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Fifty Years of Workman's Compensation

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NOTES

FIFTY YEARS OF WORKMAN'S COMPENSATION

FORWARD

Workman's compensation laws in Wyoming, like Topsey, "just grewed." This is not to say that the growth has been aimless and without purpose, but additions, deletions and amendments have been worked to meet the needs of changing times and circumstances. This material is not intended to be anything more than a short condensation of the history of the law, its status today, and some brief notes on areas of conflict between statutory language and judicial interpretation. In reviewing the statutes passing through the years, it is interesting to note the constant play of the balancing of power between labor and management. This is truly a picture of the American scene.

EMPLOYER'S LIABILITY—HISTORY OF THE ACT

Prior to the enactment of the laws of compensation, the employee was left to the vagaries of his common law remedy. In addition to the expense of litigation (usually prohibitive), the time consumed by the action often precluded recovery in time to save the employee from secondary financial disaster. Even if he brought his case to court, he was subject

to the ancient and hard defenses of assumption of risk, the fellow-servant rule, and contributory negligence. Reform movements, originating in England in the late Nineteenth Century, began to reach the continental United States around 1900. Even then litigation was long, arduous, and often worked an injustice to one or both parties. Through the application of the historical defenses the employee was often denied recovery for injury attributed strictly to the hazards of the business. On the other hand, employers were held responsible for injury without fault on their part. Workman's compensation laws were found to be a compromise between employer and employee, who suffered equally under the old system.¹

In 1910, Wyoming, with ten other states,² pioneered in enacting the first compensation laws.³ The law has remained unchanged fundamentally, providing for payment to persons injured in defined extra-hazardous occupations from funds in the state treasury. The fund was declared to be exclusive, with participation mandatory by employers within the scheduled types of enterprise. Statutory awards were exclusive of all other rights and remedies of the employee, his personal or legal representative. Generally, extra-hazardous occupations were limited to heavy industry, exclusive of those in interstate commerce. Substantial changes are found in definitional terms. "Children" were those under age 16, and "injury" was exclusive of the wilful acts of a third party or of disease, excepting disease resulting from an injury incurred in the course of employment. Injury caused by a third party, in cases in which there was no liability on the part of the employer, left the employee strictly to his remedy at common law. Employer contributions to the fund were two per cent of payroll, with a minimum account level (after deducting awards for compensation) of two per cent of his projected annual payroll, but not less than \$5000.

Compensation schedules viewed in the light of today's wages and expenses, seem small. However, considered in conjunction with a purchasing power of ninety nine cents of the dollar, they were undoubtedly commensurately adequate with current awards. Temporary total disability awards scaled from \$15 per month for the single man, to \$35 per month for a married man with dependents. Permanent partial disability ranged from \$150 for the loss of a thumb to \$1000 for the loss of a limb. Permanent total disability provided a lump sum payment of \$1000 for the single man and \$1200 for a married man with no children. If there were children living under the age of 16, the payment was increased at the rate of \$60 per year for each child until that child reached age 16. Assuming a married man with three children, ages 5, 7 and 9, the total lump award would then be \$3820. Death benefits were \$1000 plus the above schedule for dependent children, and a burial allowance of \$50.

1. 28 R.C.L. 709, 713.

2. L.R.A. 1917 D, note 82.

3. H.B. 127, passed ch. 124, L. 1915; ch. 258 Wyo. Comp. Stat. 1920.

Prior to the adoption of the Constitution of Wyoming, the Territorial Law limited recovery for death to \$5000. Art. 10, § 4 of the Constitution provides "No law shall be enacted limiting the amount to be recovered for causing the injury or death of any person." In 1904, the Wyoming Supreme Court ruled that provisions of the Constitution operated prospectively only, and did not abrogate a valid statute previously passed.⁴ As a result of this ruling, the legislature repealed the Territorial statute and in 1913 authorized a proposed amendment to Art. 10, § 4 of the Constitution, granting the state the right to accumulate funds and pay compensation fixed by law to persons injured as a result of employment.⁵ This amendment, together with the original workman's compensation law of 1910, was found to be uniform within the covered classes, and that the selection of classes covered was not unreasonable or arbitrary, but was within the discretion of the legislature and that no constitutional rights were violated.⁶ Since the workman's compensation statutes themselves were created within the constitutional authority of the legislature, the amendment to the constitution did not act to remedy a bad law, but rather established the law as a mandate of the people.

THE JUDICIAL ATTITUDE

Workman's compensation is not contractual by nature, but arises out of the contract of employment, in the mutual giving up of common law rights and obligations. As a creature of statute, early courts hostile to the plan, declared the law impolitic and invalid, violative of the Fourteenth Amendment to the Constitution of the United States. In *N.Y.C. Railroad Co. v. White*,⁷ a 1916 decision, the Supreme Court of the United States heard argument on the constitutionality of the New York compensation law, and found the law to be a valid exercise of the police power and that classification of covered employment was not arbitrary, nor in contravention of the equal protection of the laws clause.

The Wyoming courts have liberally construed the Act in favor of the workman.⁸ They (the laws) should be construed so that where reasonably possible the industry and not the individual workman should, to a large extent, bear burdens of accidents suffered within it;⁹ but the Supreme Court will not disregard principles of appellate practice in so doing.¹⁰ The Workman's Compensation Act was not intended to give compensation as damages, but is in the nature of accident insurance; a compromise between employers and employed, whereby in exchange for limited liability, the employer pays some claims where in the past no liability existed.¹¹

4. *Mestas v. Diamond Coal and Coke Co.*, 12 Wyo. 414 (1904).

