A STUDY OF JUDICIAL DECISIONS IN NEW YORK WORKMEN'S COMPENSATION CASES

BY

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A knowledge of court decisions and their tendencies in workmen's compensation cases is of importance to the casualty actuary for the same reason that an understanding of legislative enactments is necessary to a proper valuation of insurance costs. I have a feeling that this element of cost reflecting judicial decisions has not received the same careful attention, and has not been subjected to the same studious process of analysis as the changes in legislation that take place almost every year. The indifference on this subject may be ascribed to an imperfect appreciation of the part played by the courts in changing the scope of the law. There exists a wide-spread belief that the legislature alone is responsible for creative law, and that the functions of the courts are limited to construction and interpretation. This idea is based on a superficial understanding of the forces which operate to create law.

It is not difficult to follow the evidence of juristic writers to the effect that the process of lawmaking goes on continuously in the courts to a greater extent than in the halls of the legislature. Indeed, it has been asserted that the latter could achieve nothing more than to give better form to the results of judicial development.

Undeniably, the workmen's compensation law is a piece of creative legislation to be credited to the legislature and not to the courts.[1] It is true, that for a time the American courts have opposed the principle of workmen's compensation on the ground that the doctrine of "liability without fault" was repugnant to the *fundamental principles of the common law*, and to the "due process" clause in the Fourteenth Amendment of the United States Constitution. But the swift changes in the court decisions on this subject that have taken place within a brief decade are noteworthy.

1. Prof. Roscoe Pound: Interpretations of Legal History.

From the extremely conservative point of view expressed in the *Ives* case[2] to the philosophical liberalism of the decision in the *White* case[3] is only a matter of six years. In the interim the New York State Constitution has been amended, a compulsory law enacted in that state, and elective laws adopted in several other states. Public opinion had crystalized and found expression in the press, in the political forum and in legislation. In face of this expression the traditional conservatism of the courts has been abandoned and previous dogmatic conclusions reversed. It was discovered that "liability without fault" was not altogether strange to the English common law, and that rules governing responsibility as between employer and employee are not beyond alteration by legislation in the public interest. The social, political and economic influences that govern the creation and development of law had been at work and their reflex became apparent in the legislation, as well as in the court decisions of the period. Whether we accept the results as due to an aroused public opinion dissatisfied with the courts and their limitations of the employers' liability or to the rise of trade unionism with its demand for a more just conception of the rights of the workman, or to the class conflict as reflected in the Marxian philosophy of economic determinism, the fact remains that in an incredibly short time the constitutional barriers, real or illusory, have been swept aside by legislation and court decision. Once more our lawmakers, legislative and judicial, have shown ability to move in the direction of reform and social progress.

Addressing myself to the inquiry as to the attitude of the courts in passing on the numerous questions affecting compensation law, it is my purpose to give a *résumé* of selected cases covering the more important decisions in an effort to discover the principles governing these decisions and to ascertain if there exists any discernible tendency in the interpretations laid down by the courts.

To an audience familiar with the background of social legislation, it is not necessary to go into detail regarding the purpose of the legislature in substituting the principle of workmen's compensation in place of liability for negligence; but it is well to

2. Ives v. South Buffalo Railway Co., 201 N. Y. 271, Mar. 24, 1911.

3. New York Central Railroad Co. v. White, 243 U. S. 188, Mar. 6, 1917.

emphasize at the beginning that it was the intent of the legislature that workmen's compensation laws should be liberally construed. With the object of carrying this intent into effect, it has discarded traditional rules of evidence, simplified the procedure, established presumptions of fact and law in favor of the claimant, and otherwise provided for a summary proceeding so as to bring about a speedy recovery without long drawn out litigation. Appeals have been limited to questions of law, leaving in the hands of the Industrial Board the final decision on all questions of fact. The questions that have come to the appellate courts for decision may be classified under two general headings: first, questions covering constitutional points; and second, relating to the scope of the act.

As to the first; it is not necessary for me to remind you that in the early years of agitation for workmen's compensation laws the courts did not look favorably upon a scheme designed to abolish the time-honored common law defences, and to substitute therefor a principle of recovery based on "liability without fault". It is not surprising that the courts should have taken that position. As the traditional conservators of the rights of persons and the rights of property, judges and lawyers are apt to cling longer to established institutions than any other class of men. The *Ives* case went so far as to label the new principle as revolutionary. The result of that case is well known. It brought about not only an amendment to the constitution of the state, but the fear of the influence of that decision caused a number of other states to adopt elective forms of compensation. After all, this fear was unfounded.

A comparatively short time thereafter the United States Supreme Court in the *White* case expressed its complete disagreement with the decision of the New York Court of Appeals in the *Ives* case; not only was the constitutionality of the New York Compensation Law upheld, but the court went so far as to declare that "liability without fault" was not a novelty to the common law, and that the states had a right to alter the common law rules by the substitution of any other reasonable system that would do substantial justice to workmen injured in industrial pursuits. In the language of the court:

"The close relation of the rules regarding responsibility as between employer and employee with the fundamental rights of liberty and property is of course recognized. These rules as

guides of conduct are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common law liability of the carrier, of the inn-keeper, of him who employed fire or other dangerous agency or harbored a mischievous animal was not dependent altogether upon questions of fault or negligence. (New York Central v. White, 243 U. S. 188; Mar. 6, 1917.)"

At the same time the court upheld the workmen's compensation act of Washington,[4] a statute radically differing from the New York law. The Washington law makes the state the sole agency for compensation insurance, creating a special fund through an occupational tax. It was held that the act constitutes a fair and reasonable exercise of governmental power, and that the authority of the states to enact such laws as reasonably are deemed to be necessary to promote the health, safety and general welfare of their people carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration.

