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Administration of Workmen's Compensation Laws in the Southwest

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This conclusion was predicated on the assertion that "Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders."¹⁷

Raymond L. Britton.

ADMINISTRATION OF WORKMEN'S COMPENSATION LAWS IN THE SOUTHWEST

EACH of the states in the Union and of the territories of Alaska, Hawaii, Puerto Rico, and the Canal Zone has a workmen's compensation act of some kind. The purpose of this paper is to outline and compare the manner in which these acts are administered in the southwestern states of Arkansas, Oklahoma, and Texas. Claims arising under the compensation statutes of Louisiana and New Mexico are handled directly in the courts and, therefore, will not be treated herein.

POWERS

Control over workmen's compensation is vested in boards or commissions, which, ordinarily, are authorized to make rules for carrying out and enforcing provisions of the compensation act, to make such orders as meet the ends of justice, to hear and determine controversies between employer and employee, and to require injured claimants to submit themselves before them for examination.

Arkansas. The Arkansas Act is administered by a Board of three Commissioners, each appointed by the Governor for a term of six years, at a maximum annual salary of \$5,000. One must be a representative of employers, another of labor and the third, a practicing attorney, who is automatically the chairman. The Gov-

¹⁷ *Id.* at 502.

error can, at any time, remove any member of the Commission for inefficiency, neglect of duty or misconduct in office, giving him notice of the charges and a public hearing thereon. For the purpose of administering the provisions of the Act¹ the Commission is authorized (1) to make such rules and regulations as may be found necessary, (2) to fix compensation of medical and legal advisers, and (3) to make expenditures for office expense.² The Commission can hold hearings at any place within the state.³

The Commission has power to hear and determine all claims for compensation, to require and order medical services for injured employees and to approve claims for medical services, and to approve attorneys' fees,⁴ which may not exceed 25 per cent of the first \$1,000 and 10 per cent of all in excess of \$1,000.⁵ The Commission has power to excuse failure to give notice of injury, to approve agreements, to make and modify or rescind awards, to enter findings of facts and rulings of law, to enter orders in the appeal of cases, to determine the time for payment of compensation, to assess penalties, to compute awards, to require and order physical examinations of injured employees, and to issue subpoenas, administer oaths and take testimony by deposition or otherwise.⁶ The Commission is authorized to appoint referees, examiners, rate experts, investigators, and medical examiners as may be required.⁷

Oklahoma. The State Industrial Commission consists of five members appointed by the Governor with the advice and consent of the State Senate.⁸ The term of office is four years. The Governor can remove any Commissioner for neglect of duty and misconduct in office, giving him notice of the charges and an oppor-

¹ ARK. STAT. 1947 ANN. §§ 81-1301—81-1349.

² *Id.* § 81-1342 (f).

³ *Id.* § 81-1342 (g).

⁴ *Id.* §§ 81-1343, 81-1344.

⁵ *Id.* § 81-1332.

⁶ *Id.* § 81-1344.

⁷ *Ibid.*

⁸ 85 OKLA. STAT. ANN. (Perm. Ed.) § 71.

tunity for a public hearing before the Governor.⁹ *Wilson Drilling Co. v. Beyer*¹⁰ declared that the Industrial Commission is a tribunal of limited jurisdiction, the primary purpose of which is to adjust settlements between injured employees and their employers in hazardous employments. Among other things, the Commission must be in continuous session and open for transaction of business during all business hours. The Commission has power to employ secretaries, inspectors, reporters, statisticians, and clerks.¹¹ Votes must be entered of record, and a report must be made of each case considered and the award allowed.¹² An order by one member of the Commission, not approved by a majority of the members, cannot nullify a valid award.¹³ In *Continental Oil Co. v. Hayes*¹⁴ the court held that the Industrial Commission is without power to promulgate a rule which would make mere inaction for a certain time on an agreed statement of facts equivalent to an order approving such statement. The approval or disapproval of an agreed statement of facts by the Industrial Commission contemplated by Section 26 of the Oklahoma Workmen's Compensation Act is an "official act" of the Commission. The section requires that the affirmative vote of a majority of members acting as a board and authorized to perform such official act can not be delegated to or exercised by a clerical employee of the Commission.¹⁵

Each Commissioner has power to administer oaths, certify to official acts, take depositions, issue subpoenas, and compel attendance of witnesses and production of books, accounts, papers, rec-

⁹ *Carter v. State*, 77 Okla. 31, 186 Pac. 464 (1919); see Note, 4 *Southwestern L. J.* 364, 374 (1950).

¹⁰ 138 Okla. 248, 280 Pac. 846 (1929).

¹¹ 85 OKLA. STAT. ANN. (Perm. Ed.) § 71.

¹² *Id.* § 74. Acts of the Industrial Commission upon matters within its jurisdiction and required to be recorded can be established only by the record. *Nichols v. Farmers Trading Ass'n*, 191 Okla. 24, 126 P. 2d 703 (1942); *Indian Territory Illuminating Oil Co. v. Ray*, 153 Okla. 163, 5 P. 2d 383 (1931).

¹³ *Carl B. King Drilling Co. v. Farley*, 155 Okla. 99, 7 P. 2d 862 (1932).

¹⁴ 157 Okla. 142, 11 P. 2d 470 (1932).

¹⁵ *Humble Oil Co. & Refining Co. v. Phelps*, 166 Okla. 55, 26 P. 2d 207 (1933); *City of Yale v. Jones*, 166 Okla. 111, 26 P. 2d 427 (1933).

ords, documents, and testimony.¹⁶ The Commission may authorize an inspector to conduct any investigation, inquiry, or hearing,¹⁷ in which case he has the power of a Commissioner.¹⁸ Further, the Commission can adopt reasonable rules¹⁹ regulating and providing for the kind and character of notices and the service thereof, nature and extent of the proofs and evidence,²⁰ forms of application,²¹ methods of making investigations, time within which adjudications and awards shall be made,²² and the conduct of hearings, investigations and inquiries.