5. Ch. 79, L. 1913.

6. *Trent v. Union Pacific R.R.*, 68 Wyo. 146, 231 P.2d 180 (1951).

7. 243 U.S. 188, 37 S.Ct. 247, 61 L.E. 667 (1917).

8. *Claim of Carey*, 74 Wyo. 37, 283 P.2d 1005 (1955).

9. *Christensen v. Sikera*, 57 Wyo. 57, 112 P.2d 557 (1941).

10. *In re Corey*, 65 Wyo. 301, 200 P.2d 333 (1948).

11. *Fuhs v. Swenson*, 58 Wyo. 293, 131 P.2d 333 (1942).

While states may hold forth the proposition that their plan is compulsory, it must be noted that there are limitations and exceptions. Some states rule that certain types of employment, termed "extra-hazardous," are covered, but other occupations, as domestic service and farm labor, are excepted. Other states provide that municipalities may elect to come under the Act. Still others allow participation by private insurance carrier or through a public fund. In addition, there are states which allow both parties to elect between compensation and common law remedies (see table, App. A).

WYOMING'S COMPENSATION ACT—

IT'S NATURE; REMEDIES; RIGHT OF ACTION

Compensation as provided for in the Act, is for any injury or death sustained in employment declared to be extra-hazardous.¹² The list is extensive,¹³ ranging from factory workers to bartenders to power farm employees.¹⁴

Excluded from the Act are employees of railroads in inter-state commerce,¹⁵ peace officers, game wardens and coal mine inspectors,¹⁶ and persons whose employment is purely casual and not for the purpose of the employer's trade or business.¹⁷

Employees hired "in state," or who regularly work in the state, are within the Act if injured by accident outside the state and within a period of six months from the date of leaving. Extension of coverage beyond the six month period is subject to notice to the State Treasurer of the election to retain such employee under the Act.¹⁸ The problem of compliance with the compensation laws of the state where the accident occurs has been resolved by reciprocal agreements with Colorado, Utah, South Dakota, New Mexico and California. An agreement is pending with Nevada.¹⁹

12. Wyo. Stat. § 27-50 (1957).

13. Wyo. Stat. § 27-56 (1959) (Supp. 1959).

14. Wyo. Stat. § 27-49 (1957) (Supp. 1959) defines power farming as a farm which uses any power driven equipment where one or more workmen are regularly employed for an average of six months per year and, where the employer has elected to come under the Act. Agricultural employers should be alerted to the fact that they may elect, since a failure to do so places them in a position of exposure to unlimited judgments in favor of injured employees. Sub-paragraph (II) (b) of the same section further states that officers of corporations whose business is classified as extra-hazardous and who are actually subject to the hazards of the business in the regular performance of their duties, may be covered under the Act. In order to qualify such persons, a notice of intent must be filed with the department by registered mail 30 days before the taking effect of such coverage. Payroll reporting of each person to be covered is not less than \$2400, but not more than \$4800. It should be noted that a substantial benefit accrues to the typical head of a family or partnership type corporation. For a maximum cost of \$240 per year (tax deductible), the owner is given practically unlimited accident insurance, and a death benefit which could amount to \$17,000 for his family.

15. Wyo. Stat. § 27-56 (1957) (Supp. 1959)

16. Wyo. Stat. ch. 7 (1957), Labor and Employment.

17. Wyo. Stat. § 27-49 (II) (b) (1957).

18. Wyo. Stat. § 27-146 (1957) (Supp. 1959).

19. Source: Attorney General's Office, State of Wyoming.

The Act is exclusive of any rights and remedies, at common law or otherwise, of the employee; his personal or legal representative or dependent family on account of such injury against his employer.²⁰ The right to compensation from such funds is in lieu of any and all rights of action against any employer contributing to the fund in favor of such person.²¹ Common law defenses of assumption of risk, fellow-servant and

20. Wyo. Stat. § 27-51 (1957).

21. Wyo. Stat. § 27-58 (1957).

While the statutes purport to provide an insured employer complete immunity from recovery at law by his employee, the possibility of recovery over by indemnity to a third party sued by the employee should not be completely dismissed.

Rule 14, Wyo. Rules of Civil Procedure, provides the mechanics for a defendant to implead a person "not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." A third party plaintiff's position must depend on the Wyoming Court's limitations of the rule denying contribution between wrongdoers.

In *Miller v. New York Oil Co.*, 34 Wyo. 272, 243 Pac. 118, the rule denying indemnity or contribution was held inapplicable as against a landlord seeking to recover the amount paid by him to satisfy a judgment for the death of a tenant who was asphyxiated by the fumes of a gas water heater negligently installed by the defendant. The court held the landlord's liability grew out of a non-delegable duty to the tenant, and his liability was constructive rather than actual. The court rejected the rule of *Merryweather v. Nixon* (a leading English case denying contribution or indemnity between wrongdoers), holding that "it has so many exceptions that it can hardly with propriety be called a general rule." The court favorably cited *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 19 Am. Rep. 324, which repudiated the rule as applied to concurrently negligent parties, and approved the rule when applied to joint wrongdoers.

Since the *Miller* decision in 1926, the Wyoming position on indemnity has been further delineated.

In *Convoy Company v. Dana*, _____ Wyo. _____ 359 P.2d 885 (1961), the court denied plaintiff's action for indemnity against Dana, a garage owner. Convoy's employee had left a truck with Dana for repairs on the air brake system. Unknown to Dana, the emergency brake was also defective, and Dana injured one Burdick when he moved the truck. Burdick successfully sued the Convoy Company who in turn sought indemnity from Dana. In the decision the court distinguished *Miller*, in that *Miller* was allowed recovery on the grounds of his absolute liability to a tenant, passive negligence, and a complete want of knowledge of the hazardous condition.