In the contest involving the constitutionality of the Arizona act,[5] it was held that it is for the state to determine the question whether an award for compensation to injured workmen shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result.

And the courts sustained also the elective compensation act of Iowa.[6]

Here we have four statutes radically differing as to special features and modes of arriving at a common result. All of them were contested on the ground that the legislature had exceeded its authority, depriving the appellants of property under the "due process" clause of the Fourteenth Amendment; we find the objections in all four answered and overruled, the court

4. Mountain Timber Company v. Washington, 243 U. S. 219, Mar. 6, 1917.

5. Arizona Employers' Liability cases, 250 U. S. 400.

6. Hawkins v. Bleakley, 243 U. S. 210, Mar. 6, 1917.

employing the process of reasoning and language similar to that used by advocates who have for years urged the new principle insisting that the common law rules were obsolete and no longer in agreement with the industrial conditions of modern society.

In Ohio the constitutional question assumed a special aspect. The Ohio law[7] goes so far as not only to restrict insurance to a state insurance fund, but also forbids self-insurers to reinsure their liability with any private insurance company. The United States Supreme Court sustained these restrictions and inhibitions.

The New York Act, which defines certain employments as hazardous under a special group arrangement, has been amended in 1918 so as to provide that any employment not specifically named in the groups, but which has in its employ four or more workmen or operatives regularly, is to be classified in its entirety as subject to the compensation law.

The constitutionality of this amendment has been also sustained,[8] as was the amendment introduced in 1916 permitting the Industrial Board to make proper and equitable awards for serious facial or head disfigurement.[9] These decisions on constitutional points may be properly designated as liberal in that the courts have shown a disposition to favor the compensation principle as a proper exercise of the police powers of the state.

An exception to this point of view may be taken in connection with decisions that deal with maritime injuries. Here emphasis is given to the conflict between state and federal jurisdiction, the courts nullifying several attempts to bring certain classes of workmen such as longshoremen within the purview of the compensation law. The status of this class has been uncertain throughout the history of compensation. In the *Jensen* case[10] which reached the Supreme Court in 1917, it was declared that Congress had the sole and paramount power to fix and determine the maritime law which shall prevail throughout the country. Following this decision, Congress amended the Judicial Code so as to give to maritime workers an election of remedies, allowing recovery at common law or at admiralty.

7. Thornton v. Duffy, 254 U. S. 361, Dec. 20, 1920.
8. Ward & Gow v. Krinsky, 259 U. S. 503, June 5, 1922.
9. New York Central v. Bianc, 250 U. S. 596, Nov. 10, 1919.
10. Southern Pacific Co. v. Jensen, 244 U. S. 205, May 21, 1917.

This amendment was declared unconstitutional in July 1920.[11] It was held that since the beginning of our laws our federal courts have recognized and applied the rules and principles of maritime law as something distinct from the laws in the several states; that it was not the intention of the framers of the constitution to place the rules and limits of maritime law under the disposal and regulation of the several states, and that a departure from the rule might carry as a consequence the destruction to uniformity in respect to maritime matters which the constitution was designed to establish.

A further attempt to amend the Judicial Code in 1922 so as to give the compensation remedy to semi-maritime workers was also ruled out by the court as unconstitutional in a decision handed down in February 1924 involving two cases, viz. *State of Washington v. Dawson* and *California Industrial Accident Commission v. Rolph.*[12] The dissenting opinion by Mr. Justice Brandeis brings out very clearly the argument in favor of recognizing the jurisdiction of the state laws for the benefit of workers who are not exclusively engaged in maritime occupations and who may meet with injuries on vessels in navigable waters as an incident to ordinary land occupations.

On leaving the field of constitutional questions, we enter the domain of cases dealing with interpretations affecting the scope of the act. In the early days the courts debated with great intensity the question as to whether a particular employee was within or without the act. This was due mainly to the caution of a coterie of impractical social theorists who persuaded the legislature to classify employees in groups according to occupations, labeling such occupations as hazardous. This idea was prompted in part by a selfish desire to protect the skilled trades to the exclusion of the "white collar men" and in part by the feeling that the courts would be less likely to interfere with legislation restricted to the protection of men in hazardous work. Eventually the law was amended by changing several definitions relating to employments. Prior to such change we meet with cases involving serious discussions on matters that would now be answered offhand by unanimous decision without opinion.

11. Knickerbocker Ice Co. v. Stewart, 226 N. Y. 302, May 17, 1920.

12. State of Washington v. Dawson and California Industrial Accident Commission v. Rolph, 44 U. S. 302, Feb. 25, 1924.

Thus for example: In *Larsen v. Paine Drug Co.*,[13] the employer was engaged in the manufacture of drugs and chemicals. The injured employee was a porter, elevator and handy man and at the time of the accident was putting up a small shelf at the foot of the elevator and lost his balance and fell down the elevator shaft. The award was contested on the ground that the employee did not take any part in the actual manufacture of drugs and chemicals. The court sustained the award on the ground that his work was incidental to the employment.

In *Bargey v. Massaro Macaroni Co.*,[14] Bargey, a carpenter, was killed while putting up a partition for the defendant, a corporation engaged in the manufacture of macaroni. The company used part of the building for a factory and leased part of it for a saloon. The carpenter was told to put up a partition in the saloon. The court ruled that the work had no relation to the hazardous employment of manufacturing macaroni, and that the carpenter was not an employee within the meaning of the law.