Texas. The administering authority is the Industrial Accident Board, consisting of three members appointed for terms of six years.²³ At the time of appointment, members must represent employers, labor and the public, the latter of whom must be a practicing attorney, being automatically the chairman and legal adviser of the Board.²⁴ The Board is not a court,²⁵ even though it

¹⁶ The Industrial Commission can consider depositions taken before the commissioner of another state, pursuant to notices sent out by the Commission. *Standard Roofing & Material Co. v. Mosley*, 176 Okla. 517, 56 P. 2d 847 (1936); *Ranney Rig Bldg. Co. v. Givens*, 141 Okla. 195, 285 Pac. 23 (1930).

¹⁷ 85 OKLA. STAT. ANN. (Perm. Ed.) § 75.

¹⁸ Where the record shows that evidence was taken by an inspector and that he initialled the order, but the order was made by the Industrial Commission upon a roll call of the Commission, the presumption is that the record and evidence was before the Commission and was considered by it. *Swift & Co. v. State Ind. Comm.*, 161 Okla. 132, 17 P. 2d 435 (1932); *Brick & Tile Co. v. Huffman*, 150 Okla. 9, 300 Pac. 626 (1931).

¹⁹ 85 OKLA. STAT. ANN. (Perm. Ed.) § 77; *Roxana Petroleum Corp. v. Hornberger*, 150 Okla. 257, 1 P. 2d 393 (1931); *U. S. Fidelity & Guaranty Co. v. Cruce*, 129 Okla. 60, 263 Pac. 462 (1928).

²⁰ *F. W. Merrick, Inc. v. Cross*, 144 Okla. 40, 289 Pac. 267 (1930); *Standard Coal Co. v. State Ind. Comm.*, 139 Okla. 269, 281 Pac. 966 (1929).

²¹ *Maryland Cas. Co. v. Johnson*, 134 Okla. 174, 272 Pac. 833 (1928).

²² Where the award of the Industrial Commission is not questioned by application for rehearing within ten days as provided for by the rules of the Commission, nor within thirty days by action in the Supreme Court, the award is final and conclusive upon all questions within the jurisdiction of the Commission. *Lubritorium, Inc. v. Adams*, 150 Okla. 254, 1 P. 2d 745 (1931); *Liddell v. State Ind. Comm.*, 126 Okla. 235, 259 Pac. 265 (1927); *Bedford-Carthage Stone Co. v. Ind. Comm. of Okla.*, 119 Okla. 231, 249 Pac. 706 (1926).

²³ TEX. REV. CIV. STAT. (Vernon, 1948) art. 8307, § 1.

²⁴ *Id.* § 2.

²⁵ *Middleton v. T. P. & L. Co.*, 108 Tex. 96, 185 S. W. 556 (1916); *Vestal v. T. E. I. A.*, 285 S. W.1041 (Tex. Comm. App. 1926); *Consolidated Underwriters v. Saxon*,

has quasi-judicial functions,²⁶ but is merely an administrative agency. However, its decisions are in the nature of judgments and can not be collaterally attacked.²⁷ The awards of the Board do not have the "self-executing force" of judgments²⁸ and can be given effect only by suit in the courts.²⁹ The Board may make all necessary rules, not inconsistent with law, for carrying out and enforcing its provisions;³⁰ in addition it has powers expressly delegated to it to regulate attorneys' fees, medical, hospital and medicine fees and costs, to conduct investigations and hearings, to make and review and change awards, to force medical examination, to order operations, to suspend compensation, to approve adjustment and settlement of claims for compensation, to inspect books and records of parties, to punish persons guilty of contempt, and to bar lawyers guilty of unethical or fraudulent conduct from appearing before the Board.³¹ In the exercise of its more purely administrative functions, the Board must receive and file all reports, notices and papers required by law, the rules of the Board, notices from employers and insurance carriers of issuance and cancellation of policies, reports made by employers of accidents suffered or injuries sustained by employees, and claims for compensation made by injured workers and dependents of deceased workers.³² The Board must supervise adjustments of claims voluntarily assumed by the insurance carriers.³³

265 S. W. 143 (Tex. Comm. App. 1924). The court in *Poe v. Continental Oil & Cotton Co.*, 231 S. W. 717, 720 (Tex. Comm. App. 1921), declared: "If the Accident Board can be said to be useful in any respect, it is largely as an administrative board where interested parties can reach amicable adjustment quickly."

²⁶ *T. E. I. A. v. Morgan*, 295 S. W. 588 (Tex. Comm. App. 1927). *Middleton v. T. P. & L. Co.*, 108 Tex. 96, 185 S. W. 556 (1916), held that the Compensation Act vests no judicial power in the Board.

²⁷ *Security Union Cas. Co. v. Peer Oil Corp.*, 1 S. W. 2d 1109 (Tex. Civ. App. 1927).

²⁸ *Ezell v. T. E. I. A.*, 5 S. W. 2d 594 (Tex. Civ. App. 1928), *rev'd on other points*, 14 S. W. 2d 1018 (Tex. Comm. App. 1929).

²⁹ *Vestal v. T. E. I. A.*, 285 S. W. 1041 (Tex. Comm. App. 1926); *T. E. I. A. v. Adcock*, 27 S. W. 2d 363 (Tex. Civ. App. 1930) *er. dism'd*.

³⁰ TEX. REV. CIV. STAT. (Vernon, 1948) art. 8307, § 4.

³¹ *T. E. I. A. v. Roach*, 222 S. W. 159 (Tex. Comm. App. 1920).

³² TEX. REV. CIV. STAT. (Vernon, 1948) art. 8307, § 5; *Zurich Gen. Acc. Liab. Ins. Co. v. Rodgers*, 128 Tex. 313, 97 S. W. 2d 674 (1936).

