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Arthur C. Snyder

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## ADMINISTRATIVE LAW PROCEDURES IN THE HANDLING OF CONTEST- ED UNEMPLOYMENT COMPEN- SATION CLAIMS UNDER THE WISCONSIN ACT

ARTHUR C. SNYDER\*

THE Wisconsin Unemployment Compensation Act,<sup>1</sup> enacted in 1931, was the first law in the United States providing for payment of benefits to unemployed workers. Under the provisions of this Act employers contribute to a fund and out of this fund the employee of any employer, who is subject to the Act and whose reserve account is liable for benefit payments, may receive unemployment compensation benefits depending upon his eligible status under the provisions of the Act. The Wisconsin Act is to be distinguished from unemployment compensation laws now in effect in other states (except in Nebraska) because of the fact that in Wisconsin employer contributions are kept

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\*This paper hardly would have been possible except for assistance afforded the writer by members of the Claims Division of the Unemployment Compensation Department, State of Wisconsin. The writer feels particularly indebted to Stanley Rector, Michael Torphy, Arthur Barber, Willard Putnam, and Newell Lamb.

While an appreciation and understanding of the mechanics and procedure of the contested claims sections derives from close collaboration with the above individuals, the conclusions and opinions expressed herein are in no manner to be construed as reflecting departmental viewpoints or as expressions of those who have assisted me.

<sup>1</sup> WIS. STAT. (1937) c. 108.

in separate reserve accounts, and each employer's account is chargeable only by reason of unemployment occasioned by that particular employer.

The Wisconsin Act provides that the Industrial Commission shall administer the Act and that the commission shall have power to promulgate rules and regulations governing the administration of the Act.<sup>2</sup> Pursuant to the power thus vested in it, the commission has adopted the necessary administrative regulations.<sup>3</sup> This article is concerned primarily with the administration of the Act insofar as it pertains to the procedure and machinery for the formulation and disposition of issues pertaining to contested total unemployment benefit claims. (For simplicity the administrative procedures as they specifically relate to partial unemployment benefits are disregarded. Those procedures differ from those relating to total unemployment benefit claims by reason of the so-called "automatic" feature of a partial claim. The employee does not claim partial benefits but the employer reports at the time an employee has compensable partial earning weeks and he may then deny or suspend partial benefits. Once the issue is joined, by suspension or denial, the procedure is the same for total as well as partial benefits.)

The asserted public policy of the state of Wisconsin ("Unemployment in Wisconsin has become an urgent public problem, gravely affecting the health, morals, and welfare of the people of this state"<sup>4</sup>) is to provide an adequate system of free public employment offices, to place workers more efficiently and to shorten the periods between jobs. Work and wages are considerably more desirable than unemployment and unemployment benefits. Consequently, to preserve funds in employers' reserve accounts and to help employees regain their earning capacity, the Wisconsin State Employment Service and the Unemployment Compensation Department coordinate some of their activities.<sup>5</sup> These two government agencies use the same district offices throughout the state. The Employment Service records of job referrals, of job refusals, and of placement of men who have applied for unemployment compensation are made available to the representatives of the Unemployment Compensation Department in the district offices.<sup>6</sup> Those records aid the Unemployment Compensation department in its recommendations of the disposal of the claims.

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<sup>2</sup>WIS. STAT. (1937) § 108.14 (1) (2).

<sup>3</sup>Rules of the Industrial Commission Relating to the Unemployment Reserves and Compensation Act. (April, 1937). This publication, hereafter, will be referred to as COMMISSION RULES.

<sup>4</sup>WIS. STAT. (1937) § 108.01.

<sup>5</sup>WIS. STAT. (1937) § 108.14 (4); COMMISSION RULES, No. 260.

<sup>6</sup>WIS. STAT. (1937) § 108.08 (1).

In each of twenty-six employment service districts there is stationed a district examiner, except in two or three instances (depending upon the load of the district) where one examiner has jurisdiction over two or more employment service districts. These district examiners conduct investigations, make fact analyses, apprise employers and employees of their rights, and make reports to the central office.