The question as to whether the remedy given by the compensation law is exclusive of all other remedies, was first raised in the case of *Shinnick v. Clover Farms*.[15] The action was brought under the Employers' Liability Act. The claimant was injured by a vicious horse. The horse attacked and bit the plaintiff in the left ear as a consequence of which the plaintiff suffered permanent injuries. Part of the ear had to be amputated. The defendant by way of demurrer contended that the compensation law is an exclusive remedy and that an action for damages based on negligence could not be sustained. The demurrer was overruled, the court sustaining the plaintiff on the ground that the schedules in the Compensation Act did not cover the injury suffered by the employees. It was held that the claim was not within the purview of the act.

"The act provides no scale or gauge by which to determine what compensation should be provided. As to such an injury, therefore, the right to recover remains as it was before the act was passed. The schedules of the law cover with considerable detail a great number of injuries such as frequently result from accident in industrial pursuits and such as tend to impair temporarily or permanently, wholly or partially, the ability of the injured

13. Larsen v. Paine Drug Co., 218 N. Y. 252, May 12, 1916.
14. Bargey v. Massaro Macaroni Co., 218 N. Y. 410, June 16, 1916.
15. Shinnick v. Clover Farms, 169 App. Div. 236, July 9, 1915.

employee to pursue his avocation, but there is no mention in the schedules to the injury to or the loss of part of an ear. True, there is a special paragraph covering 'All Other Cases' in this class of disability, but an injury to the ear is not of the same class of disability as those specified in the schedules."

The conclusion is to the effect that the plaintiff is not covered by the workmen's compensation law and that the complaint states a good cause of action. The decision in this case caused considerable anxiety to insurance underwriters because of possible damage suits to which it might give rise. It was particularly disturbing to the managers of the State Insurance Fund for the reason that the State Fund limits its cover to workmen's compensation losses. If that decision had prevailed as law, the door would be open to liability suits against which the State Fund policies do not offer suitable protection. The decision, however, was not only modified in a subsequent case[16], but the law was also amended so as to define compensation more clearly as the exclusive remedy. In *Shanahan v. Monarch Engineering Co.*, the Court of Appeals takes issue with the decision in the *Shinnick* case and virtually overrules it. Here the plaintiff sought to recover damages for the benefit of the next of kin. He left no widow or next of kin meeting the description of those entitled to compensation under the act. His next of kin in whose behalf the action was brought were adult brothers and sisters who are not entitled to compensation under the act. The court held that the action could not be sustained. Brothers and sisters as a class and as proper next of kin to be considered under the compensation law, were not overlooked, but were provided for under certain conditions in case they are under eighteen years of age and dependents. The same condition with respect to age was observed in the case of children, those under the age of eighteen years being entitled to the benefits of the act, and those over that age not being entitled to the benefits. The court was not unanimous, Judges Bartlett and Chase dissenting.

Accidents on the way to and from work present doubtful questions of law as to whether they come within the scope of the act under the definition "arising out of and in the course of employment".

16. Shanahan v. Monarch Engineering Co., 219 N. Y. 469, Dec. 29, 1916.

In *Pierson v. Interborough Rapid Transit Co.*,[17] the plaintiff was employed by defendant as a guard on its elevated railway. He had been on duty for several hours, finished his trip at the terminal, and was off duty on what is known as a "swing" of about two hours. His time was at his disposal for that period. He was in the company's uniform and instead of leaving the train and the premises of the defendant he remained upon the same train when it started on its southerly trip. His purpose in taking the trip was to go to his dentist's on 59th Street, but it was his intention to stop off the train at 129th Street where the employees receive their pay and if there were not too many in line, to collect his pay. After the train had left the terminal and before reaching 129th Street it came into collision with another train on the same track and plaintiff sustained the injuries for which the damages were awarded. The court held that the accident did not come within the compensation act. This case, however, is an illustration of the fact that a decision excluding compensation as a remedy does not necessarily have an adverse effect upon the claimant. The suit for damages resulting in a verdict of $20,000 was sustained on the theory that the plaintiff was a passenger and not an employee.

In *Urban v. Topping Bros.*,[18] the decedent had finished his employment, which was assistant order clerk in a wholesale hardware business, laying out goods on order. He had washed up, put on his coat and hat and gone to the door to go out. It was 5:35. His quitting time was 5:30. Remembering that the companions with whom he usually went home were still there he returned; not finding them in the room upstairs, he thrust his head in the elevator shaft and called to them. The descending elevator crushed his head. The court held that at the time he met his death he was not engaged in the business of his employment. He had ceased that. His act of turning back, looking about the room for his companions, and putting his head into the elevator shaft was his own voluntary act. He had deviated from the direct and ordinary route of passage for purposes of his own. Compensation was denied.

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17. Pierson v. Interborough Rapid Transit Co., 184 App. Div. 678, Nov. 8, 1918.

18. Urban v. Topping Bros., 184 App. Div. 633, Nov. 13, 1918.

In *McInerney v. Buffalo & Susquehanna Railroad Corporation*,[19] the employee had quit work and had traveled considerably more than a half a mile upon the railroad's right of way before he met with the accident. The Appellate Division affirmed an award to the widow unanimously and without opinion. This was reversed in the Court of Appeals. The facts are stated in the opinion.