³³ *Garrett v. U. S. Fidelity & Gty. Co.*, 77 S. W. 2d 1066 (Tex. Civ. App. 1934).

If the insurer fails to comply with the award and fails to appeal, the Board certifies that fact to the Commissioner of Insurance, and such certificate is sufficient cause to justify the Commissioner to revoke or forfeit the license of the insurer to do business in Texas.³⁴ Also, the claimant can bring suit on the order, and, if he secures a judgment, he is entitled to recover the further sum of 12 per cent of the award as damages together with reasonable attorney's fees for the prosecution and collection of the suit.³⁵

PROCEDURE

Statutes usually specify the method by which the right of compensation is decided and the amount is determined.³⁶ Such proceedings are purely statutory, and the procedure pointed out by the statutes must be followed,³⁷ since the provisions of the act cannot be waived. In *Mingus v. Wadley*³⁸ it was declared: "The general rule is that where the cause of action and the remedy for its enforcement are derived, not from the common law, but from statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects. . . ." A proceeding in a compensation case is *sui generis*, and under most acts it is considered to be administrative and not judicial.³⁹ The action taken thereunder is usually required to be expeditious to the end that the purposes of the act are not defeated by delays. This policy was stated succinctly in *Ex Parte Central Iron & Coal Co.*:⁴⁰

"One of the outstanding purposes of the statute was to facilitate the settlement of matters of compensation in a simple manner with

³⁴ TEX. REV. CIV. STAT. (Vernon, 1948) art. 8307, § 5a; *Mingus v. Wadley*, 115 Tex. 551, 285 S. W. 1084 (1926).

³⁵ TEX. REV. CIV. STAT. (Vernon, 1948) art. 8307, § 5; *Independence Indemnity Co. v. White*, 27 S. W. 2d 529 (Tex. Comm. App. 1930).

³⁶ *Tex. Indemnity Ins. Co. v. Holloway*, 30 S. W. 2d 921 (Tex. Civ. App. 1930), *aff'd*, 40 S. W. 2d 75 (Tex. Comm. App. 1931).

³⁷ *Indian Territory Illumination Oil Co. v. Ray*, 153 Okla. 163, 5 P. 2d 383 (1931).

³⁸ 115 Tex. 551, 558, 285 S. W. 1084, 1087 (1926).

³⁹ See cases cited *supra* note 25.

⁴⁰ 212 Ala. 367, 102 So. 797, 798 (1925).

least possible expense, and that proceedings to that end be not incumbered by technical rules of pleading and procedure."

The courts endeavor to decide questions of practice in favor of directness and flexibility, and strict rules of practice and procedure applicable to actions generally are not utilized in proceedings for compensation under the acts.⁴¹ Nevertheless, elementary and fundamental principles of a judicial inquiry are preserved, and the established rules of procedure in courts of law are considered so far as applicable.⁴² This liberal attitude is not meant to dispense with mandatory requirements of the act⁴³ nor to obviate the necessity of observing fundamental rules which are essential to administration of substantial justice between the parties. Thus it has been said, in *Texas Indemnity Co. v. Holloway*,⁴⁴ that provisions of the statute relating to procedure must be strictly or substantially complied with. However, usually the proceedings before a board or commission are informal, and the technical rules of practice and procedure prevailing in the courts are not applicable.⁴⁵

The jurisdiction of the board or commission, having once attached, is continuing,⁴⁶ with the power to make interlocutory findings, orders and awards, even to the extent of modifying awards made by it, until the cause is legally concluded in accordance with compensation law.⁴⁷ Upon full compliance with its award the jurisdiction of the commission is lost, in absence of any provision in the act continuing it. Having made a final decision, the board can-

⁴¹ *Vignaul v. Howze*, 150 So. 88 (La. App. 1933); *Clark v. Alexandria Cooperage & Lumber Co.*, 157 La. 135, 102 So. 96 (1925).

⁴² *Oilmen's Reciprocal Ass'n v. Youngblood*, 297 S. W. 255 (Tex. Civ. App. 1927). It was held in *Smith v. Marine Oil Co.*, 10 La. App. 674, 121 So. 782 (1929), that technical objections and defenses not involving matters of substance should be brushed aside in compensation suits.

⁴³ *Fed. Surety Co. v. Jetton*, 44 S. W. 2d 923 (Tex. Comm. App. 1932).

⁴⁴ 30 S. W. 2d 921, 929 (Tex. Civ. App. 1930).

⁴⁵ *Creek County v. Fobroy*, 163 Okla. 276, 21 P. 2d 1060 (1933).

⁴⁶ *Wilkerson v. Devonian Oil Co.*, 114 Okla. 84, 242 Pac. 531 (1926).

⁴⁷ *Capitol Iron & Metal Co. v. Rogers*, 161 Okla. 137, 17 P. 2d 433 (1932).

not, by purporting to retain jurisdiction, deprive the parties of their right to appeal to the courts from a final ruling.⁴⁸

Arkansas. The original hearings for compensation are conducted by referees, who are required to make awards together with their findings of fact, which are reported to the Commission. Either party has fourteen days to appeal from the award of a referee to the entire Commission, where he may have a *de novo* hearing. The final award of the Commission is conclusive and binding on the parties on all findings of facts.

