas City Public Service Co.*, 226 Mo. App. 309, 41 So. W. (2nd) 608. In the Conklin case an employe was struck in the eye by a baseball bat while watching an indoor baseball game on the employer's premises during the noon lunch hour.

The reasoning of the Conklin case is far from convincing but, assuming otherwise, the diversity of facts makes it inapplicable. Those games were long established and a part of the daily life and routine; here they were new, intermittent and casual. That accident occurred on the premises; this one miles away. That one occurred on a work day; this on Sunday. That one during a lunch intermission; this in the middle of the night. Moreover, in the Conklin case the commission found in favor of the workman; here against him.

No definition of "arising out of and in the course of the employment" to be found in this jurisdiction can be stretched to cover the instant case.

Industrial Commission vs. Anderson, 69 Colo. 147, 169 Pac. 135;
Industrial Commission vs. Nissen, 84 Colo. 19, 267 Pac. 791;
Aetna Life Ins. Co. vs. Industrial Commission, 81 Colo. 233, 254 Pac. 955;
Skaggs Co. vs. Nixon, 101 Colo. 203, 72 Pac. (2nd) 1102.

Some of the "recreation" cases inconsistent with the Conklin case and establishing a rule contrary to that here contended for by counsel for Murphy are:

Clark vs. Chrysler Corp., 276 Mich. 24, 267 N. W. 589;
Becker Roofing Co. vs. Industrial Commission, 33 Ill. 340, 164 N. E. 668;
Hama Hama Log. Co. vs. Dept. Labor and Industries, 157 Wash. 96, 288 Pac. 655.

We find no reasonable theory upon which this judgment can be sustained.

It may be regrettable that this young man cannot be compensated under the terms of the act, but its provisions must not be pushed beyond the limits of their purpose, nor its funds diverted to those not clearly entitled thereto, and the object of their creation be thus frustrated. Kindness to one may well be cruelty to many. Allowance of this claim could but serve as a warning to employers that they may concern themselves with the social life and recreation of their men, or permit their officers to do so, or contribute to efforts to lighten life, only under penalty of liability for every accident and injury arising from such activities, however remote from the employment itself.

The judgment is reversed and the cause remanded to the district court with directions to affirm the award.

MR. JUSTICE HILLIARD, MR. JUSTICE BAKKE and MR. JUSTICE HOLLAND concur.

INDUSTRIAL COMMISSION vs. STEBBINS.
102 Colo. 136
I. C. 91609 **78 P. (2nd) 368** **Index No. 264**
Judgment Affirmed

En Banc.

BAKKE, Justice.

This is a workmen's compensation case. Claimant was the wife of Myrtle C. Stebbins, who was injured in an automobile accident near Limon, Colorado, on December 24, 1935, and who died on December 26, 1935. The Industrial Commission found that claimant "failed to sustain the burden of proof and has failed to establish that the accident above mentioned arose either out of or in the course of decedent's employment." The district court reversed the findings of the commission and remanded the case with instructions to enter an award for the claimant. The commission, the State Compensation Insurance Fund and the employer assign error and ask for a reversal of the judgment of the district court and affirmance of the commission's award.

Stebbins was employed by Kenney as a carpenter foreman in the construction of a bridge on a highway project between Hugo and Limon, about half way between the two towns. On the mid-afternoon of December 24th, Stebbins, accompanied by claimant, was driving from Hugo to Limon, when, for some unexplained reason, he lost control of the car and the ensuing accident caused the injury which resulted in his death. The accident happened about four and one-half miles beyond the bridge and three and eight-tenths miles southeast of Limon. The crew working on the bridge had just finished pouring concrete for the floor the night before and been told by Kenney that they could lay off for a couple of days over Christmas. Claimant offered to prove that Stebbins had told her before the accident that Joe Davis, the bridge foreman, had told him, Stebbins, to go to Limon to get a man to keep fires at night under the bridge to prevent the cement from freezing. Davis, however, testified that he instructed Stebbins: "While you are driving around be sure and pass the bridge and see if the fires and night watchman are all right." It was suggested that the purpose of Stebbins and his wife in going to Limon was to attend a drawing for an automobile that was being given away there that afternoon. But there was no evidence to support this suggestion.

A man named Bennett had been employed as night watchman to keep the fires burning, and to see that the canvas protecting them was properly spread. He arrived on duty each evening between 4:30 and 5:00 o'clock, and no one, apparently, had any reason to believe that he would not be on duty at the same time on the twenty-fourth, but because of the admitted extra precaution that Davis was taking in saving the cement, Stebbins realized that he must see Bennett and instruct him about the fires.

It is not necessary to pass upon the rejection by the commission of claimant's offer of proof, as being hearsay, because an analysis of the evidence shows the following facts to be uncontroverted: That Stebbins was employed by the month, and that he was so employed on the morning of December 24th; that he was a carpenter foreman in whom Davis had implicit confidence, and that he, Stebbins, was a faithful and conscientious employe; that on December 24th Davis had to go to Denver on business pertaining to the job, leaving Stebbins, next in authority, in charge; that the weather was cold and that Davis took every precaution against damage to the bridge which would be caused by freezing of the green cement; that Davis did give Stebbins specific instructions on that morning to the effect that "while you are driving around be sure and pass the bridge and see if the fires and the night watchman are all right;" that both Davis and Stebbins knew that the night watchman lived in Limon; that in the afternoon, when Stebbins was driving around he did drive by the bridge; that he saw no one there; that he kept on to Limon, and that he was injured on the way. In all of which he was carrying out instructions not denied.

To offset this, in seeking to avoid liability, the insurance carrier and employer sought to show that Stebbins and his wife were going to Limon for another purpose. We find no evidence thereof.

We agree with the trial court's holding that these uncontroverted facts amount in law to an establishment of *the* fact that Stebbins' injury resulted from an accident arising out of and in the course of his employment, and that the commission exceeded its jurisdiction and acted beyond its powers when it found to the contrary.

Ordinarily, of course, the claimant has the burden of proving his claim, but where it is admitted, as here, that the employe was at work in the course of his employment preceding the time of his accident, it becomes the duty of the employer to show that the employe had left it, where employer relies on the defense that the employe was not acting in the course of his employment at the time of the injury. *Colorado Contracting Co. vs. Industrial Commission*, 74 Colo. 206, 219 Pac. 1075, 66 A. L. R. 1409.

In reaching our conclusion herein, it is to be noted that we are not usurping the functions of the Industrial Commission as a fact finding body. When the record evidence establishes that the employe was acting within the scope of his employment at the time of his accident—no evidence appearing to the contrary—there can properly be no finding that he was not so acting. In such circumstances the reviewing court is passing upon a question of law and not upon the facts. *Skaggs vs. Nixon*, 97 Colo. 314, 50 P. (2nd) 55.

The judgment is affirmed.

MR. JUSTICE BOUCK dissents.

MR. JUSTICE BOUCK, dissenting:

The majority opinion in the case at bar overlooks and misinterprets much of the concrete record herein. To these lapses I deem it my duty to call specific attention.

Incidentally, whenever compensation is awarded by a court after the commission, as here, has lawfully denied it, the result is not only that the insurance funds are unlawfully depleted, thus compelling higher premiums, but the sanctions and safeguards deliberately inserted by the legislature in the statute itself are palpably impaired.

In the case at bar it was the province of the Industrial Commission, and of this alone, to find the facts and determine whether or not the accident that caused the death of claimant's husband arose out of, and happened in the course of, his employment: the only issue that under the present record could properly have been considered by the court below. The latter mistook its function when it set aside the commission's findings and ordered contrary ones to be entered by that body. The fact that the commission might have found the other way, or that, if the trial court or this court were the lawful fact-finding body instead of the commission, one or the other or both courts might have decided in favor of claimant, is utterly immaterial.

It is likewise immaterial whether, if the commission had found in claimant's favor, the evidence would have been sufficient to support such a conclusion.