"The fact that an employee is on the premises of his employer when those premises consist of a railroad right of way or yards does not have the significance which it naturally would have in the case of an ordinary manufacturing plant.....such rights of way extend indefinitely....such yards are of no standard size but run from small areas to large tracts extending over many miles. Tested by the general character of the undertaking in which the deceased was engaged at the time of the accident, the latter did not arise in the course of or spring out of his employment. The deceased workman was in the employ of the defendant as a car inspector in one of his yards. He was accustomed to go for his dinner to his home which was not on the defendant's premises, on weekdays taking the highway and on Sundays walking on the railroad right of way in order to avoid exposing himself in his working clothes to the view of people on the highway. On Sundays he received pay for eleven hours which included the one which he was permitted to take for dinner. On the day in question, which was Sunday, as he was thus going to dinner he received injuries causing death by falling from a trestle which was within the limits of the railroad yards in which yard he performed certain of his duties. Such a trip of an employee as he was taking is not under ordinary circumstances part of the employment."

The court draws a distinction between this case and others where an employer requests or customarily permits his employees to eat their meals upon his premises or in some place provided for them. In those cases the temporary interruption to their work thus caused will not be regarded as terminating their character as employees or as excluding them from the protection of the compensation law.

It may be of interest to compare these decisions with *Cudahy Packing Co. v. Parramore*, decided December 10, 1923 and which reached the United States Supreme Court on a writ of error from a decision by the Supreme Court of the State of Utah. In this case the injured was crossing a railroad track on a public road a half mile from the plant seven minutes before he was due there.

19. McInerney v. Buffalo & Susquehanna Railroad Corporation, 225 N. Y. 130, Jan. 7, 1919.

He was killed by a train. The road offered the only public approach to the plant. The Supreme Court of the State of Utah affirmed the award. The United States Supreme Court in sustaining the State Court held:

"That the liability is based not upon any act or omission of the employer but upon the existence of the relationship which the employee bears to the employment, and it is enough if there be a casual connection between the injury and the business in which he is employed. 263 U. S. 418."

The contractual status of the employee has given rise to a number of decisions dealing with the question as to whether he is a servant or an independent contractor. In general, the courts have retained the common law distinction as between an employee and an independent contractor. The decision in each case depends on the terms and conditions of employment and the extent of control and supervision exercised by the employer.

In *Dose v. Moehle Lithographic Company*,[20] Dose, a bricklayer, was employed by the defendant company to point up one of the walls of its plant and repair cracks wherein he and his helper were to be paid the regular wages for bricklayers and bricklayers' helpers. The company furnished all materials, ladders and supplies. While so employed, Dose fell from the scaffold. He received injuries for which an award was made by the Commission. The award was reversed by the Appellate Division. The Court of Appeals held that Dose was engaged in an employment incidental and requisite to the business carried on by the company and under the latter was clearly entitled to compensation.

In *McNally v. Diamond Mills Paper Co.*,[21] the plaintiff under order from the Erie City Iron Works undertook to move an engine from the railroad to the paper mill for a fixed sum. After that contract had been fully performed he was asked by one of the officers of the paper mill to assist in the work of installation. He was to be paid by day's labor, and he brought with him two of his own hired men and his own blocking, rigging and jacks. Two of the permanent employees of the mill and two others hired for the job, worked with him. In charge of them all was an

20. Dose v. Moehle Lithographic Company, 221 N. Y. 401, Oct. 23, 1917.

21. McNally v. Diamond Mills Paper Co., 223 N. Y. 83, Mar. 12, 1918.

engineer, superintending the installation on behalf of the Erie City Iron Works. In the course of work McNally hurt his arm. The Commission made an award which was reversed by the Appellate Division The Court of Appeals held that McNally was an employee and that the work he was doing was incidental to the business of the paper mill, and rendered a decision affirming the award.

In *Feck v. Schomske*,[22] an eleven year old school boy who was assisting a milkman on Saturday school holidays, receiving for the help thus given a dime on Saturday night, slipped and fell on a wheel of the wagon which crushed his ankle. His leg was amputated below the knee. The Commission concluded that he came within the definition of employee and made an award which was sustained by the Appellate Division unanimously and without opinion.

In *Litts v. Risley Lumber Co.*,[23] the award was contested on the ground that the deceased was an independent contractor and that he was to be paid a certain lump sum for his services. The employer furnished the material with which the painting was to be done, and the deceased was not expected to employ anyone, the necessary help being furnished by the employer. The Commission held that the mere fact of a lump sum agreement being made instead of day's wages does not take the workman out of the class of an employee within the meaning of the compensation law. An award made in the case was sustained by the Appellate Division but reversed by the Court of Appeals. Said the court:

"In the instant case Litts was an independent contractor. He agreed to do a specific piece of work for the company. In doing it he had absolute control of himself and his helper. He was independent as to when, within a reasonable time after the agreement was made between him and the company and as to where he should commence the work. He was free to proceed in the execution of it entirely in accordance with his own ideas. He was not to any extent subject to the directions of the company in respect of the method, means or procedure in the accomplishment. He was not subject to a discharge by the company because he did the painting in one way rather than in another. Those facts, considered by themselves, would constitute him an independent contractor. In the relation of employer and employee the employer has control and direction not only of the work or performance and its

22. Feck v. Schomske, 184 App. Div. 922, May 21, 1918.
23. Litts v. Risley Lumber Co., 224 N. Y. 321, Oct. 29, 1918.

result, but of its details and method and may discharge the employee disobeying such control and direction."

Of the definition of employee in the workmen's compensation law, the court said:

"This definition is not inimical to and does not disturb the distinctions established in the common law between a servant or employee and an independent contractor. The rules which demarcated the relation of master and servant from that of employer and independent contractor are operative in the consideration of claims made under the act. From the definitions and language of the act it is manifest that it deals with employers and employees, and an independent contractor is not within its protection."