Hearings before the Commission are informal, and the Commission is not bound by technical or statutory rules of evidence or by technical or formal rules of procedure.⁴⁹ Declarations of a deceased employee concerning the injury, in respect of which the hearing is being had, may be received in evidence, and will, if corroborated by other evidence, be sufficient to establish the injury.⁵⁰ Hearsay may be admitted and taken for what it is worth. However, sufficient evidence must appear in the record to warrant the making of an award. Many proceedings for enforcement of a claim for compensation show that there is a *prima facie* presumption that the claim comes within the provisions of the Act, that sufficient notice thereof was given, and that other elements have been satisfied. As a matter of practice, it is probable that the Commission does not concern itself too greatly with where the burden of proof lies, so far as claimant is concerned, but looks to the defendant to allege and prove all matters of defense.⁵¹

Within ten days after a claim is filed with the Commission, the Board notifies the employer and any other interested party of the filing of such claim.⁵² The Board makes an investigation if it considers it necessary and, upon application of an interested party or on its own motion, directs that the matter be set down for hear-

⁴⁸ *T. E. I. A. v. Marsden*, 57 S. W. 2d 900 (Tex. Civ. App. 1933).

⁴⁹ ARK. STAT. 1947 ANN. § 81-1327(a).

⁵⁰ *Ibid.*

⁵¹ *Kloss v. Ford, Bacon & Davis*, 207 Ark. 115, 179 S. W. 2d 172 (1944).

⁵² ARK. STAT. 1947 ANN. § 81-1323(b).

ing before a referee. Ten days' notice of hearing must be given the parties.⁵³ The award of the referee, together with findings, must be given the parties, along with a copy of the proceedings, as soon as possible.⁵⁴ If an application for review is filed in the office of the Commission within thirty days from the date of receipt of the award, the full Commission has to review the award or, if deemed advisable, hear the parties, their representatives and witnesses, and make and file awards and rulings of law as in an original hearing.⁵⁵

Oklahoma. Notice of injury must be given to the Commission and to the employer within thirty days after the injury.⁵⁶ Such notice may be given by any person claiming to be entitled to compensation or by someone in his behalf.⁵⁷ Failure to give such notice, unless excused by the Commission either on the ground that notice, for some sufficient reason, could not have been given⁵⁸ or on the ground that the insurance carrier or employer has not been prejudiced thereby,⁵⁹ is a bar to any claim.⁶⁰ The Industrial Commission, before excusing the claimant's failure to give written notice of injury, is without jurisdiction to award compensation.⁶¹ In *Forest Oil Corp. v. Breshears*⁶² it was held that where an employer brought a proceeding to review an award for permanent partial disability, it was not necessary for the employee to file a new

⁵³ *Id.* § 81-1323(c).

⁵⁴ *Long-Bell Lbr. Co. v. Mitchell*, 206 Ark. 854, 177 S. W. 2d 920 (1944).

⁵⁵ ARK. STAT. 1947 ANN. § 81-1327(a); *Fordyce Lbr. Co. v. Shelton*, 206 Ark. 1134, 179 S. W. 2d 464 (1944).

⁵⁶ 85 OKLA. STAT. ANN. (Perm. Ed.) § 24; *Trigg Drilling Co. v. Thomas*, 160 Okla. 85, 15 P. 2d 985 (1932).

⁵⁷ If there is competent evidence to sustain a finding of the State Industrial Commission that neither the employer nor insurance carrier was prejudiced by failure to give written notice, the award will not be vacated for failure to give such notice. *Douglas Aircraft Co. v. Snider*, 196 Okla. 433, 165 P. 2d 634 (1945).

⁵⁸ The purpose is to afford an opportunity to the employer to investigate to determine whether there is an accidental injury within the terms of the Act. *Amerada Petroleum Corp. v. Lovelace*, 184 Okla. 140, 85 P. 2d 407 (1938).

⁵⁹ *Wirt Franklin Petroleum Corp. v. Wilson*, 164 Okla. 129, 23 P. 2d 644 (1933).

⁶⁰ *Dover Oil Co. v. Bellmyer*, 163 Okla. 51, 20 P. 2d 556 (1933).

⁶¹ *Pioneer Gas Utilities Co. v. Howard*, 154 Okla. 239, 7 P. 2d 435 (1932).

⁶² 201 Okla. 116, 202 P. 2d 706 (1949).

claim in order to introduce evidence of disability based on injuries not included in his initial claim for compensation.

Any time after the expiration of the first five days of disability on the part of an injured employee, a claim for compensation may be presented to the Commission.⁶³ Upon application, the Commission may set down the claim for hearing and, after notice to the adverse party, proceed to hear and determine liability.⁶⁴ Hearings can be held before any member of the Commission.⁶⁵ When a cause is properly before the Commission, the entire range of disability may be inquired into and an award made in accordance with the facts.⁶⁶ Where the claimant's disability is of such character as to require skilled and professional men to determine the cause and extent thereof, the question is one of science and must be proved by expert testimony.⁶⁷ If the Commission denies the award for failure to give notice of injury and there is any evidence reasonably tending to support the order denying the award, the decision of the Commission cannot be disturbed on review.⁶⁸ The Commission is at liberty to refuse to give effect to any portion of the evidence which in its opinion is not entitled to belief and is not required to give credence to the greater amount of evidence as against the lesser.⁶⁹

Texas. The Industrial Accident Board is not governed by rules of pleading and evidence that prevail in the courts, but is free to act in its own way and to adopt such speedy and informal procedures as it may deem fit.⁷⁰ There is no jury provided for, and, since review by courts is through a trial *de novo*, no record is preserved for appellate purposes.⁷¹ No terms or sessions of the Board are

⁶³ 85 OKLA. STAT. ANN. (Perm. Ed.) § 26.

⁶⁴ *Id.* § 41.

⁶⁵ U. S. Fidelity & Gty. Co. v. Cruce, 129 Okla. 60, 263 Pac. 462 (1928).

⁶⁶ Sparkman v. Cosden Pipe Line Co., 182 Okla. 184, 77 P. 2d 21 (1938).

⁶⁷ Gillette Motor Transport, Inc., v. Holbrook, 215 P. 2d 836 (Okla. 1948); Gentry v. State Ind. Comm., 210 P. 2d 160 (Okla. 1948).