That the evidence was clearly sufficient to enable the commission to decide against claimant is obvious from the following verbatim testimony:

(*By the Witness J. H. Davis,* Superintendent of Bridge Construction, Deceased's Superior; on *Direct Examination*)

"* * * I will ask you to state whether or not Mr. Stebbins came to the scene of the work on December 24, 1935 (the date of the fatal accident). Yes, he did. When did he come out there? In the morning. About what time? I don't know exactly, around eight or nine o'clock. *Was there any work for him to do that day? No.* Did you tell him whether there was, or not? *I told him there was no use for him to be there,* my whole crew took two days off. *Did you give any instructions as to getting a man to* keep up the fires. *Not to get a man but to* instruct about the fires. State what was said. *I said, 'While driving around you might pass the bridge and see the fires and if the night watchmen are all right.' Did he state he was going to be driving around? Yes. What was said? Nothing, only I presumed he would be driving around that day taking the day off.* * * * Do you know Mr. Bennett? I knew he was the night watchman. Was he working under your supervision? Yes. What were his duties? To take care of the bridge (admitted to be about half-way between Hugo and Limon) and see that it was protected. And to keep the fires up? Yes, when necessary. * * * I ask you to state whether or not the part marked 'bridge' (on an exhibit) is the bridge under which the fires were kept? Yes, that is it. And is that the bridge on which Mr. Bennett kept the fires? That is it. *Those are the fires you wanted Mr. Stebbins to look at if he was riding around that evening? Yes.* * * * *Would it be necessary to go through Limon from his home in Hugo to go to the scene of the fire? No, but from my understanding with Mr. Stebbins in talking he would be in Limon that evening. Did he give any reason why he would be in Limon? No, not that I can recall. Did you instruct him to go to Limon to see Mr. Bennett? No.* Had Mr. Bennett given you any information that he would not be back on the job on the twenty-fourth? None whatever; just a precaution is all. *Did you tell him to contact Mr. Bennett at all? No, Mr. Bennett had been working and was supposed to work that night,* but I did not want to take chances of losing green cement. *And that is why you wanted him to look at the fires? Yes, and he promised to do so.* As far as you knew, Mr. Davis, *did Mr. Stebbins have any reason for being in Limon so far as any instructions given by you to him? Not as far as any from me, no.* Were you in charge of the job? Yes. *You say he told you he would be in Limon? Yes; it was more like he said he would be driving around and I said, 'While you are driving around be sure and pass the bridge and see if the fires and the night watchman are all right'."*

The above would seem ample to serve as a fair basis for the commission's findings. However, I quote further from the evidence before the commission, as drawn out by counsel for claimant while cross-examining, as follows:

(*J. H. Davis on Cross-Examination*)

"According to the testimony here *he said he was going to be driving around and you asked him to stop and see that the fires and watchman were all right? Yes. And you told him you were going to leave the bridge and go home to Denver? Yes. Did you ask him to take charge of things and see that everything was all right? Nothing beyond that;* I told him to take the two days off and *all I asked was to stop and see that that watchman was there.* You were disturbed about the watchman? No, not disturbed, I was cautious. * * * And you felt confident that Stebbins would stop by the bridge and see that everything was all right and keep those fires going? Yes. Do you remember about March of this year, Mr. Davis, of talking to Mr. Knight? I talked to him at some time. He came to Colorado Springs to talk to you? Yes. *You signed a statement, did you not? Yes. Did you tell him at that time in words to this effect, that either the night before or the twenty-fourth Davis instructed Stebbins to stop by the bridge and see*

if Bennett was keeping up the fires and stop the next morning to see if everything was O. K. and the man was there? Yes. You told him that? Yes. * * * *Did you think Bennett was supposed to be on the job to the next morning? Yes. He started his work at four or five o'clock in the afternoon;* what time did he quit? He was usually there when we left the job and stayed until someone showed up in the morning. * * * Had you laid everyone off? No, there was a man to watch the fires. You said on direct examination a few minutes ago, if I understood you correctly, that you told Stebbins that the rest were laid off and he might as well be off, too? That applied to him and his crew but not the watchman. * * * It (the time book) shows * * * Joe Davis worked eight hours on Tuesday; was that correct, or not? Yes. You stated you left about noon for Denver? My time goes on just the same. * * * It shows on here that M. C. Stebbins worked eight hours on that day, Tuesday, the twenty-fourth of December; was that correct? *He did not work but his time went on. He did not work the eight hours? No.* How many of them were on the monthly pay roll and shown as having worked on the twenty-fourth of December, and how many were on an hourly basis? Curry, myself and Stebbins, those are the ones *paid by the month.* * * * Stebbins had no men he was in charge of that day."

It was of course for the commission to believe or disbelieve any particular testimony. We have no right to dictate how the commission should exercise its power of determining credibility of witnesses or weight of evidence. It obviously believed Davis. That was natural because there was no competent evidence whatever inconsistent with it. It would indeed be difficult to discover in the record any evidence contrary to Davis'. Certainly there was no admissible evidence that could have justified approval if the findings of the commission had been the other way. The above quoted passages easily support the findings actually made. No one would be so reckless as to say that that evidence is "no evidence" or *"evidence so weak that it would amount to no evidence,"* within the language used by this court in *Industrial Commission vs. Elkas,* 73 Colo. 475, 477, 216 Pac. 521, 522.

There thus being substantial evidence to support the commission's findings, courts had no lawful right to set them aside, and, a fortiori, no court could lawfully usurp the fact finding commission by substituting findings of its own, as did the trial court.

Now, as heretofore, I respectfully submit that certain errors and fallacies appearing in the majority opinion destroy whatever plausibility it might have possessed. I quote verbatim from that opinion.

(1) "It was suggested that the purpose of Stebbins and his wife in going to Limon was to attend a drawing for an automobile that was being given away there that afternoon. But there was no evidence to support this suggestion." This is entirely immaterial in view of clear evidence that Stebbins had made a plan of his own to go to Limon, whatever might have been his private purpose, a matter manifestly immaterial. See also subdivision (5) below.

(2) "Because of the admitted extra precaution that Davis was taking in saving the cement, Stebbins realized that he must see Bennett and instruct him about the fires." No legal evidence can be pointed out from which such an inference could be drawn. It is purely the product of the imagination.

(3) "Stebbins was employed by the month, and * * * was so employed on the morning of December 24th." To be accurate, the majority opinion should have said that Stebbins was *paid* by the month. It is uncontradicted that Stebbins was given a two days' holiday from his regular employment. Whether the accident occurred "in the course of his employment" would therefore depend entirely upon the giving of special instructions, and the evidence is all to the effect that none were given. If there had been some evidence to the contrary, nevertheless the commission would have had the right to decide as it did, notwithstanding any such conflict. One could not say that, because an employe is paid by the year or by the month or by the week, he becomes entitled to compensation for accidents during every lay off and regardless of the fact that he is not then working at all within the meaning of the act.

(4) "On December 24th Davis had to go to Denver on business pertaining to the job, leaving Stebbins, next in authority, in charge." The testimony of Davis which I have quoted refutes the claim that Stebbins was left in charge. There was no evidence to support that claim. Davis simply gave his restricted instruction, which could not have been and was not complied with by Stebbins by being at the place of the accident at the time when it happened.

(5) "* * * He kept on to Limon. * * *In all of which he was carrying out instructions not denied." There is no evidence whatever of an instruction to go or keep on to Limon, and the claim that there was is most emphatically denied by Davis, the only one who could have given it.

(6) "To offset this, in seeking to avoid liability, the insurance carrier and employer sought to show that Stebbins and his wife were going to Limon for another purpose (than that of following an express instruction from Davis). We find no evidence thereof." It was not incumbent upon the plaintiffs in error to prove any motive or purpose at all. The express instructions were clearly proved as limited to a visit at the bridge in question, to see *there* a night watchman who was not due or expected at his post until 4:30 p. m. at the earliest, so that the special instructions could not possibly be complied with by a trip taken not only away from the bridge but even farther away from Stebbins' Hugo home *more than an hour before the night watchman's expected arrival at the bridge.*

(7) "We agree with the trial court's holding that these uncontroverted facts amount in law to an establishment of *the* fact that Stebbins' injury resulted from an accident arising out of and in the course of his employment, and that the commission exceeded its jurisdiction and acted beyond its powers when it found to the contrary." The facts claimed as favoring the claimant not being "uncontroverted," but strenuously denied, the conclusion of the court is beyond my comprehension.

(8) "Ordinarily, of course, the claimant has the burden of proving his claim, but where it is admitted, as here, that the employe was at work in the course of his employment preceding the time of his accident, it becomes the duty of the employer to show that the employe had left it," etc. The fallacy of this statement seems to me clear on its face. Citation of the case of *Colorado Contracting Co. vs. Industrial Commission,* 74 Colo. 206, 219 Pac. 1075, is strangely inapposite.

Other matters might be mentioned, equally inadequate to explain the present decision on logical or historical grounds. My time, however, will not permit me to discuss them.