In *Farrington v. United States Railroad Administration*,[24] a station agent not being able to close the door of a freight car called upon a bystander to help him. The bystander responding, cut and injured his finger. Tetanus developed, causing his death. The Commission held that the bystander was a temporary employee and awarded death benefits to the widow against the station agent's employer. The award was affirmed by the Appellate Division, Justice H. T. Kellogg dissenting.

In *Mandatto v. Hudson Shoring Co.*,[25] two special contractors were working upon the same building. One of them called upon the other for the services of himself and his derrick and gas engine to hoist a large timber or beam. The contractor so called upon having hurt his foot while doing the work, the Commission held that he stood in the relation of employee to the contractor for whom the work was being done. It awarded compensation accordingly and was sustained by the Appellate Division. The Court divided, Justice H. T. Kellogg dissenting.

The New York law extends its arms of protection to workers who are sent on industrial errands outside of the state. The leading cases on the subject are given below. The principle seems to be that an employer engaged in operations in New York and employing labor in the state, brings all of his employees within the scope of the act regardless of whether their work is performed within or without the state. Under this rule a foreign employer who hires labor in New York but does not conduct

24. Farrington v. United States Railroad Administration, App. Div. 189, Dec. 29, 1919.

25. Mandatto v. Hudson Shoring Co., 190 App. Div. 71, Dec. 29, 1919.

operations in New York does not come within the scope of the act. As a collateral feature of the rule, a workman from another state who is sent to New York and is injured in his pursuit in this state may recover compensation on the basis of the schedule provided by the law of his home state.

In *Post v. Burger & Gohlke*,[26] the plaintiff was engaged as a sheet metal worker for the defendant corporation. The contract of employment was made in the state of New York. On September 1, 1914, the employee was sent to perform certain sheet metal work on a grain elevator in Jersey City, and while engaged in his work on that day a sheet of metal slipped from his hands and he received an injury to his wrist. The Commission made an award which was confirmed by the Appellate Division. The question on appeal in the New York Court of Appeals involved the point as to whether the employee, having received his injuries in the state of New Jersey was entitled to compensation under the New York law. The court directs attention to two important provisions which must constantly be borne in mind as they affect and characterize all the other provisions of the act.

1. In the absence of substantial evidence to the contrary, it must be presumed that the claim comes within the provisions of the act. 2. The liability of the employer for compensation includes every accidental personal injury sustained by the employee arising out of and in the course of employment.

The award was sustained on the following grounds:

If the claimant were only entitled to recover compensation for his injuries as for a tort, the general rule that an act of the legislature, unless otherwise shown, is not intended to apply outside of the boundaries of the state, would have been applicable, but in the case at bar it was the intention of the legislature that every contract of employment should be read as though it included the provisions of the act, and the parties are bound without reference to the place where the injury occurs. The cost of insurance is determined by ascertaining the number of all the employees of the employer and the wages paid to them. There is no provision in the act for ascertaining the number of employees of an employer engaged within the state nor is there any deduction from the amount to be paid for state or other insurance by reason of the fact that a portion of the employees may be engaged outside of the boundaries of the state.

26. Post v. Burger & Gohlke, 216 N. Y. 544, Jan. 11, 1916.

In *Smith v. Heine Safety Boiler Co.*,[27] the defendant is a Missouri corporation having factories in Missouri. Smith entered the service under a contract of employment which was made in New York. Smith was a traveling engineer. Some years before the accident the engineering office was moved to Phoenixville, Pa., and all that was left in New York was a selling agency. In 1916 Mr. Smith was sent from Pennsylvania to Biddeford, Maine to install a boiler, and while working there was killed.

The court held that the operations of the employer consisting mainly of the selling agency was not subject to the act; it had no obligation to insure, and the employer was not liable as for a compensable accident.

In *Perles v. Lederer*,[28] plaintiff was to perform duties of a waitress in a summer hotel in Forest Park, Pa. Contract of hire was made through an agent of an employment office in the City of New York. She was injured in a laundry connected with the hotel. The Commission made an award. This was reversed by the Appellate Division on the authority of *Smith v. Heine Safety Boiler Co.*

If an employee regularly employed in New Jersey and entitled to compensation for accidental injury under the New Jersey law is sent by his employer into New York and incurs an injury in New York, the New York courts will sustain the New Jersey Compensation Law to the exclusion of an action of the employee against his employer for negligence.[29]

A resident of Sheldon, Iowa, came to Rochester and entered into a contract of employment as a traveling salesman for a company having a factory at Rochester. The contract was executed in the company's office. The employee worked at the plant about ten days to get acquainted with the business. He then departed for his territory in the West. While traveling in an automobile in Missouri, the machine skidded and fatally injured him. His employer was paying for the use of the automobile. An award by the Commission was affirmed by the Appellate Division.[30]

An employer with a main office in New York City sent a

27. Smith v. Heine Safety Boiler Co., 224 N. Y. 9, May 28, 1918.
28. Perles v. Lederer, 189 App. Div. 425, Nov. 21, 1919.
29. Barnhart v. American Concrete Steel Co., 227 N.Y. 531, Jan. 6, 1920.
30. Hospers v. Hungerford-Smith Co., 194 App. Div. 945, Nov. 10, 1920.

plasterer to work upon a building in New Britain, Connecticut. An award for hernia was affirmed.[31]

In a series of cases beginning with Fiocca v. Dillon[32], home workers are definitely construed to come within the act.[33]

Compensable injuries are defined in the law as "accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." The cases selected under this heading illustrate for one thing the paucity of human language to express in satisfactory form of statutory law, ideas and concepts sufficiently definite to remove all reasonable doubt on the part of intelligent men accustomed to interpret and apply law to a given state of facts. Is the particular injury accidental? Is there a causal connection between the accident and injury? We have variable answers to these questions in the appellate courts. In the leading cases we are confronted with reversals of the court below, and with dissenting opinions in both appellate courts.