⁶⁸ Johnson v. E. I. Du Pont de Nemours & Co., 201 Okla. 206, 203 P. 2d 717 (1949).

⁶⁹ E. I. Du Pont de Nemours & Co., v. Spencer, 195 Okla. 300, 157 P. 2d 186 (1945).

⁷⁰ Miller v. T. E. I. A., 63 S. W. 2d 883 (Tex. Civ. App. 1933).

⁷¹ Southern Cas. Co. v. Fulkerson, 30 S. W. 2d 911 (Tex. Civ. App. 1930), *rev'd on other points*, 45 S. W. 2d 152 (Tex. Comm. App. 1932).

provided by law, and the Board is always open to receive, hear and determine complaints.⁷² The Act does not require that all claimants involved in a particular case enter a personal appearance. Thus, where a number of persons claim to be beneficiaries of a deceased employee, any one of them may file a claim in behalf of all,⁷³ and the Board will determine their respective rights and apportion the award among them.⁷⁴

The insurer is a necessary party to the proceeding before the Board. If the insurer is not joined, the Board is without jurisdiction to make any award that affects any interest of the insurer, unless, of course, the insurer voluntarily intervenes.⁷⁵ The claimant must give notice of his injury to his employer within 30 days after the accident.⁷⁶ This provision is mandatory, and observance of it is essential to jurisdiction of the Board.⁷⁷ The claimant next files with the Board a proper statement of his claim.⁷⁸ Although the claim is in the nature of a pleading, it is much less formal than the ordinary pleading and need not be alleged with the same particularity as would be required in court.⁷⁹ All that is required is an intelligible statement of the matters in controversy, describing the injury in a general way, identifying the interested parties, and narrating the manner in which it occurred.⁸⁰

The claim having been duly filed, the Board must hold a hearing within a reasonable time, unless the claimant is being paid compensation and furnished hospitalization or medical treatment,

⁷² *T. E. I. A. v. Williams*, 57 S. W. 2d 218 (Tex. Civ. App. 1933).

⁷³ *Security Union Ins. Co. v. Reed*, 42 S. W. 2d 494 (Tex. Civ. App. 1931).

⁷⁴ *T. E. I. A. v. Knouff*, 271 S. W. 633 (Tex. Civ. App. 1925) *er. ref.*

⁷⁵ Case cited *supra* note 73.

⁷⁶ TEX. REV. CIV. STAT. (Vernon, 1948) art. 8307, § 4a; *Williamson v. Tex. Ind. Ins. Co.*, 90 S. W. 2d 1088 (1936).

⁷⁷ *Morgan v. Petroleum Cas. Co.*, 40 S. W. 2d 205 (Tex. Civ. App. 1931) *er. ref.*

⁷⁸ *Merritt v. Amer. Mut. Liability Ins. Co.*, 67 F. 2d 777 (5th Cir. 1933).

⁷⁹ *Great American Indemnity Co. v. McElyea*, 57 S. W. 2d 966 (Tex. Civ. App. 1933) *er. ref.*

⁸⁰ When the claimant asks for compensation only in respect of a specific injury, the Board may not consider any other or a general injury. *Hartford Acc. & Ind. Co. v. Choate*, 126 Tex. 368, 89 S. W. 2d 205 (1936).

in which case the Board may, "within its discretion, delay or postpone the hearing."⁸¹ The Board may hold hearings or take testimony "at any point within this State,"⁸² provided due notice thereof is given to all the parties in interest.⁸³ While the burden rests upon the claimant,⁸⁴ he is not required to put in all his evidence nor need he prove his case by witnesses personally present at the hearing; the Board is authorized to receive *ex parte* statements under oath as well as other evidence not usually received in courts of law.⁸⁵ Inasmuch as the proceedings are informal, the Board is bound by no specific procedural requirements. The province of the Board is to determine the facts of the controversy, and so long as its rulings and decisions are based upon the facts presented, the Board performs its duty.⁸⁶

While an award of compensation or an order denying it is regarded as a final order,⁸⁷ not all orders of the Board are of this kind. An order directing a claimant to undergo a hernia operation, for example, is purely interlocutory.⁸⁸ An award or order is in the nature of a judgment, and, unless and until it is set aside by the taking of an appeal, it is binding and conclusive upon the parties.⁸⁹ An award is not subject to collateral attack, and, in respect of jurisdictional matters, it is said that the recitals therein import absolute verity.⁹⁰

The Board may, either upon its own motion or upon the application of any person interested showing a change of condition,

⁸¹ But the Board has no authority to postpone the hearing upon any claim properly before it. *Todd v. So. Cas. Co.*, 18 S. W. 2d 695 (Tex. Civ. App. 1929).

⁸² TEX. REV. CIV. STAT. (Vernon, 1948) art. 8307, § 10.

⁸³ *Associated Ind. Corp. v. Baker*, 76 S. W. 2d 153 (Tex. Civ. App. 1934) *er. disp'd.*

⁸⁴ *Barta v. Tex. Reciprocal Ins. Ass'n*, 67 S. W. 2d 433 (Tex. Civ. App. 1933) *er. ref.*

⁸⁵ *T. E. I. A. v. Jimenez*, 267 S. W. 752 (Tex. Civ. App. 1924) *er. disp'd w. o. j.*

⁸⁶ "All rulings and decisions of the board relating to disputed claims shall be upon questions of fact and in accord with the provisions of this law." TEX. REV. CIV. STAT. (Vernon, 1948) art. 8307, § 4.

⁸⁷ *Welch v. U. S. Fidelity & Gty. Co.*, 54 S. W. 2d 1041 (Tex. Civ. App. 1932) *er. disp'd.*

⁸⁸ *T. E. I. A. v. Marsden*, 127 Tex. 84, 92 S. W. 2d 237 (1936).