For the reasons above appearing, I respectfuly dissent.

CONSOLIDATED FAST FREIGHT vs. WALKER.

103 Colo. ...

I. C. 88253 **.. P. (2nd) ...** **Index No. 265**

Judgment Affirmed

En Banc.

HOLLAND, Justice.

Error is assigned to a judgment in favor of defendant in error upon his claim under the Workmen's Compensation Act, on the ground that the trial court erroneously found that the Industrial Commission had jurisdiction of the claim, and ordered payment, which it had denied by a final award upon a finding that it had no jurisdiction by application to the facts of Section 10 of the act (C. S. A. '35, Vol. 3, c. 97, Sec. 289), which is as follows:

> "The provisions of this article shall not apply to common carriers engaged in interstate commerce nor to their employes."

Plaintiff in error, under a certificate of convenience and necessity, issued on application by the Colorado Public Utilities Commission, was, on February 6, 1935, operating freight trucks in Colorado between Denver, Greeley and Fort Collins, and not beyond the Colorado boundary. It had applied for insurance as provided by the act, but at the time of the injury to claimant, February 6, 1935, it was not carrying insurance. Claimant on the date of the injury was a driver of one of its trucks, conveying a load of intrastate freight from Denver to Fort Collins. While unloading this freight at Fort Collins, which was a part of claimant's duties, he slipped on the sidewalk and was injured by a heavy iron I-beam which was a part of his load. The injury resulted in a disability to the extent of 50 per cent of his working capacity. In due time he made claim to the Industrial Commission for compensation and upon hearing before a referee of the commission, his claim was allowed, and upon application of plaintiff in error, the referee's findings were reviewed and sustained by the Industrial Commission, which upon a second review, were again sustained. Plaintiff in error filed its action in the district court to set aside the findings and award of the commission, and upon trial the court returned the cause to the Industrial Commission with directions to take further evidence and determine whether or not plaintiff in error was engaged in interstate commerce within the meaning of the provisions of Section 10, *supra,* and whether or not the claimant was at the time of his injury occupied with work connected with interstate shipments, both in the general course of his employment and his employment at the time of the injury. Thereafter the Industrial Commission, after taking additional evidence, made its findings to the effect that it had no jurisdiction in the case, vacated all previous awards, and dismissed the cause. In its previous findings and awards, the commission had found that plaintiff in error was not insured under the provisions of the law; that it had applied for insurance but for some reason unknown to the commission, the policy, though issued, was cancelled, and because of such application plaintiff in error is estopped to raise the defense that it is an interstate commerce carrier within the meaning of the compensation act. On a hearing as directed by the district court, the Industrial Commission, after taking additional testimony, entered its supplemental award to the effect that plaintiff in error was engaged in interstate commerce within the meaning of the compensation act; that claimant was engaged in work connected with interstate shipments with respect to his employment, but at the time of his accident was engaged in work connected with intrastate shipments; that the plaintiff in error being engaged in interstate commerce, the Industrial Commission has no jurisdiction in the matter; and that all previous awards of the commission be vacated and claim denied for lack of jurisdiction and evidence.

Upon return of this award to the district court, and thereafter on the issues there joined, the court entered its findings and judgment in the following general effect: That the plaintiff in error at the time of the injury to claimant did not operate a truck outside of the state of Colorado; that the iron I-beam in question was a part of a shipment from Denver to Fort Collins and did not originate outside of, or extend beyond, the state of Colorado; that Section 10

of the compensation act does not apply to this cause; that the supplemental award of the commission by which it found that it had no jurisdiction is erroneous and is therefore set aside; that the plaintiff in error voluntarily applied for and was using a certificate of convenience and necessity issued by the Public Utilities Commission at the time of the injury; that it had made application for insurance under the certificate of convenience and necessity; that by these acts, plaintiff in error had voluntarily submitted itself to the jurisdiction of the Industrial Commission and is now estopped from denying such jurisdiction, and the case was remanded to the Industrial Commission with instructions to reinstate the award made by it in accordance with its findings.

Plaintiff in error contends that because 35 or 40 per cent of the shipments it handled were of an interstate nature, that (it) is, originating from points outside of Colorado, and in its continuous shipment was handled by it to points in Colorado, and other shipments originating in Colorado handled by it on a billing to points outside of Colorado, that it was engaged in interstate commerce within the meaning of Section 10, *supra,* and that the Industrial Commission was therefore without jurisdiction.

Defendant in error, claimant, contends that plaintiff in error is estopped to make this defense because of its having submitted to the jurisdiction of the Colorado Public Utilities Commission in voluntarily applying for and receiving a certificate of convenience and necessity, and by voluntarily applying for insurance under the provisions of the compensation act. The State Compensation Insurance Fund, by *Amici Curiae,* point out questions which they claim have wide interest and therefore should be determined in this action. Those questions, in addition to the ones above raised by the parties hereto, are: Whether the bar of Section 10 applies to all common carriers, without distinction, engaged in interstate commerce and therefore is a total bar as to the class as a whole; whether it applies to all of the employes of a common carrier without limitation as to their employment in interstate commerce in any degree or at any time; whether the bar is such a complete bar as to prevent a common carrier from electing to become subject to the Workmen's Compensation Act of Colorado and thus preventing its employes from becoming subject thereto; and whether the application for, or the securing of workmen's compensation insurance by such a common carrier, constitutes an estoppel which would prevent the carrier from raising the question as a defense in a workmen's compensation case.

The controlling question presented is: Was the carrier, plaintiff in error here, engaged in interstate commerce within the meaning of the act? If this question be answered in the affirmative, the claim of defendant in error is barred by the act. It is shown by the record that the load of freight being handled by claimant at the time of the injury contained no interstate shipments and the finding both by the referee and the commission is to that effect, with the further finding that claimant was not injured while handling an interstate shipment or interstate commerce. The case has turned largely upon the application of Section 10, *supra,* because the carrier here involved engages in some interstate commerce. In the consideration of the questions presented, a wide field is entered. It cannot logically be contended that there is any purpose of the Workmen's Compensation Act other than to protect all workmen, save those specifically excluded. If we extend the application of Section 10, *supra,* to the employes of every recognized class of common carriers, that may at times engage in interstate commerce, then we have lifted the protecting cloak of the act from workmen and this would generally be the result, regardless of the extent to which a carrier was engaged in interstate commerce, where it also was engaged in some intrastate commerce. A holding in this case that Section 10 is not applicable, would not be an interference with, or regulation of, the business of interstate commerce, but would be a regulation of the carrier that, or person who, may at times engage in interstate commerce business. Because an employe is in the service of a carrier that engages in both intrastate and interstate commerce, is no reason why he should be deprived of the protection afforded workmen employed by carriers not engaged in interstate commerce; neither should he be exempt from the application of Section 10, *supra,* because he is otherwise within the protection of the compensation act. Carriers conducting a business that has the aspect of both interstate and intrastate operations, cannot claim to be engaged in either, to the exclusion of the other. Such carriers, and their employes accepting employment with them, must assume the burden and regulations which apply to the dual operations. It would seem, therefore, that a determination of the character of such a carrier's business, for jurisdictional purposes under the act, must necessarily depend upon the specific engagement and work at the time involved. If the injured employe was at the time of the injury unquestionably engaged in interstate commerce or in work so closely identified with it and necessarily related to it as to be an essential part of the interstate movement, then the act applies. It would thus seem, in view of the situation before us, that the section here calls for an interpretation resulting in the conclusion that its provisions shall not apply to common carriers *while* engaged in interstate commerce or to their employes; but that under the facts here presented, the interpretation should be such as to give the Industrial Commission full jurisdiction, which it refused, and which the trial court held it to have. This determination necessarily carries with it the apparent solution of the other questions involved, without a detailed discussion thereof. The contention that the trial court made its own findings is not supported by the record; on the contrary it appears that it adopted the original findings of fact as made by the Industrial Commission, holding only that the commission had improperly applied the law relative thereto.

The judgment of the district court is therefore affirmed.

EMPLOYERS MUTUAL INSURANCE CO. vs. JACOE.
102 Colo. 515
I. C. 8519 **81 P. (2nd) 389** **Index No. 266**
Judgment Affirmed

En Banc.

BAKKE, Justice.

Action under the Workmen's Compensation Act. Judgment below affirmed award of compensation to claimant by the Industrial Commission for permanent partial disability of 10 per cent, and it is to review that judgment that the matter is before us.