In the instant case the court approved the general rule denying indemnity, when under such circumstances that both parties are joint tortfeasors, or are in *pari delicto*, as when each of the parties contributes to cause an injury. On the facts the court found the plaintiff's negligence in failing to provide an effective emergency brake, and further failing to so advise Dana was one of the proximate cause of the injury, where Dana was negligent or not.

In a recent Iowa case (*American District Telegraph Co. v. Kittleson*, 179 F.2d (8th C.C.A. 1946)), under substantially the same statutory limitations as Wyoming, the defendant American successfully impleaded Kittleson's employer, whose negligence, while passive, was a proximate cause of Kittleson's injury. The court found that Kittleson's employer was contractually bound by statute to reimburse the injury through compensation, and that American was liable at law. But between the employer and American there was no bond, and they were not joint tortfeasors and not subject to the rule against indemnity.

While all three cases recognize the limitations of indemnity, each rests on a separate position of the parties. The writer believes that a right of indemnity over against an insured employer may exist in Wyoming, but only under exceptional and rare circumstances. In the *Miller* case, indemnity was allowed against an actively negligent concurrent tortfeasor by a plaintiff whose liability existed without fault. The *Convoy* case denied indemnity when the negligence of the third party plaintiff was found to be active and a proximate cause of the injury. In order to apply the *Kittleson* rule in Wyoming, there must be a passively negligent third party plaintiff whose negligence cannot be raised to the degree of an intervening cause. It is not difficult to foresee a situation which fits the requirements of both the *Convoy* and the *Miller* cases. Since the Compensation laws require the employer to reimburse any injury sustained by an employee, an employee who fails to bring a

contributory negligence are not available to the employer, nor may the employer relieve himself from liability by contract, rule or regulation.²² Liability under the Act is absolute, for injury incurred within the scope of employment, subject only to a defense of culpable negligence.²³

The Employer

Employers of covered occupations are required to file with the director of workman's compensation upon commencing such employment and to make timely contributions into the fund.²⁴ New employers who fail to comply may be restrained from further employment,²⁵ and any employer who fails to make payments when due is subject to double assessment and fine.²⁶ If an employee is injured in a covered occupation while the employer is delinquent, any payment of award by the state makes the employer personally liable for such award. Recovery is by suit, on the relation of the state treasurer, and the entry of final order of the court is prima facie proof of liability.²⁷ This of course means the employer has forfeited his right to challenge the validity of the claim or to assert a defense. The employee may bring an action at law for his injuries,²⁸ or he may recover through the fund, but once the election is made against the fund, recovery at law is waived.²⁹

The Fund

Payments to the fund are remitted monthly, equal to 5% of the total insured payroll for the first twelve months of employment,³⁰ and 1% per month thereafter, subject to a minimum account level of \$2000.³¹ Such payments are entered to the employer's account, and awards are charged against that account. Overdrafts resulting in drawing the account level below the minimum result in an additional monthly levy of 4% of payroll, until the overdraft is recovered.³² Large overdrafts may create an urge to reorganize the business into another form. This should be discouraged, since the courts have little difficulty in appending the old liability upon the new firm.³³

Employer's accounts have a real monetary value, and are fully assign-

tort action against the person who causes injury allows the employers recovery to go by default, the employer should be entitled to an action for indemnity.

22. Wyo. Stat. § 27-52 (1957).

23. Who. Stat. § 27-50 (1957). While culpable negligence is often a difficult standard of measure, the Wyoming courts have held the misconduct to be a question of fact, and each case must be weighed and determined by its own circumstances. *Hamilton v. Swigart Coal Mine*, 50 Wyo. 485, 143 P.2d 203, 149 A.L.R. 998. Culpable negligence is an affirmative defense and the burden of proof is on the employer. *Hotelling v. Fargo-Western Oil Co.*, 33 Wyo. 240, 238 Pac. 532 (1925).

24. Wyo. Stat. § 27-63 (1957).

25. Wyo. Stat. § 27-69 (1957).

26. Wyo. Stat. § 27-68 (1957).

27. Wyo. Stat. § 27-74 (1957).

28. Wyo. Stat. § 27-53 (1957).

29. Wyo. Stat. § 27-51 (1957).

30. Wyo. Stat. § 27-63 (1957).

31. Wyo. Stat. § 27-64 (1957).

32. Wyo. Stat. § 27-66 (1957) (Supp. 1959).

33. *State v. Nugget Coal Co.*, 60 Wyo. 51, 144 P.2d 944.

able.³⁴ The assignee should, however, make some inquiry into the status of the account he is acquiring, since not only does he succeed to the rights, privileges and immunities of the assignor, but assumes any obligations of compensation incurred under the account. Possibly in a large industrial firm this may not be of any consequence, since injuries may maintain the contribution at the maximum level. But to the small employer, acquiring an established account immediately reduces his tax liability from 5% to 1%. Prospective purchasers of existing accounts should be cautioned to obtain a statement of account from the State Treasurer's office. Deficit balances are maintained even though there is a change in management, and such deficits must be reimbursed by the owner even though the liability may not be his originally. Unused balances of accounts in the fund, belonging to employers who have discontinued employment within the state for three years, are closed and become a permanent part of the industrial fund.