⁸⁹ *T. E. I. A. v. Morgan*, 295 S. W. 588 (Tex. Comm. App. 1927).

⁹⁰ *T. E. I. A. v. Adcock*, 27 S. W. 2d 363 (Tex. Civ. App. 1930) *er. disp'd.*

mistake or fraud, "review any award or order, ending, diminishing, or increasing compensation previously awarded, within the maximum and minimum provided in this Law, or change or revoke its previous order denying compensation. . . ." ⁹¹ While it appears to be settled that this provision was not intended to authorize the Board to furnish a second trial on the same issues or to enable it to correct errors of law occurring in the original proceeding, ⁹² there are definite suggestions in the decisions that the Board has inherent power to correct clerical errors, inadvertencies and mistakes manifest upon the record, in the same manner that courts correct judgments by *nunc pro tunc* orders, ⁹³ and to revise orders upon a showing of change of conditions. This was clearly shown in *Hoyle v. Federal Lloyds of America*, ⁹⁴ wherein it was stated:

"It seems to be equally well settled that until some party at interest has perfected an appeal, the Industrial Accident Board retains jurisdiction of the parties and the subject-matter, and can make any orders with reference thereto it thinks proper."

It has also been held that the Board may set aside an award on a showing that an interested party had no notice of the hearing. ⁹⁵

The Board's power to revise its own awards and orders is limited and may only revise orders denying compensation; it may not revise orders approving compromise settlements and the like. ⁹⁶ And, of course, the power may be exercised only while the Board has jurisdiction of the cause. ⁹⁷ When an appeal is taken or a suit is brought to enforce the award, the Board loses jurisdiction, and its revisory power is at an end. ⁹⁸ And the same situation arises at

⁹¹ TEX. REV. CIV. STAT. (Vernon, 1948) art. 8306, § 12d.

⁹² *Jones v. Cas. Reciprocal Exchange*, 275 S. W. 279 (Tex. Civ. App. 1925) *er. ref.*

⁹³ *Blair v. Millers' Indemnity Underwriters*, 220 S. W. 787 (Tex. Civ. App. 1920).

⁹⁴ 295 S. W. 202, 203 (Tex. Civ. App. 1927) *er. ref.*

⁹⁵ *Associate Ind. Corp. v. Baker*, 76 S. W. 2d 153 (Tex. Civ. App. 1934) *er. disp'd.*

⁹⁶ *Commercial Cas. Co. v. Hilton*, 126 Tex. 497, 87 S. W. 2d 1081 (1935).

⁹⁷ *Daniels v. Southern Surety Co.*, 40 S. W. 2d 209 (Tex. Civ. App. 1931) *er. ref.*

⁹⁸ *Vestal v. T. E. I. A.*, 285 S. W. 1041 (Tex. Comm. App. 1926).

the expiration of the compensation period. Once the insurer has paid the compensation ordered, the Board is powerless to impose a new liability upon it.⁹⁹ The Board's power to review awards and orders may be exercised only upon a showing of definite fraud, mistakes of a factual character, or a change in the claimant's physical condition.¹⁰⁰

An application for review of an award may be made at any time prior to the end of the compensation period. But where it is sought to review an order denying compensation, the rule is different; in such cases, the act provides that the application must be made within 12 months after entry of the order, "and not afterward," and "shall be only upon notice to the parties interested."¹⁰¹ When the Board alters or revokes a previous order, it must immediately send to the parties a copy of its subsequent order.¹⁰²

JUDICIAL REVIEW

Limitations on the right or extent of appeal to the courts from awards by boards and commissions have been generally sustained.¹⁰³ Under a constitutional authority to provide for settlement of compensation disputes, the legislature has authority to limit review of compensation awards to the manner specified and to make them otherwise presumptively valid. In *Obrecht-Lynch Corp. v. Clark*¹⁰⁴ it was said:

"... [I]t is well settled that compensation laws of this general character, which establish administrative machinery for applying statutory measures to the facts of each particular case, and which provide for a hearing before an administrative tribunal, may limit the judicial review to fundamental and jurisdictional questions."

⁹⁹ *Southern Cas. Co. v. Boykin*, 298 S. W. 639 (Tex. Civ. App. 1927).

¹⁰⁰ The Board may not set its award aside for a mere mistake of law. *Cone v. T. E. I. A.*, 251 S. W. 262 (Tex. Civ. App. 1923).

¹⁰¹ TEX. REV. CIV. STAT. (Vernon, 1948) art. 8306, § 12d.

¹⁰² *Ibid*; *Commercial Cas. Ins. Co. v. Hilton*, 126 Tex. 497, 87 S. W. 2d 1081 (1935).

¹⁰³ *Obrecht-Lynch Corp. v. Clark*, 30 F. 2d 144 (D. Md. 1929).

¹⁰⁴ *Id.* at 146.

Provisions making the award or findings of the board or commission conclusive on appeal as to questions of fact have been sustained as not invalidly delegating judicial powers,¹⁰⁵ and as not denying due process of law; likewise a limitation of judicial review to cases in which "the findings of fact of the commission do not support the order or award" is not a denial of due process of law.¹⁰⁶ However, the parties cannot be deprived of the right to have court review of action of the board to the extent of determining whether it has acted illegally or without jurisdiction.¹⁰⁷

Arkansas. Upon appeal from an award of the Arkansas Workmen's Compensation Commission, the court can review only questions of law, with power to modify, reverse, remand for rehearing, or set aside only on the following grounds: that the Commission acted without or in excess of its powers; that the facts found by the Commission do not support the award; that there was not sufficient competent evidence in the record to warrant the making of the award; or that the award was procured by fraud.¹⁰⁸ Under this statutory provision awards of the Commission have received friendly consideration from the Arkansas Supreme Court. In almost every case that court has reiterated that findings of fact by the Commission are final if supported by substantial evidence.¹⁰⁹ Appeal is a matter of right and may be had by either party when the statutory requirements are followed. Appellant must file notice with the Commission within thirty days from the date of the final award,¹¹⁰ whereupon the Commission must transfer the transcript, findings, award, documents on file, reports and any other matters on file relative to the proceedings to the circuit court of the county in which the injury occurred.¹¹¹

¹⁰⁵ *Wheeling Corrugating Co. v. McManigal*, 41 F. 2d 593 (4th Cir. 1930).