Claimant was injured November 1, 1918, while working in a mine, when some rock fell against his right leg (original claim recited left leg, but doctor's testimony indicates it was the right one. Immaterial in any event), and broke both bones just above the ankle. A hearing was had on his claim January 7, 1919, and he was awarded $88 for temporary total disability. He received this award by check from the company, which he endorsed under the usual "payment in full' clause, and the correspondence of the insurance carrier (plaintiff in error here) with the commission indicates this, although the formal receipt, which claimant was said to have signed was destroyed by fire in the office of insurance carrier several years ago. Claimant says he never signed any separate receipt.

From 1919 to 1937, claimant, who was not represented by counsel at the first hearing, did nothing further about the injury except, as he says, "I did call at the office of the insurance company at the time, several times, and stated that I was unable to go to work. I did, but there was nothing done." This statement is not denied by the insurance carrier.

The Industrial Commission, upon its own motion, reopened the case under authority conferred by Section 110 of the Compensation Act, '35 C. S. A., Vol. 3, c. 97, Sec. 389), which reads as follows:

> "Upon its own motion on the ground of error, mistake or a change in conditions, the commission may at any time after notice of hearing to the parties interested, review any award and on such review may make an award ending, diminishing, maintaining or increasing the compensation previously awarded, subject to the maximum and minimum provided in this article, and shall state its conclusions of facts and rulings of law, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys already paid."

We have held that the defense of laches is not available where the award is made under this provision. *Industrial Commission vs. Carpenter,* 102 Colo. 22, 76 P. (2nd) 418. And that "payment in full" does not bar a review (*Employers Mutual Ins. Co. vs. Industrial Commission,* 83 Colo. 315, 265 Pac. 99); but we also have held that an amicable, bona fide settlement, approved by the commission, is binding. *Independence Coffee & S. Co. vs. Taylor,* 97 Colo. 242, 48 P. (2nd) 798.

Counsel for the insurance carrier contends that the finding of temporary disability only, and awarding compensation therefor by the commission in 1919, "must be deemed" to be a finding of no permanent disability (*Flick vs. Industrial Commission,* 78 Colo. 117, 239 Pac. 1022), and, hence, there is no "error, mistake or a change in conditions" that constitute a ground for reopening the case. Assuming that to be the rule of that case, it is justly tempered with an exception that the commission may, in its sound discretion (determining as a fact that there was error, mistake, or changed conditions), reopen a case whenever there has been a natural development of an industrial injury, uninfluenced by an independent, intervening cause. *Post Printing and Pub. Co. vs. Erickson,* 94 Colo. 382, 30 P. (2nd) 327.

The natural development of the injury here, as disclosed by the record, is the swelling of the ankle caused by the incomplete mending of the break of one of the bones, which, with its attendant weakness, causes exhaustion in an unreasonably short time. It is not contended that there was any independent, intervening cause that resulted in claimant's present condition, other than the lapse of time.

Claimant's reason for the long delay was that he was unaware of his right to have a further hearing. While ignorance is no excuse, in fairness to him, it should be said that he was not represented by counsel at the first hearing. The charge of concealment against him, we feel, is not well founded. We prefer to believe that all parties acted honestly in the matter.

There is little dispute in the medical testimony as to the condition of the leg in 1937, when the case was reopened, and we feel there is clearly sufficient competent testimony to support the commission's award. There was a chronic enlargement, and the fractured internal malleolus had not completely united, which conditions, even though potentially existing at the time of the original hearing, were not considered by the commission in connection with any attempt to fix permanent partial disability. Whether we call it a mistake on the part of the commission or a change of conditions is immaterial, since either would justify the commission's action in reopening the case. In any event, we have held that where the commission on its own motion has entered a supplemental award, it must be assumed, on review, that it believed it had made a mistake, and an award without a specific finding to that effect has been sustained. *Clayton Coal Co. vs. Zak,* 94 Colo. 171, 29 P. (2nd) 374; *Century Indemnity Co. vs. Klipfel,* 99 Colo. 213, 61 P. (2nd) 842.

We are of the opinion that the facts and circumstances in the case at bar are sufficiently similar to those in *London G. & A. Co. vs. Sauer,* 92 Colo. 565, 22 P. (2nd) 624, to make that case controlling here.

The case of *Independence Coffee and S. Co. vs. Taylor, supra,* is distinguishable, because there the temporary total disability had terminated at the time claimant signed the receipt, and the claim of his having sustained any permanent disability was very questionable, both of which elements are lacking in the present case.

Finally, we feel that whatever doubts may exist concerning the disposition of this case, should, in view of the circumstances, be resolved in favor of the judgment below.

MR. CHIEF JUSTICE BURKE, MR. JUSTICE BOUCK and MR. JUSTICE HOLLAND dissent.

MR. JUSTICE BOUCK, dissenting:

I respectfully dissent.

The district court judgment sought to be reversed herein is one that sustains a certain supplemental award of the Industrial Commission which purports to grant additional compensation under the Workmen's Compensation Act.

Jacoe, an employe of the Matchless Fuel Company, suffered a compensable injury on November 1, 1918, at Louisville, Colorado, his right ankle being broken by a fall of rock. He was disabled until February 1, 1919. On March 5, 1919, the commission, after a full hearing, awarded him compensation for that period at $8.00 a week. The amount was duly paid and in Exhibit 1 Jacoe acknowledged final payment to be "in full settlement of liability for compensation under the Colorado Workmen's Compensation, for all injuries received * * * the first day of November, 1918, * * * subject to approval and review by the Industrial Commission of Colorado." The commission duly approved this receipt and release on July 21, 1919 (fol. 156).

The hearing preceding the award had been held in the usual manner, the witnesses produced being duly examined. On that evidence the commission made its adjudication. There is no suggestion of fraud, mistake or other irregularity in the record. The commission must make its adjudication, as any lawful tribunal must make its adjudication, on the evidence actually before it, whether or not any particular party has succeeded in procuring and introducing all available evidence in his favor. There is no provision in the Workmen's Compensation Act for reopening a case merely because further evidence might have been adduced, either to make a case or to corroborate other evidence already presented or to refute the evidence of the adversary, or because a different conclusion might have been reached by a witness, expert or otherwise, or even by the commission itself. As for errors or mistakes chargeable, not to the commission but to the parties themselves, it is incumbent on the parties to correct their own errors or mistakes, whether affirmative ones or in the way of omissions, before the award of the commission becomes final and prior to expiration of the time for filing a petition for review. Such errors or mistakes do not justify the reopening of a case by the commission under Section 110 of the act, '35 C. S. A., c. 97, Sec. 389.

On October 26, 1937, the commission received from the claimant an "application for hearing" on the blank intended for use whenever the original negotiations for compensation have reached a deadlock. Therein the "nature of controversy or dispute" was specified by the claimant as "end of temporary disability and degree of permanent." Of course, no provision is found in the Workmen's Compensation Act for such a communication from a claimant after an award has been allowed to become conclusive by failure to ask for a review at the hands of the commission; the claimant has no right to reopen a case in such circumstances. Here the attempt was made by the claimant so to reopen after the lapse of more than eighteen years.

The commission, on arrival of the claimant's aforesaid communication, reopened the case by ordering another hearing to be held on November 10, 1937, "to determine whether there has been error, mistake or change in condition."

The power of the commission to reopen a case, as already indicated, is governed exclusively by Section 110 of the act. Thereunder the power can be lawfully exercised if there has been an "error" or "mistake" of the commission itself or a "change in conditions" of the claimant. None of these contingencies appears to have happened in the case at bar. There is no finding by the commission that one of these situations existed, nor does the evidence reasonably show it. Under the evidence originally introduced, the commission could not have made a greater allowance of compensation than it did. It committed no error or mistake in this regard, and the award was not questioned at the time; in fact, the award was, as already shown, acquiesced in and agreed to by a formal document which is not refuted, and which the commission expressly found to have been executed by the claimant. Such being the facts, the duly executed release must govern, because its binding effect is not impugned on any known ground for cancellation.

As for a change in the claimant's condition, the evidence reveals nothing of the sort. It is indeed manifest, under the evidence taken at the second hearing, that no change had taken place.

The claimant himself testified at the second hearing that his ankle is swollen, and has been "in that same condition" ever since he got hurt (fol. 109); that it has been "about the same" in the past few years; that he has "always been complaining about having a little pain in there" and "it don't seem to be getting any improvement" since he got hurt; that he thinks it is about the same as it was when he went back to work; that he has worked in the mines at various times since he went back to work, and has earned the regular wages (fol. 122, 123, 124, 125, 127, 128). It is obvious that the industrial efficiency of the claimant has not been lessened.