In *Days v. Trimmer & Sons*,[34] frost bite was held to be an accident and compensable. Similarly, vertigo, nervous breakdown and strain were classed within the definition of accidental injury.

In *Hernon v. Holihan*, decided by the Appellate Division on March 6, 1918, sunstroke was construed to be an accident compensable under the law.

In *Kelly v. States Metal Co.*,[35] the court affirmed an award to the widow unanimously and without opinion. This is a case where a laborer employed by a firm in manufacture of metallic salts was overcome by fumes while cleaning one of its tanks, and as a result died of degenerate changes of liver and kidneys.

In *O'Dell v. Adirondack Electric Power Corp.*,[36] a workman stringing wires in a cellar was partly overcome by coal gas and steam; congestion of his lungs led to tuberculosis and upon his

31. Francavilla v. Mitchell, 231 N. Y. Rep.510, Mar. 22, 1921.
32. Fiocca v. Dillon, 175 App. Div. 957, Nov. 15, 1916.
33. See also Liberatore v. Friedman, 224 N. Y. Rep. 710, Nov. 26, 1918, and Allied Mutuals v. DeJong, 205 N. Y. S. 165.
34. Days v. Trimmer & Sons, 176 App. Div. 124, Dec. 28, 1916.
35. Kelly v. States Metals Co., 184 App. Div. 918, May 8, 1918.
36. O'Dell v. Adirondack Electric Power Corp., 223 N. Y. Rep. 686, May 14, 1918.

death from the disease, the court affirmed an award to his widow unanimously and without opinion.

In *Brockelbank v. Funk*,[37] the court sustains an award for sunstroke suffered by a driver's helper upon the ground that the employer had kept the deceased employee at his employment after he had complained of the heat.

In *Mahoney v. Troy Gas Co.*,[38] a laborer for a gas company inhaled illuminating gas while repairing a leaking pipe in a cellar. The undue strain upon his heart caused death within a few hours. The court affirmed an award to dependents unanimously and without opinion.

In *Keenan v. Roosen Co.*,[39] a laborer in the color department of a factory manufacturing printers' ink and colors worked on a balcony over a 300 gallon tank of "bronze blue." Acid fumes from the tank aggravated pneumonia that he had, either in dormant or developing state and caused his death within two days. The court affirmed an award for dependents unanimously and without opinion.

In *Richardson v. Greenberg*,[40] the workman was employed as a stableman. While so employed he was required to lead a horse affected with glanders through the streets of the city of New York. During this journey he contracted glanders. The disease was contracted through the inhalation of the bacteria. He died fourteen days thereafter. The Commission made an award which was reversed by the Appellate Division. The court divided on the question as to whether the case came within the definition of accidental injury and disease. The majority opinion was to the effect that a disease contracted without previous accidental injury occurring in the course of employment cannot be classed within the workmen's compensation law of this state as an accidental injury arising out of and in the course of employment. The minority opinion expressed the view that it was erroneous to assume that the workmen's compensation law applies only where an accident is shown. The amendment to the Constitution upon which the workmen's compensation law rests was not to limit cases of compensation to accident. The

37. Brockelbank v. Funk, 186 App. Div. 924, Nov. 13, 1918.
38. Mahoney v. Troy Gas Co., 186 App. Div. 924, Nov. 13, 1918.
39. Keenan v. Roosen Co., 187 App. Div. 962, Mar. 5, 1919.
40. Richardson v. Greenberg, 188 App. Div. 248, May 19, 1919.

legislature may award compensation for an injury resulting from the employment—and so in this case the germs did not knock the employee down or break his jaw—but concededly they caused his death. The death occurring from a risk of the employment, it is better to rest upon the ordinary presumption in favor of the claim than to resort to fine spun theories to destroy it. A disease or infection naturally and unavoidably resulting from the employment is compensable under the statute.

In *Swanson v. Doehler Die Casting Co.*,[41] a woman employee was making die castings. Some filings flew into her eye. The Commission found that resulting ulceration lighted up latent blood conditions which in turn clouded the cornea. The award of the Commission was reversed and the claim dismissed for lack of causal relation between the accident and disability.

In *Pinto v. Chelsea Fibre Mills*, decided March 2, 1921, a bobbin boy in a factory went to the nurse in the emergency room and complained of his eye. She put some drops in it. A corneal ulcer developed. The Commission found that particles of dust from a machine had entered the eye; that the boy had rubbed it; that the dust had caused the ulcer; that resulting opacity amounted to a ninety per cent. loss of vision. Compensation was awarded. The Appellate Division reversed the award and dismissed the claim on the ground that there was no probative evidence either of an accident or of causation of the ulcer by dust.

In *Connelly v. Hunt Furniture Co. et al.*,[42] we have a gruesome statement of facts. Claimant's son, Harry Connelly, was employed by an undertaker as an embalmer's helper. In the line of his duty, he handled a corpse, which by reason of the amputation of a leg had become greatly decayed and was full of gangrenous matter. Some of this matter entered a little cut in his hand, and later spread to his neck when he scratched a pimple with the infected finger. General blood poisoning set in, and caused his death. His dependent mother obtained an award for death benefits. The Appellate Division reversed and dismissed the claim. The Court of Appeals by a vote of four to three affirmed the award on the ground that the disease which caused death was due to an accidental injury arising out of and in the course of

41. Swanson v. Doehler Die Casting Co., 191 App. Div. 930, Mar. 3, 1920.
42. Connelly v. Hunt Furniture Co. et al, 240 N. Y. 83, Mar. 1925.

employment. The opinion presents an interesting discussion on accidental injuries and resulting infections.