The Employee

Hearing and Appeal.³⁵

Recovery for injury is begun by the employee or his representative making a report of the accident to the employer within 24 hours of the accident, and by having the report filed with the clerk of court of the district where the accident occurred. Forms are provided by the state treasurer, and should be made available by the employer. Claims for compensation must be made within one year of the accident, and are also filed with the clerk of court. Claims may be amended at any time before the original order of award is made. Employer's verified report of the accident must be filed with the clerk of court, and a failure to comply is punishable by fine. Upon receipt of the notice of injury and claim, the judge of that court must immediately conduct such investigation as is deemed necessary, to determine that the claim is not disputed by the employer, and that the employee is entitled to the claim. Upon verification of these facts, an order of award must be issued within 60 days of the notice.

If the employer contests the claim as being non-compensable within the Act, or from the injury having been caused by the culpable negligence of the employee, either party may claim the right to trial by jury. Proceedings are summary, and have precedence over the court calendar. The county and prosecuting attorney represents the workman, against whom no costs may be assessed. Application for modification of any award may be made within two years, on the grounds of increase or decrease in capacity, or upon fraud or mistake. The state treasurer has the right to cause a case to be re-opened within 30 days of receipt of order of award, but must show probable cause of error. Any order is subject to review by the Supreme Court of Wyoming.

34. Wyo Stat. § 27-76 (1957).

35. Wyo. Stat. § 27-104 to 27-131, incl. (1957).

COVERAGE, DEPENDENTS, MODE OF PAYMENT

Medical and Hospital Care

Undoubtedly the payments greatest in number and least in per unit cost are those for the every day, minor injury, requiring immediate medical attention, with or without the loss of a few days work, and subsequent out-patient treatment until healed. After notice to the employer, the court may award payment of submitted medical service up to \$385, and hospital costs up to \$495. If it appears that the original award is inadequate, or that further expense is necessary, the court may direct that all additional expenses be allowed for a period up to six months, and may issue supplemental orders for additional periods so long as the need is apparent. Costs of the services after the initial ward is not charged to the employer's account.³⁶ Ambulance service is included in the award when required, but must be usual and reasonable, and within the rates set by the state treasurer.³⁷ Where death results, burial expense is allowed up to \$600.³⁸ It should be noted that warrants issue directly to the attending physician or servicing hospital,³⁹ and also that such payments are free from garnishment or levy, and not assignable.⁴⁰

Disability Awards

Temporary total disability is the result of an injury which temporarily incapacitates an employee from performing any work at any gainful occupation for the time, but from which injury such person may recover by treatment and may be able to resume work. No award, other than for medical attention is made for the first three days of disability, unless such disability runs beyond eight days, in which case it is allowable for the full time of the injury. Payments are equal to 66⅔% of the actual average monthly earnings received for the last three months preceding the injury, from the employer for whom he was working at the time of the injury. Awards are subject to a minimum and maximum, scaling from \$130 per month for a single person to \$260 per month for a workman with four or more dependents. Periods of less than a month are prorated, and payment is allowed for the day of injury, unless full wages were received for that day.⁴¹

Permanent partial disability, as the loss of one member or portion thereof, or one eye, is compensable in amounts from \$300 for the loss of a finger, to \$6000 for the loss of an arm. Awards for an unscheduled disability, as a spinal injury or hernia, are discretionary with the court, but based on the proportionate extent of disability and the schedule.⁴²

Payment of the award is in monthly installments of \$90 per month to unmarried workmen, and \$110 if there is a wife living at the time of

36. Wyo. Stat. § 27-94 (1957).

37. Wyo. Stat. § 27-99 (1957).

38. Wyo. Stat. § 27-101, L. 1951, ch. 204, § 5 (1957).

39. Wyo. Stat. § 27-96 (1957).

40. Wyo. Stat. § 27-102 (1957).

41. Wyo. Stat. § 27-79 (1957) (Supp. 1959), L. 1961, ch. 204, § 1.

42. Wyo. Stat. § 27-80 (1957) (Supp. 1959), L. 1961, ch. 204, § 2.

the injury. Unpaid balances at the death of the claimant are paid to the surviving wife, or if deceased, then to surviving children. If there are neither surviving wife or children, the award returns to the general fund, and such amount is credited to the account of the employer.⁴³

Permanent total disability is based on the loss of both arms or legs, loss of sight, paralysis, or other condition which permanently incapacitates the workman from performing any work at any gainful occupation.⁴⁴ An award of \$12,000 is made on the findings, plus a lump sum award equal to \$24 per month for each dependent child or brother or sister under the age of 18, computed until that child reaches age 18. The lump sum award for dependencies is limited to a total of \$7000, and is held by the state treasurer for disbursement on order of any Wyoming District Court.⁴⁵ The base award is distributed at the rate of \$125 per month to a single man, and \$150 per month to a married man. Upon the death of the workman (from causes other than the compensated injury), any balance remaining unpaid in the workman's account returns to the state fund and is credited to the account of the employer.⁴⁶

Awards If Death Results From A Compensable Injury

If the workman's death by the insured accident occurs before other awards, his widow (or an invalid widower) will receive an award of \$10,000 payable in monthly installments of \$125.⁴⁷ Any balance remaining unpaid upon remarriage reverts to the account of surviving children, or if there are no surviving children, then back to the state fund.⁴⁸ Surviving children at the death of the employee are granted a lump sum award under the same terms as under permanent total disability.⁴⁹ If there are neither surviving wife nor children, but surviving dependent parents, an award of \$3000 is granted for one, and \$4000 if both are living.⁵⁰

In the event the workman dies of injuries sustained under any of the three classes of disability, and after an award has been made and payments received thereon, the following adjustments are made:

1. Following temporary total disability, the widow and children

43. Wyo. Stat. § 27-81 (1957).

44. But the ability of the workman to continue in his former employment is not a conclusive test on the question of his eligibility for total disability. *Standard Oil of Indiana v. Ervin*, 44 Wyo. 88, 8 P.2d 447.