Dr. Cassidy, who did not examine the claimant until about nineteen years after the accident (fol. 132), testified at the second hearing that he treated

the claimant "for minor things, nothing serious" (fol. 134); that the claimant, during the three or four years the witness had known him, "never complained * * * about the condition of his foot;" that witness had not "noticed anything in (claimant's) getting around to indicate a disability;" that claimant apparently "walks around about as good as (witness or cross-examining attorney);" that witness "looked at the ankle and saw there was swelling on the inside of the ankle above the internal malleolus" (fol. 135), which swelling was not apparently an acute condition, but just a chronic enlargement; that claimant apparently has good function of the ankle (fol. 137); that he has not full extension of his foot (fol. 138); that the internal malleolus had not been completely united, according to the X-ray (fol. 138); that all witness found under clinical examination was a lack of extension and swelling of the ankle (fol. 140-1); that the extension and flexion of the foot constitute only one of its functions, and it is still a support for him and is a serviceable foot, a very serviceable foot (fol. 142); that witness has had only the general practitioner's standpoint in studying the basis of determining estimates of disability of the different members, and does not often have occasion to do it, his practice being mostly trying to cure the effect, as he does not hold himself out as an expert; that he estimates the time necessary for recovery of fractures of the malleolus as six months to a year, this being his opinion; that there is not any treatment indicated in the present case.

Dr. Packard, who examined the claimant by request of the commission, reported (fol. 101, 102) that he found claimant to be a fairly healthy-appearing, well-developed man who presents some valgus of the right foot on standing; that in the sitting position the ankle shows some enlargement, three-eighths inch increase in diameter, the same in circumference, but that there is no gross deformity except for some enlargement of the internal malleolus of the tibia; that palpation reveals no abnormal motion over the internal malleolus; that there is evidence of an old healed fracture of the fibula three inches above the joint; that there is restriction of full inversion of the foot; that X-rays taken at the Denver General Hospital in July, 1937, show slight eversion of the ankle, an old healed fracture of the fibula, and an ununited fracture of the malleolus of the tibia.

It is reasonably inferable from the above statements of the two physicians that the claimant was correct in representing his present condition to be substantially the same as his condition immediately after the injury and at the time of the first hearing. There was nothing in the 1937 situation that was not, or could not have been, told about in 1919. Our Workmen's Compensation Act does not permit the Industrial Commission to reopen a case of its own volition for the purpose of bolstering up the case as originally presented in order that evidence which was available in the first instance might be supplied at a later hearing with a view to obtaining an increase in compensation. Such a procedure would be destructive of the fundamental safeguards and permanence of surrounding judicial, quasi-judicial or administrative determinations arrived at in the absence of fraud or other recognized grounds for setting such a decision aside.

The claimant, who was entitled to use the services of the company physician, employed a physician of his own choosing instead. This physician testified at neither the first nor the second hearing, though he resided and had his office in Denver, where the hearings were held, and it must be assumed that this failure was an omission which possibly constituted an error or mistake of the claimant himself, but not of the commission.

The case at bar is seen to be essentially different from *London Co. vs. Sauer*, 92 Colo. 565, 22 P. (2nd) 624. In the latter the claimant, the members of the commission and the other persons connected with the proceedings labored under a common error, as will be seen from the following language in the opinion there handed down:

> "His possible right to compensation for permanent disability had been overlooked by everybody, including Sauer, who says he was unaware of such a right and had no one to advise him. He apparently discovered his oversight shortly before the 1932 hearing."

The case at bar bears a striking resemblance to *Independence Co. vs. Taylor*, 97 Colo. 242, 48 P. (2nd) 798, where under the facts the claimant was denied the right to additional compensation, and where we cited and distinguished the Sauer case, *supra*.

The judgment should be reversed and the case remanded to the commission with directions to vacate the supplemental award.

MR. JUSTICE HOLLAND concurs in this opinion.

FRANK vs. INDUSTRIAL COMMISSION.

103 Colo. ...

I. C. 78890 **.. P. (2nd) ...** **Index No. 267**

See Also Index Nos. 202, 240

Judgment Affirmed

In Department.

BAKKE, Justice.

This is a workmen's compensation case, and it is the third time it has been before us. *Frank vs. Industrial Com.*, 96 Colo. 364, 43 P. (2nd) 158; *Black Diamond Co. vs. Frank*, 99 Colo. 528, 64 P. (2nd) 797. On the last occasion, the decision as reported in 96 Colorado at page 364, was specifically overruled, the judgment of the trial court reversed, and the cause remanded, "with instructions to the trial court to * * * transmit to the Industrial Commission the issues to be considered with directions to fully hear and determine all questions presented, and return its findings on the same to the court for its judgment thereon."

In view of the above directions, no good purpose will be served by a review of the early history of this litigation. Suffice to say, that, pursuant to said directions, the commision did "fully hear and determine all questions presented," with the following result announced in its supplemental award:

"In the above entitled cause, the commission having reviewed the entire file including all of the evidence taken herein and orders of the Supreme Court in the case and being now fully advised in the premises finds:

"That this claimant alleges he sustained an accident arising out of and within the course of his employment October 11, 1932 and that by reason thereof he was required to leave work October 13, 1932 and that he is still seriously disabled by the accident.

"The commission further finds that the condition which disabled the claimant at the time he left work and which required operative interference consisted of a new inflammatory exudate and old adhesions which had developed around ulcers in the ileum. The old adhesions probably resulted from an infection from amoebic dysentery. This resulted in acute peritonitis in the abdomen, and inflamation of the appendix. The entire condition resulted from the amoebic dysentery which the claimant contracted in 1906 and from which he had suffered recurrent attacks.

"The condition could not have resulted from an accident such as the claimant describes nor could it, in this case, have been aggravated by such an accident.

"The commission further finds upon full consideration of the evidence that the claimant did not sustain an accidental injury arising out of and within the course of his employment as alleged in this claim or at all.

"It is, therefore ordered: That the claim for compensation filed herein be and the same hereby is denied.

"And this commission does hereby retain jurisdiction of this claim until the same is finally and fully closed."

This award of the commission was affirmed by the district court.

The record discloses, and our opinion in 96 Colorado holds, that the compensability of the alleged injury was based solely on the story of the claimant. He "was the only witness called by either side." While in the hearing terminating in this review, the conclusion of non-compensability was based on conflicting testimony on the question whether there ever was any injury incurred in the course of claimant's employment. As already noted, the commission found that his illness resulted from a protracted abdominal condition, going back as far as 1906, and that any deficiency in his working condition while in the mine could not have been aggravated by the alleged accident.

Without attempting to analyze the medical testimony, we may point out the evidence upon which the commission based its finding of no compensable injury. First, there is the testimony of Dominico, one of the men who was working on the same car at the time of the alleged injury. He said that he and Winkle, another employe, were at the front of the car (two front wheels being off the track) lifting, and that claimant simply stood on the rear bumper to balance it; that claimant was not hurt in any manner in replacing the wheels of the car on the track, made no complaint about any injury, and that he returned to his work after the car was back on the track.

Tom Pissone, the assistant superintendent, who was in and about the mine all day, testified that while he did not see Frank that evening, no accident or injury of any kind was reported, nor did claimant make any complaint to him. This testimony is corroborated by Tom Hilton, the mine superintendent, and by Mr. Morgan, president of the company.

That medical treatment was given claimant at the Community Hospital is not disputed, and the findings of the commission contain a resume of the medical testimony concerning his condition at that time, but plausibility of his story as to any accidental injury sutained by him fades when considered in the light of the above testimony.

There being sufficient competent testimony to support the commision's award, and no error disclosed by the record, the judgment is affirmed.

MR. JUSTICE BURKE, MR. JUSTICE HILLIARD and MR. JUSTICE HOLLAND concur.

PRYOR COAL CO. vs. CONTINO.

103 Colo. ...

I. C. 63008 **.. P. (2nd) ...** **Index No. 268**

Judgment Affirmed

In Department.

BAKKE, Justice.

Action by plaintiffs in error, plaintiffs below, to vacate an award in favor of Contino, the claimant, based on total disability which the commission found existed. The district court affirmed the award. The only question involved is the sufficiency of evidence of total disability upon which the commission based its finding.

Claimant, a coal miner, was severely injured in the course of his employment on September 9, 1929, when a large rock fell upon him, resulting in a fracture of several ribs, several vertebra and the pubis and ischium on the left side.