"A trifling scratch was turned into a deadly wound by contact with a poisonous substance. We think the injection of the poison was itself an accidental injury within the meaning of the statute. More than this, the contact had its occasion in the performance of the servant's duties. There was thus not merely an accident but one due to the employment. We attempt no scientifically exact discrimination between accident and disease or between disease and injury. None perhaps is possible, for the two concepts are not always exclusive, the one of the other, but often overlap. The tests to be applied are those of common understanding as revealed in common speech.....

"If Connelly's death was the outcome of an accident, as we think indisputably it was, only a strained and artificial terminology would refuse to identify the accident with the pernicious contact and its incidents, and confine that description to the scratch or the abrasion, which had an origin unknown. On the contrary, when a scratch or abrasion is of itself trivial or innocent, the average thought, if driven to a choice between the successive phases of the casualty, would find the larger measure of misadventure in the poisonous infection. The choice, however, is one that is needless and misleading. The whole group of events, beginning with the cut and ending with death, was an accident not in one of its phases, but in all of them. If any of those phases had its origin in causes engendered by the employment, the act supplies a remedy.....

"The point is made that infection is here coupled with disease as something other than an accident or an injury, though a possible concomitant. We think the intention was by the addition of these words to enlarge and not to narrow. Infection, like disease, may be gradual and insidious, or sudden and catastrophic. It may be an aggravation of injuries sustained in the course of the employment and arising therefrom, in which event it enters into the award though its own immediate cause was unrelated to the service. It may be an aggravation of injuries which in their origin or primary form were apart from the employment, in which event, if sudden and catastrophic and an incident of service, it will supply a new point of departure, a new starting point in the chain of causes, and be reckoned in measuring the award as an injury itself."

A very good idea of the attitude of the appellate courts may be gained by studying cases dealing with decisions that relate to the schedule of benefits. These decisions are important because here the courts are called upon to regulate the amount of compensation, depending upon the extent and nature of the injury. The

very first case that has come to the attention of the Court of Appeals involved the question as to whether an accident which resulted in amputation of part of the first phalange of the third finger was subject to an award for the loss of the entire phalange. Here the court goes on record in denying the appellant's plea for a strict construction of the statute as derogatory to the common law.[43]

In the *Matter of Petrie*,[44] the claimant who was in the employ of the Oneida Steel Pulley Company, met with an accident which among other things resulted in injury to, and subsequent amputation of part of the first phalange of his third finger, and award was made as for the loss of the entire phalange of the finger.

Section 15 of the law provides that the loss of the first phalange shall be considered to be equal to the loss of one-half of the finger, and the loss of more than one phalange shall be considered as the loss of the entire finger. There is also general provision that in all other cases in this class of disability, compensation shall be at a certain rate fixed in the section. The award was contested on the ground that it should have been made under the general clause providing for "All Other Cases", and that compensation for the loss of a phalange can be awarded only in cases where the entire phalange has been lost. The court held that the findings of the Commission were somewhat contradictory and rather unsatisfactory in that they state in one place, that the amputation of the phalange occurred near the first joint, and in another place, that about one-third of the bone of the distal phalange was cut off. Construed together and in the light of the evidence, it may be regarded as stating that the substantial part of the phalange was cut off. On the above theory, the award was sustained.

The reasoning of the court is of interest. The workmen's compensation law was adopted in deference to a wide-spread belief and demand that compensation should be awarded to workmen who were injured and disabled temporarily or permanently in the course of their employment, even though sometimes the accident might occur under such circumstances as would not permit a recovery in the ordinary action of law. The underlying thought was that such a system of compensation would be in the

43. Waite—Columbia Law Review, Feb. 1925, p. 137.
44. Matter of Petrie, 216 N. Y. 116, June 16, 1916.

interest of the general welfare by preventing a workman from being deprived of means of support as the result of an injury received in the course of employment. The statute was the expression of what was regarded by the legislature as a wise public policy concerning injured employees. Under such circumstances it is to be interpreted with fair *liberality*, to the end of securing the benefits which it was intended to accomplish. Applying these rules to what happens to be in this case an accident of minor importance, the provisions of the statute providing compensation for the loss of a certain portion of the finger become operative and applicable when it appears that substantially all the portion of the finger so designated has been lost and that such provisions should not be interpreted too narrowly for the purpose of defeating a recovery.

The opinion contains a reservation to the effect that the loss of part of the distal phalange of a finger might be so slight as not to constitute loss of one-half of the finger. Acting on this reservation, the Appellate Division set aside an award for loss of one-half of a finger on the ground that the loss had amounted to only the merest shaving of bone. Said the court: "A liberal interpretation should not go to the extent of becoming an absurd interpretation."[45]

In *Grammici v. Zinn*,[46] the case involved the amputation of claimant's first, second and third fingers and the first phalange of the fourth finger of his right hand. The appellants submitted evidence tending to prove that neither the hand nor the use of it was lost. There was no substantial contradiction of this evidence. The court held:

"That the expressions 'loss' and 'loss of the use' as used in the law, should be given their unrestricted and ordinary meaning. In the case at bar, the hand, or the use of it, was not lost, provided it could fulfill, in a degree fair and worth considering, in any employment for which the claimant was physically and mentally fitted or adaptive, its normal and natural functions. In case the hand was destroyed by amputation, directly or indirectly caused by the injuries, to such an extent that it could not thus fulfill its natural functions, it was, within the purview of the law, lost. While the loss of a hand necessarily involves the loss of the use of it, the loss of the use of

45. Mockler v. Hawkes, 173 App. Div. 333, May 3, 1916.
46. Grammici v. Zinn, 219 N. Y. 322, Nov. 28, 1916.

a hand does not involve the actual loss of the hand as a physical member—a distinction the law recognizes and observes."