¹⁰⁶ *Booth Fisheries Co. v. Industrial Comm. of Wisc.*, 271 U. S. 208 (1925).

¹⁰⁷ *Courter v. Simpson Constr. Co.*, 264 Ill. 488, 106 N. E. 350 (1914).

¹⁰⁸ *ARK. STAT. 1947 ANN. § 81-1325.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *J. L. Williams & Sons v. Smith*, 205 Ark. 604, 170 S. W. 2d 82 (1943).

In *Garrison Furniture Co. v. Butler*¹¹² the Supreme Court of Arkansas dealt with an award in which one issue was based almost entirely on hearsay. The only evidence that the deceased had suffered an injury while at work consisted of the employee's own statements made to members of his family and to other employees prior to his death. Hearsay, of course, is admissible before the Commission.¹¹³ But some courts have held that an award may not be maintained when the only evidence supporting it is hearsay.¹¹⁴ Other courts have held that hearsay should be given probative value and should be deemed sufficient to support a finding when of a character relied upon by reasonable persons in their important daily affairs, particularly where better evidence is not available. In the *Butler* case the court aligned Arkansas with states supporting the latter view.

Oklahoma. The award or decision of the Commission is final and conclusive upon all questions within its jurisdiction between the parties, unless, within 20 days after a copy of the award or decision is sent the parties, an action is filed to review such award or decision.¹¹⁵ A peculiarity of the Oklahoma system is that actions for review are filed directly in the highest court of the state—the Supreme Court. The proceeding is heard in a summary manner and has precedence over most other civil cases in that court. The Commission is deemed a party to such proceeding, and the Attorney General represents it therein. Such action is subject to the law and practice applicable to other civil actions cognizable in said court.¹¹⁶ Upon final determination of the action in which the award or decision of the Commission is sought to be reviewed, the Commission makes an order or decision in accordance with the judgment or decision of the court.¹¹⁷ A “party interested” having right to bring

¹¹² 206 Ark. 702, 177 S. W. 2d 738 (1946).

¹¹³ ARK. STAT. 1947 ANN. § 81-1327(a) provides that declarations of a deceased employee concerning his injury are admissible.

¹¹⁴ *Carrol v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507 (1916).

¹¹⁵ 85 OKLA. STAT. ANN. (Perm. Ed.) § 29.

¹¹⁶ *Ibid.*

¹¹⁷ *Taylor v. Langley*, 188 Okla. 646, 112 P. 2d 411 (1941).

suit to review an award of the Commission must have a present, direct, pecuniary interest in the subject matter and have suffered a real wrong in the particular case.¹¹⁸

One who has presented his case or defense before the Commission upon a certain theory will not ordinarily be permitted to prevail upon another theory in the Supreme Court or to raise an issue which has not been previously passed on by the Commission.¹¹⁹ In *Sparkman v. Cosden Pipe Line Co.*¹²⁰ the court held that in the absence of any evidence in the record to the contrary, it must be presumed that a finding of the Commission was justified by competent evidence adduced before the Commission.¹²¹ The Commission's fact findings on issues relating to its jurisdiction are not binding upon review, but the Supreme Court must weigh the evidence and arrive at its own view of the effect thereof to afford judicial process to the complaining party.¹²² And it will not accept as conclusive a finding of the Commission on jurisdictional questions, but will make its own independent finding with respect thereto.¹²³ However, where there is evidence to support the finding of the Commission that an accidental injury was sustained, such finding will not be disturbed on appeal.¹²⁴ An award of the Commission based on a material finding of fact which is unsupported by any competent evidence will be vacated by the Supreme Court in review as a matter of law.¹²⁵ Of course, where the findings of fact and conclusions of law of the Commission are too indefinite for judicial interpretation, the Supreme Court, on appeal, will vacate the order and remand the case for further proceedings.¹²⁶

¹¹⁸ *Cameron & Henderson, Inc. v. Franks*, 199 Okla. 143, 184 P. 2d 965 (1947).

¹¹⁹ *Board of County Commissioners of Payne County v. Hayter*, 192 Okla. 262, 135 P. 2d 975 (1943).

¹²⁰ 182 Okla. 184, 77 P. 2d 21 (1938).

¹²¹ *Double-Cola Bottling Co. v. Singletary*, 185 Okla. 242, 91 P. 2d 77 (1939).

¹²² *Hurley v. O'Brien*, 192 Okla. 137 P. 2d 592 (1943).

¹²³ *Briscoe Contr. Co. v. Miller*, 184 Okla. 136, 85 P. 2d 420 (1938).

¹²⁴ *Clarksburg Paper Co. v. Roper*, 196 Okla. 504, 166 P. 2d 425 (1946).

¹²⁵ *Eagle-Picher Mining & Smelting Co. v. Davison*, 192 Okla. 13, 132 P. 2d 937 (1942).

¹²⁶ *Special Indemnity Fund of Okla. v. Hewes*, 214 P. 2d 240 (Okla. 1950).