At a hearing on September 22, 1930, the referee for the commission found a permanent disability of 80 per cent as a working unit. No review was sought of this finding.

On September 13, 1937, the commission ordered the case reopened on ground of error, mistake or change in condition, in pursuance of which another hearing was had and the following finding made:

"The commission now finds: that the finding as to degree of permanent disability was in error, that claimant then, and now is, permanently and totally disabled * * *."

This finding is supported by the first report of Dr. Lamme in which he recited that claimant "will not be able to resume work again." This was on July 24, 1930. On September 2, 1937, after examining the claimant again, he gave as his opinion that claimant was totally and permanently disabled because of limitation of motion and weakness of the spine accompanied by pain in the chest and weakness about the hip joint because of the broken pelvis, also that claimant could never again resume his old work. As to other gainful occupation Dr. Lamme expressed no opinion.

Dr. Abrams, appointed by the commission, submitted a detailed report of claimant's condition on December 9, 1937, which concluded with the statement:

"If he were a younger man, he undoubtedly would be able to do considerable work. The estimation of 100 per cent for heavy work and 80 per cent for all kinds of work would appear to have been a liberal one, because of his improved condition today."

Claimant testified:

"I hurt in my back all the time and I can't do nothing; I have not done any work at all since I was hurt; I can't, I tried a little bit and I fall down; I tried the first time about 1930. I try but I can't do nothing; I just get a bucket of water or coal, that is all; I have not tried to do anything heavier than that; I was 57 years old the 15th of last April; I am getting worse all the time; I am seven years older, but it hurts me more all the time. If I walk a little fast I cannot walk any more."

Attempt is made to counteract this testimony by showing that claimant tried to procure a lump sum settlement of his compensation in the sum of $1500 to be used in purchasing an eighty-acre chicken farm. The commission denied this application, but even had it been allowed and claimant had acquired the farm, it does not follow that he would be able to do the work himself, or that if he did so that he was not totally disabled within the meaning of the workmen's compensation law as construed by our former decisions.

Claimant was not represented by counsel, and counsel for plaintiffs in error must have substantially conceded claimant's condition to be as stated in his evidence, because no effort was made to establish any factual situation, other than that related by him and the doctors.

Claimant is now nearly 60 years of age; he is of foreign extraction and illiterate; has never known anything but hard physical labor all his life apparently, and now is broken in body and, as he says, unable to work any more. Dr. Lamme testified that his present condition is "a total permanent disability from work."

We well may ask what chance will this wrecked and outworn human machine have in the highly competitive and excluding labor market of today?

As stated in *Motor Way vs. DeMerschman*, 100 Colo. 421, 68 P. (2nd) 446:

"An injured workman is not to be denied a finding of total and permanent disability because not the victim 'of helpless paralysis reducing bodily functions to the minimum essential for the maintenance of a mere spark of life.' And though 'able to obtain occasional employment under rare conditions and at small remuneration,' * * * one may still 'be totally disabled for all practical purposes of competing for remunerative employment in any general field of human endeavor'."

See, also, *New York Indem. Co. vs. Industrial Commission*, 86 Colo. 364, 281 Pac. 740.

We find no error in the record.

Judgment affirmed.

MR. CHIEF JUSTICE BURKE, MR. JUSTICE HILLIARD and MR. JUSTICE HOLLAND concur.

ROGERS vs. SOLEM.

103 Colo. ...

I. C. 96928 **.. P. (2nd) ...** **Index No. 269**

Judgment Affirmed

In Department.

BAKKE, Justice.

This is a workmen's compensation case. Claimant Solem alleges that he suffered an injury to his right eye while drilling in a mine, when pieces of steel and rock struck the eyeball. Later the eye had to be removed. The commission found for the claimant, which finding and award based thereon was affirmed by the district court. Plaintiffs in error seek reversal.

In considering this matter, it is desirable to have before us the finding of the commission, because, if the evidence supports the finding, the judgment, necessarily, will be affirmed. The finding was as follows:

"In the above entitled cause, the Commission having further reviewed the entire file and now being fully advised in the premises finds:

"That Sadie B. Rogers and Margaret D. Rogers are owners of certain real estate known as the Lower Rogers Tract No. 7, situate, lying and being in Boulder County, Colorado. In the management of this property, the owners are represented by their agent, Walter Loesch, who in turn

takes his instructions from Platt Rogers, Mr. Rogers has the general supervisory control over this and other property belonging to these owners. He approves any and all leases before they are made, collects royalties and pays taxes. He maintains, however, that he acts only for his mother, Margaret D. Rogers, even though any function he performs is as beneficial to his aunt, Sadie B. Rogers, as it is to his mother. Though his authority is limited, Walter Loesch is the agent in actual charge of the property.

"About the middle of October 1936, Loesch and the claimant in this case, undertook to remove ore from the property above mentioned. Loesch, acting under his special authority and claimant under a verbal lease from him. As to the claimant, the place of operations, period of time, and royalties to be paid, were definite.

"The Commission finds that the claimant sustained an accident arising out of and in the course of his employment November 27, 1936, and left work upon that date. His temporary disability terminated March 17, 1937. His average weekly wages were $14.02. By reason of the injury claimant has sustained the enucleation of the right eye.

"When apprized of the injury to this claimant and his desperate financial circumstances, Platt Rogers transmitted to Walter Loesch his personal check for $200.00 to be used by Loesch for the benefit of the claimant in any manner he saw fit; $150.00 of this amount was actually expended for claimant's relief.

"The Commission finds from the evidence that Platt Rogers was the actual agent of his mother, Margaret D. Rogers, and a constructive agent of his aunt, Sadie B. Rogers, and that Walter Loesch was the special agent of both; that the payment of $150.00 by and through their agents constitutes the payment of compensation within the meaning of Section 84 of the Workmen's Compensation Act, and that, therefore, claimant's claim against Sadie B. Rogers and Margaret D. Rogers is not barred thereby."

Three principal grounds are urged for reversal: (1) There was no such legal relationship existing between claimant and plaintiffs in error as would make them liable to claimant for compensation. (2) Payment of $150 to claimant was not "payment of compensation" within the exception of the six months' statute of limitations so as to bind the plaintiffs in error. (3) Removal of the eye was not made necessary by the alleged accident.

1. The legal relationship necessary to support liability in claims of this character is as follows: "Any person, company or corporation operating or engaged in or conducting any business by leasing, or contracting out any part or all of the work thereof to any lessee, sub-lessee, contractor or sub-contractor, shall * * * be construed to be and be an employer as defined in this article, and shall be liable * * *." '35 C. S. A., Vol. 3, c. 97, Sec. 328; C. L. 4423.

The testimony of Platt Rogers, son of Margaret D. Rogers and nephew of Sadie B. Rogers, the owners of the property, was in part as follows: "I do not exactly represent my mother's interest in this land, except that she generally does what I recommend." "Mr. Loesch is the agent in some capacity for the owners, he represents them both." "He is subject to my direction, not because he has to be but simply because I go up there and he is inclined to do what I tell him." "I have received royalties on some of this land for several years." "People were working there and paid royalties to the owners." "The mill paid the checks to me for the owners, my aunt and mother." "I just look after my mother's affairs." "Since my father died nearly ten years ago." "Loesch has certain authority as the agent, caretaker, guard, or whatever you choose to call it, of the property,—it is hard to describe Loesch's position there," but he "has authority to show pieces of land and make arrangements for leases." "I would not undertake to say how far Mr. Loesch could go legally, in representing my aunt." Quotations are from an analysis of the testimony made by the plaintiffs in error, and are substantially as appear in the record.

Prior to November 1, 1936, claimant had been negotiating with Loesch for a deal to work some of the property, and finally agreed on "No. 7, the lower Rogers Patent."

Loesch testified: "I told him he would have to pay twenty per cent royalty on the ore he took out."

Pursuant to the arrangement, claimant went to work at the place designated, Loesch being with him much of the time. Solem said: "We were in together 50-50. No written lease was ever entered into or signed."

We deem this testimony sufficient to justify the commissions' finding that the arrangement was covered by the statute above quoted. We have said of this section that its purpose is to prevent evasion of the insurance requirements of the act by leasing. *Industrial Commission vs. Bracken,* 83 Colo. 72, 262 Pac. 521. Plaintiffs in error carried no compensation insurance.