45. Wyo. Stat. § 27-85 (1957) (Supp. 1959).

46. Wyo. Stat. § 27-86 (1957) (Supp. 1959). While the statutes do not spell it out, it is implied that the fund set up for dependent children is not included in the refund provision. Wyo. Stat. § 27-85 (1957) provides: "There shall be credited to the account of each of such children. . . ." Wyo. Stat. § 27-86 (1957) makes provision for the workman, on showing of hardship, to withdraw any unused portion of his total award, and further states "provided, that if the workman shall die leaving an unpaid balance of the award, then such unpaid balance shall be returned to the fund." Application of the rule of liberal construction to the statutes would seem to meet the legislative intent, and to follow the rule set forth by the Supreme Court in *Christensen v. Sikera*, supra note 9.

47. L. 1961, ch. 204, § 3.

48. Wyo. Stat. § 27-88 (1957).

49. Wyo. Stat. § 27-89 (1957) (Supp. 1959).

50. Wyo. Stat. § 27-90 (1957).

shall receive awards as provided for under the death benefits sections,⁵¹ but subject to a reduction in the principal sum of all payments made to the workman in excess of \$2400.⁵²

2. Following permanent partial disability, the death benefits are allowed to both the widow and children, but all payments received by the workman are deducted.⁵³

3. If death follows an award for permanent total disability, an award is made to the surviving widow only, and all payments in excess of \$2000 paid to the workman are deducted from the death benefit.⁵⁴

SUBSEQUENT INJURY AND DISASTER REINSURANCE FUNDS

The Subsequent Injury Fund

In the absence of controlling statutes, state administrative agencies (where applicable) and the courts, have often faced difficult decisions arising out of subsequent injuries to employees which, when combined with a previous unrelated injury, classify the employee as permanently, totally disabled. Suppose employee John Doe, while working for corporation X, loses his left hand at the wrist. Under the schedule of compensation for permanent partial disability, his medical and hospital expenses are paid, and in addition he is awarded a lump sum benefit of \$5000. After recovery, and with or without the aid of an artificial hand, corporation Y employs him in a hazardous occupation. As a result of a "no negligence" accident, he suffers the loss of the right arm. This second injury places John in the classification of permanent total disability, eligible for a lump sum benefit of \$12,000 for himself, and up to \$7000 for his dependent children. At the same time, corporation Y should not have to bear the entire burden, since the injury for which it is responsible would entitle the employee only to a lump award of \$6000, the statutory award for loss of an arm above the elbow.

In the past, corporation Y (or its insurance carrier) had to reimburse John for the ultimate loss arising out of his latest employment, or John remained uncompensated for the cumulative burden now placed on him.

Recognizing the injustice to one party regardless of the final decision, the Wyoming legislature in 1945,⁵⁵ introduced and passed H.B. 43, creating the Subsequent Injury Fund.⁵⁶ Under the provisions of this Act, corporation Y contributes only the sum which would have been payable had there been no previous injury, and after deducting the award for such previous injury, any sum due as an award for permanent total disability is paid out of the Subsequent Injury Fund. This amount is not charged to either employer, since the amount is funded by appropriation.

51. *Supra* notes 47, 48, 49.

52. Wyo. Stat. § 27-91 (a) (1957).

53. Wyo. Stat. § 27-91 (b) (1957).

54. Wyo. Stat. § 27-91 (c) (1957).

55. L. 1945, ch. 45, § 3.

56. Wyo. Stat. § 27-149 (1957) et seq.

It should be noted that in the case of an injury which was caused by a party other than the second employer, the right of recovery by subrogation is expressly granted to the Fund, ex rel. the State Treasurer, and that the Fund shares ratably with the employee. In the absence of any ruling by the Supreme Court, this would be interpreted to mean that the reimbursement feature operates in a direct ratio of the contribution by the Fund over the judicial award. If the recovery by judgment is less than, or equal to the contribution by the Fund, the employee recovers nothing. If the judgment exceeds the contribution, all over goes to the employee.⁵⁷

In order to relieve individual employers of the nearly permanent liability of total disability or death claims, the legislature, in 1957, created the Disaster Reinsurance Fund.⁵⁸ This fund provides for reimbursement of an individual account of all over \$2000 arising out of single claim.

After an award exceeding \$2000 is charged to the employer's account, the Fund pays over into the Compensation Fund the total in excess of \$2000, and the statutory deficit is relieved by the mechanics set up within the Compensation Fund, wherein the employer's rate returns to 1% of payroll as soon as the \$2000 deficit is paid off. All employers contributing to the Compensation Fund contribute an additional $\frac{1}{2}$ to $\frac{1}{4}$ of 1% of payroll, credited to the Reinsurance Fund, except those firms contributing 5% as their initial rate, or those contributing 4% or more by reason of overdrafts from previous awards.