An award having been sustained by the Supreme Court, the matters decided become *res judicata* as to the parties¹²⁷ and are not challengeable in a collateral action for alleged error therein.¹²⁸

Texas. Any interested party who desires judicial review of an award of the Industrial Accident Board must, within 20 days after rendition of the award, file with it notice that he will not abide by the award and then, within 20 days after giving such notice, must bring suit in the county in which the injury occurred, to set aside the award of the Board. Compliance with these provisions is mandatory and jurisdictional.¹²⁹ Unless the notice called for is timely given and suit thereafter is timely brought, the court has no jurisdiction to review the case.¹³⁰ A suit to set aside an award for an injury suffered outside the limits of the state must be brought either (a) in the county where the contract of hiring was made or (b) in the county where the employee or his beneficiaries reside at the time of filing suit or (c) in the county where the employee or employer resided when the contract of hiring was entered into, as the one filing the suit may elect.¹³¹

The legal effect of bringing a suit to set aside an award or order is to divest the Board of all jurisdiction in respect of the claim and to invest the court with jurisdiction over all parties and issues concerned,¹³² "subject only to the qualification that rights and liability of the parties shall still be determined by provisions of the act."¹³³ Once suit is duly and properly filed, the Board loses all control over the proceeding and can take no further step toward

¹²⁷ *O. C. Whitaker, Inc. v. Dillingham*, 194 Okla. 421, 152 P. 2d 371 (1944).

¹²⁸ *White v. Shell Oil Co.*, 193 Okla., 374, 143 P. 2d 825 (1943); *Southwestern Brewing Corp. v. Cothrum*, 184 Okla. 63, 84 P. 2d 609 (1938).

¹²⁹ It is clear that the court does not acquire jurisdiction of the cause until the appeal from the award has been actually perfected. *Millers' Indemnity Underwriters v. Hayes*, 240 S. W. 904 (Tex. Comm. App. 1922).

¹³⁰ *Mingus v. Wadley*, 115 Tex. 551, 285 S. W. 1084 (1926).

¹³¹ TEX. REV. CIV. STAT. (Vernon, 1948) art. 8306, § 19.

¹³² *Hartford Acc. & Indemnity Co. v. Choate*, 126 Tex. 368, 89 S. W. 2d 205 (1936).

¹³³ *Lumbermen's Reciprocal Ass'n v. Behnken*, 226 S. W. 154, 157 (Tex. Civ. App. 1921).

adjustment of the controversy.¹³⁴ While there are decisions to the effect that filing of suit merely suspends the award and that it is restored to effectiveness upon abandonment or dismissal of the action,¹³⁵ it now seems to be definitely settled that the award is abrogated and vacated *in toto* when the suit to set aside is filed and that a claimant is "out of court without an award or judgment in his favor."¹³⁶

Since the court's power to act in a compensation case is dependent upon prior authorized action of the Board, it is clear that unless the Board had jurisdiction, the court itself can have none.¹³⁷ And this means, of course, that there must either be pleading and proof, or an agreement of the parties, that a claim for compensation was filed within the time allowed by law,¹³⁸ or that there was good cause for any delay that may have occurred.¹³⁹ The cause of action alleged in court must conform to that pressed before the Board, and if it differs therefrom in a material particular, the court has no alternative but to dismiss the proceeding.¹⁴⁰

Once a suit to set aside an award has been duly instituted in the proper court, it is conducted in the same general manner as all other actions filed therein. It is a trial *de novo*.¹⁴¹ Citation is issued and served, parties are joined, and pleadings filed, as in any other suit.¹⁴² Since the verdict might be influenced if jurors were allowed to know the tenor of the Board's decision, it is a settled rule that they should not be informed thereof either "by the introduction of evidence, pleading, or remark of counsel."¹⁴³ The statute provides

¹³⁴ *T. E. I. A. v. Boudreaux*, 213 S. W. 674 (Tex. Civ. App. 1920), *rev'd on other points*, 231 S. W. 756 (Tex. Comm. App. 1921).

¹³⁵ *Wilson v. Associated Ind. Corp.*, 74 F. 2d 896 (5th Cir. 1935).

¹³⁶ *Tex. Rec. Ins. Ass'n v. Leger*, 128 Tex. 319, 97 S. W. 2d 677 (1936).

¹³⁷ *Cooper v. U. S. Fidelity & Gty. Co.*, 29 S. W. 2d 971 (Tex. Comm. App. 1930).

¹³⁸ *Durham v. Tex. Ind. Ins. Co.*, 60 S. W. 2d 255 (Tex. Civ. App. 1933) *er. disp'd.*

¹³⁹ *Fox v. T. E. I. A.*, 94 S. W. 2d 569 (Tex. Civ. App. 1936).

¹⁴⁰ *Stratton v. Gulf Cas. Co.*, 53 S. W. 2d 518 (Tex. Civ. App. 1932).

¹⁴¹ *New York Ind. Co. v. Rasmusson*, 1 F. Supp. 156 (S. D. Tex. 1932).

¹⁴² *Jago v. Ind. Ins. of North America*, 120 Tex. 204, 36 S. W. 2d 980 (1931).

¹⁴³ *Fidelity Union Cas. Co. v. Klatt*, 47 S. W. 2d 417, 419 (Tex. Civ. App. 1932) *er. disp'd.*

that in all suits "the burden of proof shall be upon the party claiming compensation."¹⁴⁴ This means that even though the suit is brought by the insurer, the claimant must prove by a preponderance of evidence every fact not admitted or agreed to by his opponent, and failing therein, the claimant cannot hope to prevail.¹⁴⁵ The court decides the case upon the preponderance of evidence, and exclusionary rules apply as in other court proceedings.

T. Michael Kostos.

¹⁴⁴ TEX. REV. CIV. STAT. (Vernon, 1948) art. 8307, § 5.

¹⁴⁵ But when the employee has proved his case according to the statute, "then the burden shifts to the insurer to defeat that claim if he can." *Southern Surety Co. v. Scheel*, 49 S. W. 2d 937, 939 (Tex. Civ. App. 1932), *rev'd on other points*, 125 Tex. 1, 78 S. W. 2d 173 (1935).

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