The Commission allowed an award as for the loss of the hand, substituting this in place of a previous award of compensation for one hundred eight and one-half weeks. The Appellate Division reversed the decision. The original award was reinstated and affirmed.

The question as to the power of the courts in dealing with questions of fact crops up frequently in a number of cases. Section 20 of the New York law provides that the decision of the Industrial Board shall be final as to all questions of fact. In its commentaries on this provision, the court ruled that the Commission cannot act arbitrarily on the information it receives or in direct violation of the conceded facts. Its duty is to base its determination upon the undisputed facts of the case and the reasonable inferences to be drawn from the general situation. When its findings are without evidence and in direct conflict with the undisputed facts, and all reasonable inferences which may be drawn from them, its determination may be reversed as error of law.

In the case of *Rhyner v. Hueber Building Co.*,[47] the question raised was whether the Commission was correct in its finding that the beneficiary was a dependent. In sustaining the award it was held that where there is any evidence to support the finding of fact, the decision of the Commission is final and the court is not permitted to review.

"It is not well for this court to fall into the habit of discussing the facts, even for the purpose of showing that the findings of fact are reasonable and meet with our approbation. We cannot, except by usurpation, invade the realm of facts, for it was the clear intent of the legislature that the decision of the Commission shall be final as to all questions of fact! Of course, if there are no facts and the decision is arbitrary, unfair and unreasonable, a question of law arises and we may right the wrong. . . . .

"The Commission is the sole judge and the final judge of the facts, and the court is not only forbidden to trespass upon the jurisdiction of the Commission in this field, but, by section 20 of the act, it is circumscribed, even, in its review of questions of law. It was the purpose of the legislature to create a tribunal to do rough justice, speedy, summary, informal, untechnical. With

47. Rhyner v. Hueber Building Co., 171 App. Div. 56, Jan. 5, 1916.

this scheme of the legislature we must not interfere, for, if we trench in the slightest degree upon the prerogatives of the Commission, one encroachment will breed another, until finally simplicity will give way to complexity, and informality to technicality."

In *Kade v. Greenhut Co.*[48], a saleswoman in a hardware store claimed that she had met with accidental injury while lifting some tubs. More than six months later she was operated upon for the removal of a diseased kidney. She died almost two years after the accident. The Commission made an award reversing previous conclusions after taking into consideration the opinion of a deputy commissioner who alleged that the claimant was an unusually healthy girl. The award was made on the ground that the diseased condition of the kidney was due to the accident. The doctor who performed the operation could not establish any causal relation between the accident and the condition which was demonstrated by the operation. The court held that it was its duty to determine whether there was evidence supporting or tending to sustain a finding of fact; that the alleged infection introduced two months after the alleged accident was not such an "infection as may naturally and unavoidably result" from a fall which merely bruises the person, and that the evidence was insufficient to serve as a foundation on which the verdict of a jury could rest. The award was reversed and the claim dismissed.

What conclusions can be drawn from this mass of decisions? Have the courts shown a disposition to be conservative or unduly liberal? Judgment on that point may be influenced by the particular interest of the critic. To generalize is unsafe, and yet if I were called upon to characterize the attitude of the courts I would be inclined to say that the courts were guided by conservative legal principles applied in a liberal spirit. The truth of the matter is that in these decisions there is visible a clash between two opposing ideas; the eighteenth century philosophy of individual rights seeking to impress its point of view upon twentieth century legislation. Directly and indirectly these decisions have had an enormous effect in reshaping the compensation law. We are accustomed to speak of the political and economic forces that had influenced the social

48. Kade v. Greenhut Co., 193 App. Div. 862, Nov. 18, 1920.

concept of workmen's compensation. There is also the judicial influence. It may be too early to evaluate this element and perhaps impossible to express it in terms of mathematical formulae. But it would appear that workmen's compensation has opened a new field for judicial empiricism, for the development of new principles and their application to new situations, for experimentation with new forms of procedure and new methods for the trial of complicated questions of fact and law.

It is worth while to take a glimpse—even though it may be brief and hurried—into this laboratory of judicial lawmaking, to learn the process of reasoning and tendencies developed by the courts.

At first, constitutional questions were brought to the front and that involved a battle between two diametrically opposed forces: the individualistic ideals fortified by the "due process" clause and the growing social concept, expressed as "the police power of the state." The victory of the latter over the former is due in part to the changes that have taken place in industry, to the pressure of organized groups, and to the intensive propaganda conducted by social reformers. It is not surprising that the courts steeped in traditions of the common law should have been slow in yielding to the new social philosophy and slow in accepting it as part of the American jurisprudence. As it emerged from the hands of the legislature, the figure of the new goddess was blurred and indistinct. Now the mist is clearing away; the many puzzling questions have been answered. Home workers are under the protection of the law; also men who travel beyond the borders of the state. Compensable injuries arising out of employment are more clearly defined. Maritime workers are subject to the courts of admiralty. The compensation remedy is exclusive. The Board is the final judge on questions of fact, but findings of fact must be supported by legal evidence. The picture becomes clearer. The judicial lawmaker has been at work perfecting the crudities of early legislation.