2. Was the payment of $150 out of the proceeds of Platt Rogers' personal check for the relief of claimant a payment of compensation within the terms of the exception contained in section 363, chapter 97, '35 C.S.A., so as to toll the six months' statute of limitations? On this point we may say that there was no question as to the claim against Platt Rogers being filed in apt time, and it would follow, that when, after the action was started, permission was given to bring in the plaintiffs in error as proper parties and the relationship of agency established as between them and Platt Rogers, the rule that notice to the agent is notice to the principal is applicable. We are not impressed with the contention that the money was a loan or something else. It is admitted that $150 of the $200 was used to pay hospital and doctor bills. We think it was "payment of compensation" within the meaning of section 363, chapter 97, *supra.*

3. Plaintiffs in error contend that the removal of the eye was not necessitated by the alleged accident. The commission first found that it was unable to determine this as a fact, but upon further hearing, as the above recited supplemental award discloses, the commission found that "By reason of the injury claimant has sustained the enucleation of the right eye." It is admitted that the testimony on this point is in conflict but two competent eye specialists testified respectively in response to specific questions as follows: Question: "From the history you obtained and your examination, what in your opinion, doctor, was the cause of the condition of the right eye which resulted in its enucleation? Answer: "I feel that there was an acute iritis caused by the traumatic injury at the time he mentioned that Friday afternoon, when the steel, and probably metal, splattered his face." The second doctor, in answer to the question, "Boiling the thing down, doctor, under those circumstances, in your opinion, was the trauma the cause of the enucleation of the eye?" stated: "Certainly in a large measure, even if you agree it was of an endogenous origin, the ineffective end of it was in the blood." While this testimony is not particularly comprehensive or convincing, coupled with the acknowledged injury and other circumstances in the history of the case, we cannot say as a matter of law that it is insufficient to support the commission's finding based thereon in this behalf.

Perceiving no error in the record, the judgment is affirmed.

MR. CHIEF JUSTICE BURKE, MR. JUSTICE HILLIARD and MR. JUSTICE HOLLAND concur.

SECHLER vs. PASTORE.

103 Colo. ...

I. C. 96329 **.. P. (2nd) ...** **Index No. 270**

Judgment Affirmed in Part and Reversed in Part.

En Banc.

KNOUS, Justice.

The judgment here presented for review was rendered in a workmen's compensation case.

The defendant in error Eberhart, to whom we shall refer as the claimant, sustained a compensable injury on March 11, 1937. Previous to this time the defendant in error Pastore, to whom we shall refer by name or as the contractor, had entered into an agreement with the Sechler Electric Company for the installation of electric outlets in a house being constructed by Pastore at 3710 Zuni Street in Denver, Colorado. At the time of the injury claimant, an electrician, was engaged in making such installments as an employee of the Sechler Electric Company. Neither the employer nor the contractor carried workmen's compensation insurance. After a number of hearings the Industrial Commission by a final supplemental award ordered that the Sechler Electric Company and Pastore pay compensation to the claimant. Thereafter Pastore instituted the present action in the district court. A decree was entered therein affirming the award of the Industrial Commission in all respects and with the further adjudication that the liability for the payment of compensation as between the employer and the contractor was therein fixed as a primary liability against the former and a second liability against the latter and the Industrial Commission was directed to modify its award accordingly.

No question is raised as to the compensability of the injury sustained by claimant or as to the amount of compensation awarded him. Plaintiff in error contends that the order of the commission, as sustained by the judgment of the district court, is erroneous in so far as it finds that plaintiff in error was subject to the Workmen's Compensation Act, for two reasons: (1) That prior to the happening of the injury sustained by claimant, plaintiff in error had withdrawn from and rejected the provisions of the Workmen's Compensation Act; (2) that at the time of his injury claimant was not an employe of plaintiff in error as an individual but was in the employ of the Sechler Electric Company, a copartnership consisting of plaintiff in error and his son, and that said copartnership was not subject to the provisions of the Workmen's Compensation Act. Plaintiff in error further asserts as a third objection that the judgment of the district court is erroneous in so far as it attempts to classify and establish the liability for payment of compensation as a primary and secondary liability between plaintiff in error and the contractor respectively. We shall consider these contentions in the order stated.

It is conceded by plaintiff in error that under the name and style of the Sechler Electric Company, he was individually engaged in the electrical contracting business and subject to the provisions of the Workmen's Compensation Act for a number of years prior to February 2, 1933. Unless this previous status imposes liability upon him it is conceded none here exists. Having thus been within the act plaintiff in error could withdraw therefrom only in the manner prescribed by statute. '35 C.S.A., c. 97, Section 296; *Comerford vs. Carr*, 86 Colo. 590, 284 Pac. 121. Said Section 296, among other things, provides:

> "Any employer subject to the provisions of this article may withdraw from its provisions and reject the same upon the first day of any month, provided, said employer gives written notice to the commission of his intention to withdraw from and reject such article, not less than thirty days prior to the first day of the month in which he desires such withdrawal and rejection to become effective; and, provided further, that such withdrawing employer shall post in conspicuous places in his several places of employment written or printed notices to the effect that on and after the first day of the month in which such withdrawal and rejection shall become effective, said employer will not be subject to

the provisions of the workmen's compensation law, which notices shall be posted at least thirty days prior to the date of such withdrawal and rejection and shall be kept continuously posted thereafter in sufficient places frequented by his employes to reasonably notify such employes of such rejections."

The record discloses that under date of January 30, 1933, the Globe Indemnity Company, plaintiff in error's insurer, notified the commission in writing of the cancellation of his policy because of its expiration and nonrenewal. On February 15, 1933, the commission dispatched a letter to plaintiff in error, the body of which reads:

> "The Globe Indemnity Company notifies us of the termination of your Workmen's Compensation policy. The Workmen's Compensation Act provides that having accepted the provisions thereof by insuring your liability you must be continuously insured, irrespective of the number of employes you now have, unless the act is rejected as provided therein or your operations have been entirely discontinued. Please sign and return to this office at once the notice at the bottom of this letter, giving us the information as indicated."

At the bottom of the sheet upon which this letter was written was a printed form for use by the employer in transmitting requested information to the Industrial Commision. A portion of the form as originally prepared is as follows: "Discontinued operations .....(Date)..... and have no employes whatever." In filling out this form and supplying the information requested, plaintiff in error inserted after the word "operations", the words, "as to employes," making the report read: "Discontinued operations *as to employes* August, 1932, and have no employes whatever." This report was delivered to, and filed by, the Industrial Commission March 3, 1933, and upon the employer's index card as kept by it, and containing the insurance record of plaintiff in error, the commission made this notation: "Globe Ind. Effective 1-30-32 Expires 1-30-33 Globe—406005 Ceased oper. 2-2-33."

Plaintiff in error insists that by virtue of his written communication to the commission above mentioned and the other circumstances detailed, he substantially complied with the provisions of section 296, *supra,* and made effective his withdrawal from the provisions, and rejection of the act, as of February 2, 1933. He does not contend that at any time during the period here involved he had actually discontinued his business. He testified that in August, 1932, he abandoned the contracting business, but continued with his electrical work, the actual labor in connection therewith being performed by him or by his son. The electrical inspector for the City and County of Denver testified that from January 26, 1933, and continuing to the time of the hearing before the Industrial Commission, numerous permits had been issued by the city of Denver to plaintiff in error for electrical work. Claimant stated that he had been working for the Sechler Electric Company approximately three and one-half years previous to the accident which would fix the time of the beginning of his employment with the company in the latter part of the year 1933; and at other times previous to the accident and after August, 1932, plaintiff in error's records show the employment of other workmen. The record thus disclosing that while plaintiff in error after August, 1932, may have curtailed the scope of his business activities and reduced the number of his employes, he at no time actually concluded or terminated his operations. We are not here called upon to determine whether the actual and complete cessation of operations by an employer, previously subject to the provisions of the Workmen's Compensation Act, effects a withdrawal from the provisions of the act.

The communication relied upon by plaintiff in error as constituting notice of withdrawal, on its face does not suggest to us that such was his intention at the time of its transmittal. At most it seems to amount only to an excuse for not renewing his liability insurance policy. There is no statement of a cessation of operations, but merely that they were limited in scope. Neither does the notation of the Industrial Commission on the insurance record of plaintiff in error indicate a withdrawal from, or rejection of the provisions of, the act. Concerning this matter, the insurance secretary of the commission testified:

> "Q. Mrs. Ehrhart, does there appear in the records, in the office of the Industrial Commission, any notice, or any record of any notice, that G. A. Sechler, or the Sechler Electric Company had rejected the provisions of the workmen's compensation act?
> "A. It does not appear.
> * * * * * *
> "Do you have a form that you furnish employers for the purpose of making such rejections?
> "A. I have."