SPECIAL PROBLEMS AND QUESTIONS

THIRD PARTY LIABILITY AND REIMBURSEMENT

Wyo. Stat. § 27-54, 1957, amended Laws 1959, c. 198, § 3, provides that the provisions of the Act shall not bar an employee's right of recovery for injury sustained under circumstances creating legal liability in some person other than his employer. This right is in addition to his right to statutory compensation, and prohibits denial of a favorable judgment on the grounds of co-existing recovery from the Fund. Whenever such employee has received compensation benefits, and also elects to pursue a

57. Particular problems are raised by the application of a subrogation right in the state. While the writer makes no attempt to present a solution, it is felt that they should be raised at this time. If the state commences the action, is the employee a necessary party under Rule 19 of the Rules of Civil Procedure. As between the state and defendant, it would appear that he is not; but if he is not made a party, and the recovery is limited to the state's contribution, has the employee lost his claim for pain and suffering? Under a pure subrogation action it is apparent the subrogee is limited to his own loss. The rule of joinder of parties applies to persons having a joint interest in the claim, but the rule does not necessarily follow the facts. Here, the state is interested only in recovery of money spent; the employee is interested in expanding the claim for pain and suffering. Each claim arises out of a single occurrence, and against a single wrongdoer, but each is for different elements of damage. If the employee brings an original action against the third party, he will save his case for (1) uncompensated injury, (2) suit costs, (3) "set aside" under § 27-54. This would serve to defeat the apportionment ratio governing subrogation. If the assumptions are correct, it would immediately appear that any action under the third party tortfeasor statute should be initiated by the employee. Failure to do so may result in the giving up of a substantial right.

58. Wyo. Stat. § 27-169 (1957) (Supp. 1959).

recovery from such third party, the State of Wyoming has a right and interest in the action, and must be joined as a party plaintiff. The state takes no part in the suit, but the mandatory joinder acts to protect the state's right of recovery of outlay made by the Fund on behalf of the employee. Double recovery is not permitted, and a reimbursement formula set out in the above statute makes the following provision: "After deducting the reasonable cost of recovery or collection, which cost shall not exceed thirty three and one third per cent ($33\frac{1}{3}\%$), one third ($\frac{1}{3}$) of the remainder shall in any event be paid to the injured employee. . . . Out of the balance remaining the Industrial Accident Fund shall be reimbursed, if said balance be sufficient, or to the extent of said balance if insufficient, for the total amount of all awards received by the injured employee under this Act, including all monies paid to him or on his behalf for doctor and hospital bills, and for any other purpose on his behalf under orders of a district court."

Prior to the enactment of the above law, the pertinent portion of Wyo. Stat. 27-54 (1951) read: "He may also pursue his remedy at law against such third person, provided that he shall not be entitled to a double recovery, and in the event that such employee recovers from such person, he shall be entitled to retain only the excess over any compensation paid to him, and must reimburse the Industrial Accident Fund for all moneys advanced to him for such injury, less not to exceed $33\frac{1}{3}\%$ for its share of the cost of such recovery."

Appealing from a decision of the District Court, Albany County, awarding the State of Wyoming \$9,172.76 as its share of a third party judgment in favor of Russell Brown, the following facts and arguments were presented.⁵⁹ Brown had obtained a judgment from a third party for his injuries in the amount of \$22,500. The state had contributed \$13,759.16 through his claims for compensation, and now demanded \$9,172.76 as the amount to be returned to the fund out of the judgment. Brown contended that, in as much as the compensation award included only \$1900 paid directly to him, the recovery due the state was two thirds of that sum, and tendered payment of \$1266.67. This was refused, and after hearing, the trial court ruled (1) that compensation was not limited to an award paid directly to the employee, but included all sums paid to him or on his behalf, which includes medical and hospital expenses, and (2) that \$13,759.16 was the figure from which reimbursement contribution by the state was to be computed. Both the trial judge and counsel for each side construed the current statute to mean that a flat one third be deducted from the amount paid to the employee as the state's share of recovery costs, with the remainder to be returned to the fund. Item one above was upheld in the supreme Court, but item two was overruled and held erroneous. In the Supreme Court's interpretation of the statute, it referred to the qualifying phrase "in the event that such employee recovers from such (third) person," and held that (1) the one-third referred

59. *Brown v. State*, 79 Wyo. 355, 334 P.2d 502 (1959).

to was a maximum figure, to be adjudged by the trial court on the merits of the case, and (2) that the one-third saved to the employee was to be one-third of the total judgment, and which was then to be deducted from the amounts paid to or on behalf of the employee by the Fund. The judgment of the lower court was reversed, with an order to amend the state's recovery to \$6259.16.

Reduced to comparative figures, the effect of this ruling becomes apparent:

Results Before Brown v. State

	Case No. 1	Case No. 2	Case No. 3
(1) Judgment	\$22,500.00	\$20,000.00	\$9,500.00
(2) Funds's Expense	13,759.16	17,365.89	1,614.49
(3) Less $\frac{1}{3}$	4,586.38	3,455.29	538.17
(4) Fund's Share	\$ 9,172.78	\$14,910.60	\$1,076.32

Results After Brown v. State

(1) Judgment	\$22,500.00	\$20,000.00	\$9,500.00
(2) Fund's Expense	13,759.16	17,365.89	1,614.49
(3) Less $\frac{1}{3}$ line (1)	7,500.00	6,666.67	3,166.67
(4) Fund's Share	\$ 6,259.16	\$10,699.22	0

Simply put, before the *Brown* decision, the amount set over to the injured employee from his judgment was $\frac{1}{3}$ of the payments from the fund, plus any surplus after the fund was made whole.⁶⁰ Following the *Brown* decision, the negligent party paid the total judgment, amounts for pain and suffering were set aside, one-third of the judgment allocated to recovery for personal expense was set over with the remainder going to make the fund (and employer) whole. *Brown v. State* was settled on Jan. 20, 1959, and immediately thereafter (March 1, 1959) the amendment to Wyo. Stat. § 27-54 (1959) was effected. The amended Act not only retains the provisions interpreted in the *Brown* decision, but provides that in no event shall the fund's reimbursement exceed $\frac{2}{3}$ of the remainder of the judgment after deducting the $\frac{1}{3}$ "set aside" for costs of recovery. The combined effects of the *Brown* decision and the 1959 amendment are seen in the following illustration:

	Case No. 1	Case No. 2	Case No. 3
(1) Judgment	\$22,500.00	\$20,000.00	\$9,500.00
(2) Less $\frac{1}{3}$	7,500.00	6,666.67	3,166.67
(3)	\$15,000.00	\$13,333.33	\$6,333.33
(4) Fund's expense	13,759.18	17,365.89	1,614.49
(5) Less line (2)	7,500.00	6,666.67	3,166.67
(6) Fund's share	6,259.18	10,699.22	0
(7) But not more than ($\frac{2}{3}$ line (3))	10,000.00	8,888.88	4,222.22
(8) Fund's share	6,259.18	8,888.88	0

60. It should be recognized that in many cases, an injustice was worked on the

In view of the legislative intent to (1) fully compensate industrial accidents, (2) save the employee's action at law against third persons, (3) participate in costs of recovery and (4) prevent double recovery, the financial result to successful litigants is somewhat startling.

CASUAL EMPLOYMENT

Casual employment is a term which has given the courts some difficulty. The problem does not lie within the facts of a given case, but rather in a general application of the term. In one sense the term relates to the element of time, and here the courts have found antonyms as "regular," "certain," "periodic," and "systematic." A thing is casual when it comes without regularity and is of comparatively minor importance. It usually is temporary and of short duration. At the same time, it is said that it is the employment, not the employment of the particular employee, that is determinative; the nature of the work that was done leads to the conclusion that the employment was casual.⁶¹ A statutory exclusion of a person whose employment is "purely casual" rather than simply "casual" was said to call for a strict construction as against the employer, and a liberal construction in favor of the employee.⁶²

The Supreme Court of Wyoming examined the claim of an itinerant painter against a hotel, for injuries incurred in a fall while doing miscellaneous painting at the instance of the hotel manager. In reversing the lower court and dismissing the claim, the court found that the hotel keepers were not within the schedule of extra-hazardous employment, and that the painting was done in the claimant's trade or business, and not in the hotel's. "Further, if the law applies to hotel keepers under the circumstances here disclosed, it would under the some or similar circumstances apply to storekeepers . . . and perhaps to all owners of a home."⁶³ In 1939, the court ruled on a somewhat similar case.⁶⁴ Claimant was injured while building a scaffolding used in the construction of partitions in remodeling defendant's store. Defendant denied liability, under the "casual employment" section of the Act. The court, however, found the defendant to be an insured employer under the Act, due to its employing butchers, and further found that it customarily re-decorated and furnished leased premises, using local tradesmen under the direction of a company foreman. While granting the employment was casual in that it was not under an employment contract, was temporary and of short duration, the court ruled the employment was of a nature regularly engaged in by the defendant, and the injury was sustained in defendant's regular trade or business.

While the cases may seem irreconcilable on the facts, it should be

employee, who was faced with attorney fees out of his judgment, which together with the amount recovered by the fund, may have exceeded the total judgment.

61. 107 A.L.R. 935, 936.

62. Gardner v. Main St. M. E. Church, 217 Iowa 1390, 250 N.W. 740 (1933).

63. Lamont v. Intermountain Realty Co., 48 Wyo 56, 41 P.2d 497 (1935).

64. Pope v. Safeway Stores, Inc., 54 Wyo. 266, 91 P.2d 58 (1939).

pointed out that the Safeway store was an insured employer at the time of the accident, and under the rule of *Christensen v. Sikera*,⁶⁵ the broad policy is to pass the burden of loss to the employer, *who is under the Act*. Even so, it is apparent that Wyoming is following the definition as applicable to the employment within the scope of the business, rather than a time test.

NON-TRAUMATIC ILLNESS: DISEASE OR INJURY?

Workman's compensation laws are generally divided into two groups; those which include occupational disease, and those which particularly exclude occupational disease. Among the latter, there is a further divergence whether the exclusive remedy of the Act bars a recovery at law by an employee whose illness is not compensated under the Act. In some jurisdictions where injuries such as lead poisoning, nervous exhaustion and lung injury from noxious fumes are uncompensated, cases hold the Act to be exclusive, and bar the employee from a remedy at law. On the other hand, some jurisdictions have found that an uncompensated injury or disease allows the employee to proceed at law against the negligent employer.⁶⁶

The difficulty of each position is readily seen. In the first instance, the employee is denied both the benefits of statutory compensation and his remedy at law for a hurt occasioned by industry. In the second situation, the employer is limited by statute as to the type of injury for which he is insured, and is subject to unlimited liability for types of injuries on which he may only speculate. In jurisdictions where the coverage is statutory and exclusive of private insurers, he is even denied the opportunity of insuring against such remote possibilities.⁶⁷

On the question of illness and occupational disease, the Wyoming Legislature has taken a position somewhat between the two extremes. "The words 'injury and personal injury' shall not include . . . a disease, except as it shall directly result from an injury incurred in the employment."⁶⁸

From this section one would conclude the legislative intent was to exclude disease excepting it result from an "injury." Injury is usually associated with some external force applied to the body, attributable to a definite point in time, and with a physical manifestation of the result. Disease is commonly alluded to as a deviation from the healthy or normal condition of any functions or tissues of the body. An occupational disease is a disease gradually contracted in the usual and ordinary course of the employment, because thereof, and incidental thereto.⁶⁹ The Wyoming Court, however, has faced the problem squarely in its constant search to compensate the employee for any hurt arising out of the employment.⁷⁰

65. *Supra* note 9.