While the form of the questions and the paucity of information conveyed by the answers do not command, the inference is unmistakable that plaintiff in error did not proceed by the usual course to secure the immunity he now asserts. Nor does he claim that he gave any notice whatsoever to the commission thirty days prior to the first day of the month upon which he desired to reject the act or that he at any time posted notices upon his premises of his withdrawal from the provisions of the act or of his rejection thereof, as the statute requires. As relieving from his failure in these respects plaintiff in error argues that having no employes when the purported rejection was made, it would have been an idle formality to have posted notices since there were no employes interested in his status; likewise, that no practical object would be attained by his compliance with the statutory provision relating to giving the notice contemplated by section 296, *supra,* thirty days previous to the effective date of the withdrawal, since for more than six months prior to the time the alleged notice was given in

March, 1933, he had had no employes. To make effective a withdrawal from, or rejection of, workmen's compensation acts it has been generally held in other jurisdictions under statutes similar to ours that notice must be posted as well as filed with the commissions.

Beveridge vs. Illinois Fuel Co., 283 Ill. 31, 119 N. E. 46;
O'Rourke vs. Percy Vittum Co., 166 Minn. 251, 207 N. W. 636;
Paucher vs. Enterprise Coal Min. Co., 182 I. 1084, 164 N. W. 1035.

Even if a situation might exist which would relieve an employer from the necessity of posting, and keeping posted, notices of his withdrawal from and rejection of the provisions of the act, concerning which we do not comment, the circumstances here do not suggest any valid basis for tolerance. As has been mentioned, it clearly appears that after his purported rejection of the act, plaintiff in error from time to time employed workmen, and consistency, as well as the express terms of the statute, certainly would require that he should have kept posted on his premises, accessible to the observation of his employes, the notices proclaiming his alleged status with reference to the Workmen's Compensation Act, a thing in which every workman naturally would be vitally interested.

We must conclude, therefore, as did the commission and the trial court, that the circumstances upon which plaintiff in error relied as constituting his withdrawal from, and rejection of the act, fall short of meeting the requirements of section 296, *supra;* as a consequence of which, at the time of the accident suffered by claimant, plaintiff in error as his employer, unless relieved by other considerations, was subject to the provisions of the act.

The second objection of plaintiff in error is based upon the contention that at the time of the accident, instead of being an employe of plaintiff in error doing business as an individual under the firm name and style of the Sechler Electric Company, claimant was in fact an employe of a copartnership formed in 1935 and composed of plaintiff in error and his son doing business under the precise name and style under which plaintiff in error had previously operated as an individual. The commission found from the evidence that the association of father and son did not constitute a partnership and that no new or different legal entity was formed when the son came into his father's business. Without detailing the evidence on this issue, it is sufficient to say that much of it was inconsistent with, and contradictory of, the existence of the alleged copartnership and taken as a whole it was ample to support the finding of the commission. It is elementary that under such circumstances these findings are conclusive on review. Further, although we do not base our disposition of this contention thereon, it is likely that where a business, subject to the Workmen's Compensation Act, is conducted by an individual under a firm name, the statute requiring notice of withdrawal from, or rejection of, the provisions of the act cannot be circumvented as to such individual by an internal change of ownership where he continues as a partner and the business proceeds under the previous name and style. *Adams vs. McKay*, 229 Mich. 670, 202 N. W. 962.

Passing to the third contention of plaintiff in error, we believe the district court committed error in ordering the commission to amend its award by adding a finding of primary and secondary liabilities as between plaintiff in error, the original employer, and the contractor Pastore respectively. Counsel for the Industrial Commission made no argument in support of or against the holding of the district court in connection with this point. The liability of plaintiff in error as employer is predicated upon section 296, *supra*, and that of Pastore, the contractor, is grounded upon section 328 of the same chapter, which provides that the contractor "shall irrespective of the number of employees engaged in such work, be construed to be and be an employer as defined in this article, and shall be liable as provided in this article * * * and * * * any employe of such * * * subcontractor, shall * * * be deemed employes as defined in this article." In the final analysis, the liability of each is based upon the express provisions of the compensation act by operation of which, as the commission determined, each was liable as an employer of the claimant. While under the statute the commission has power, here exercised, to impose liability for the payment of compensation upon the original employer, who has become a subcontractor, and upon the contractor in the case of a compensable injury to an employe of the subcontractor, there is no express statutory authority giving the commission, or any court reviewing the proceedings of the commission, the power to determine or fix a comparative degree of liability for the compensation as between the subcontractor employer and the contractor. This dearth of express statutory authority is conceded by all parties, but the contractor asserts and the trial court evidently believed, that such procedure was justified by reason of the decision of this court in *Index Mines Corporation vs. Industrial Commission*, 82 Colo. 272, 259 Pac. 1036. That case involved the death of an employe of lessees of a mine. The commission made an award against the owners of the mine on the ground that they were conducting their business through leasing and hence, under the act, subject to liability to employes of the lessees. The award of the commission was affirmed by the district court. On review we held that the lessees also were liable, and accordingly reversed the district court judgment. In this connection we said: "We think that the lessees were liable for compensation, and that the commission should have found that they were primarily so, and the plaintiff in error secondarily, as in *American Radiator Company vs. Franzen*, 81 Colo. 161." After the opinion in the *Index Mines Corporation* case was announced, a petition for rehearing was filed by the commission and the lessees, and a rehearing granted as to the liability of the latter for the asserted reason that the lessees employed less than four persons. On rehearing upon this proposition, we held the lessees not liable, modified the former opinion and affirmed the original award of the Industrial Commission against the owners of the mine. It thus is apparent that in the final disposition of the case

no question existed as to comparative liability, since the award was against the owners alone and the portion of the original opinion quoted could have had no application to the controversy as finally adjudicated. Further, an examination of the opinion in *American Radiator Company* case, cited as authority for the quoted portion of the opinion in the *Index Mines Corporation* case, discloses that in the former the only question involved was whether Franzen was an employee of the radiator company, because of which the quoted statement was obiter dictum. In view of these considerations we are satisfied there is no authority in Colorado, either legislative or judicial, authorizing the determination of the comparative degree of liability between those who are answerable to a claimant employe in a proceeding before the commission for the awarding of compensation, or upon a court review of the commission's award. The primary purpose of the Workmen's Compensation Act is to expeditiously provide an award of compensation in favor of an injured employe against all persons who may be liable therefor. It is not contemplated by the statute that such proceeding should be hampered or delayed by the adjudication of collateral issues relating to degrees of liability of the parties made responsible by the statute for the payment of compensation. Such a determination may well involve questions of contractual obligations or even equitable considerations between the responsible parties, of no concern to the injured employee, and, if involved, should be resolved by a court in an independent proceeding in which the employe should not be required to participate. We are in accord with the pronouncement of the Connecticut Supreme Court in its opinion in *Johnson vs. Mortenson,* 110 Conn. 221, 147 Atl. 705, 66 A. L. R. 1428, where it is said:

> "The better view and practice of the compensation commissioners appears to have been to regard their jurisdiction as limited to determination of the right of the employee to compensation and as to who is liable therefor to such claimant, leaving the rights and liabilities between those held jointly liable to the claimant to 'be worked out in such proceedings, among themselves, as may be brought for the purpose.' See *Freeman vs. Furrey,* 2 Conn. Comp. Dig., Part I, 400, 402.
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> "In *Witchekowski vs. Falls Co.,* 105 Conn. 737, 741, 136 Atl. 565, it was held that 'for the commissioner to attempt to determine * * * which of two insurers is liable for payments already made by the employer was clearly to exceed his jurisdiction' citing *Hargraves vs. Shelvin Mfg. Co.,* 179 N. Y. App. Div. 477, 165 N. Y. Supp. 960. It appears that equal impropriety would characterize determination of the question of ultimate liability between contractor and subconstractor, as to which no rule is afforded by the statute which confers the commissioner's jurisdiction but marks its limitations."

The decree of the district court is reversed in so far as it provides for a determination of primary and secondary liability for the payment of compensation as between plaintiff in error and the contractor Pastore, and in all other particulars is affirmed.

MR. JUSTICE BOUCK concurs in the conclusion.

MR. JUSTICE HOLLAND not participating.

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