66. Ann. 100 A.L.F. 519.

67. See Tables, App. "A".

68. Wyo. Stat. § 27-49 (III) (b) (1957).

69. Black's Law Dictionary, 4th ed.

70. *Supra* note 9.

Silicosis is a lung condition, caused by inhalation of foreign particles such as grain dust, rock dust or chemicals into the lungs. These particles become imbedded in the tissue, causing inflammation, hemorrhage, loss of strength, and if untreated, death. The process is usually gradual, and is cumulative over a long period of exposure. In effect, it is a classic case of occupational disease. In 1935, the Supreme Court dismissed the argument that as an occupational disease, it was not a compensable injury within the Act, but rather that it arose from a series of chance circumstances eventually causing an injury which was "not the customary and natural result of the work in which he (the employee) was engaged."⁷¹ The court further held that whether the condition in the claimant's lungs was an occupational disease or a mechanical hurt, it "directly resulted from an injury incurred in the employment, as contemplated by the statute."

Following the "direct result" rule, the court had occasion to affirm an award to an employee who became permanently blind from multiple hemorrhage of the eyes following the strain of lifting heavy grain sacks.⁷² The hemorrhages were attributed to a weakening of the eyes by an undetected childhood case of tuberculosis. The court ruled that an "accident" was an unlooked for mishap or untoward event, which is not expected or designed. Furthermore, the condition of an employee's health, while increasing the possibilities of injury, does not bar the event from being a compensable injury. "It is the hazard of the employment acting on the particular employee in his condition of health." In rapid order, the court affirmed an award for the death of an employee by coronary occlusion twenty two days after an injury sustained in the course of employment;⁷³ affirmed an award for appendicitis following an injury sustained by falling off a plow;⁷⁴ but also affirmed an order denying an award to an employee who died of a coronary occlusion six hours after a fall from a scaffolding.⁷⁵ In each of the three cases last mentioned, the court refused to upset the judgment on the facts, indicating that where there was a conflict of expert medical testimony, but sufficient evidence to warrant a finding that the external hurt could have been a predisposing cause of the injury on which the claim was made, the judgment of the lower court would not be reversed.

Finally, in 1952 the court again met the occupational disease problem squarely.⁷⁶ Here, claimant apparently had a high allergy to certain medicants used in the clinic at the training school and developed a critical case of contact dermatitis, requiring extensive treatment and causing loss of employment. In this case, the Wyoming position on non-traumatic injuries became fully developed. Borrowing from the preceding decisions, the court said (1) bodily injury accidentally sustained is an unusual or

71. *In re Pero*, 49 Wyo. 131, 52 P.2d 690 (1935).

72. *In re Scroggum*, 52 Wyo. 232, 73 P.2d 300 (1937).

73. *White v. Mavarick Prod. Co.*, 63 Wyo. 452, 182 P.2d 818 (1947).

74. *In re Grant*, 54 Wyo. 382, 82 P.2d 463 (1939).

75. *In re Corey*, 65 Wyo. 301, 200 P.2d 333 (1948).

76. *Wright v. Wyo. State Training School*, 71 Wyo. 173, 255 P.2d 211 (1953).

unexpected result attending the operation of a necessary act or event;
(2) it is the hazard of the employment acting on the particular employee;
(3) individual allergy or weakness is immaterial if the particular conditions of employment in fact cause the disability.

Whether traumatic or non-traumatic, occupational disease or remote consequence, it is apparent that Wyoming will not be faced with the problem of common law litigation between employee and employer for non-compensated injuries arising while in the course of employment. If the facts are sufficient to sustain a finding of a casual connection between the employment and the hurt, an award must be made from the Fund. If the facts do not sustain such a finding, collateral recovery is barred on the facts.

FRANK M. ANDREWS

APPENDIX A

State	Compensation is:		Common Law Rules	State Fund		Private Insurer
	Compulsory	Elective		Excl	Opt	
Alabama		(1) x	(1)			x
Alaska	x					x
Arizona	x				x	x
Arkansas	x					x
California	x (2)				x	x
Colorado	x				x	x
Connecticut	x (2)					x
Delaware	x					x
D. C.			(3)			x
Florida		x				x
Georgia		x				x
Hawaii	x					x
Idaho	x				x	x
Illinois	x					
Indiana		x				
Iowa		x				
Kansas		x				
Kentucky		x				
Louisiana		x				
Maine		x				
Maryland	x (4)				x	x
Massachusetts	x					x
Michigan	x				x	x
Minnesota	x					x
Mississippi	x					x
Missouri		x				x
Montana		x			x	x
Nebraska		x				x
Nevada	x				x	
N. Hampshire	x					x
New Jersey		x				x
New Mexico		x				x
New York	x				x	x
No. Carolina		x				x
North Dakota	x				x	
Ohio	x				x	
Oklahoma	x (4)				x	x
Oregon		x			x	
Pennsylvania		x			x	
Puerto Rico	x				x	
Rhode Island	x					x
South Carolina		x				x
South Dakota		x				x
Tennessee		x				x
Texas		x				x
Utah	x					x
Vermont		x			x	x
Virginia	x					x
Washington	x (4)				x	
West Virginia		x			x	
Wisconsin	x					x
Wyoming	x (4)				x	

(1) Employer's election to common law waives defenses of contributory negligence, assumption of risk and fellow servant rule.

(2) Failure to insure waives defenses as in (1).

(3) Subject to stated exceptions, all employee injuries are subject to the provisions of the Longshoreman's and Harbor Workers Compensation Act, U.S.C. tit. 33, ch. 18

(4) Compulsory as to hazardous employment only.