The adjustment and appellate sections are headed by examiners. Those examiners working in the adjustment section and having their headquarters in the central office, draw up the initial determinations;<sup>7</sup> other examiners in the appellate section conduct hearings in the districts when a case is appealed from the initial determination and write decisions covering the cases. One examiner in the contributions division carries on the enforcement of payment of contributions and of inflicting penalties. The Chief of the Claims Division supervises the work of the adjustment and appellate sections (besides being responsible for the administration of sections handling uncontested claims) and he in turn is responsible to the Director of Unemployment Compensation.

All the examiners are attorneys. The district examiners are not required to have had practical legal experience; however, the appellate division examiners and the examiner who is the head of the adjustment division were required to have had three years experience in the active practice of law or have had equivalent experience of a qualifying character.

#### UNCONTESTED CLAIMS

An applicant for total unemployment benefits is required to report at the public employment office most convenient to him,<sup>8</sup> to make formal application for compensation<sup>9</sup> and to register for work.<sup>10</sup> In order to check the eligibility of employees during the course of the waiting period and of payments of benefits, some system of "follow-up" must be provided. The applicant registers weekly for work, and this registration makes for a prima facie case that the employee is available for work. The employee likewise in each week gives notice as to the extent of his unemployment for the preceding week and thereby completes his benefit eligibility requirement with respect to that week.<sup>11</sup> These reports are made out by an interviewer, are subscribed to by the employee, and copies sent to the employer, as well as to the central

<sup>7</sup> "Initial determinations," as used in this article, does not pertain to the initial determinations made by employers for benefit rates of their employees, but they are the first decisions of the central office either allowing or disallowing benefits based upon the findings and recommendations of the district examiners and the reports of the parties. See page 169, *infra, et seq.*

<sup>8</sup> WIS. STAT. (1937) § 108.08 (1); COMMISSION RULES, No. 260 (1) (a); Wisconsin Industrial Commission, Form UC-260.

<sup>9</sup> WIS. STAT. (1937) § 108.08 (1).

<sup>10</sup> WIS. STAT. (1937) § 108.04 (2).

<sup>11</sup> Wisconsin Industrial Commission, Form UC-261.

office in Madison. After the termination of the employer-employee relationship a benefit liability report<sup>12</sup> is prepared by the employer in accordance with commission instructions.<sup>13</sup> In his separation report the employer sets out the weeks worked by the employee in the last fifty-two, the benefit rate he has calculated for the employee, and in case of contested claims, further information which will be discussed later. This form submitted by the employer is the basis for the determination and payment of all benefits, total and partial. Copies of this report go to central and district offices and to the employee. After the requirements of the statute as to the waiting period have been fulfilled<sup>14</sup> and the employee remains eligible in subsequent weeks, compensation is paid him in the form of checks mailed from the central office directly to his last known address.<sup>15</sup> Thus, as to uncontested claims there is a minimum of procedural difficulty in the securing and processing of employers' reports. The same reports as described above are required when the claim is contested, and the function and importance of those reports as pertaining to the procedure for treatment of contested claims will be discussed subsequently.

#### CONTESTED CLAIMS

The statutes list the grounds for the non-payment of compensation under the terms of "barring," "suspending," or "terminating" benefits and describe in what situations those sections may be invoked.<sup>16</sup> The meaning of the terms used in the statute are explained in the footnotes.<sup>17</sup>

<sup>12</sup> Wisconsin Industrial Commission, Form UC-203; this is also called "separation report."

<sup>13</sup> Instructions on Unemployment Reports (1938), Wisconsin Industrial Commission, Form UC-201.

<sup>14</sup> WIS. STAT. (1937) § 108.04 (3).

<sup>15</sup> COMMISSION RULES, No. 350.

<sup>16</sup> WIS. STAT. (1937) § 108.04 (1) (2) (4) (5) (6).

<sup>17</sup> "Barring" benefits means that because an employee was discharged for misconduct connected with his employment or because he quit without good cause attributable to the employer he cannot be considered eligible at all for total unemployment benefits from the particular employer in question. There is an absolute cutting-off of any rights to total unemployment benefits he may have had by virtue of prior credit weeks accrued to his favor with that employer, and his rights against preceding employers are suspended for the next three weeks of unemployment if he was discharged for misconduct, or four such weeks if he quit.

"Suspension" of benefits means that for some reason, specified by the statute, the employee is currently ineligible for compensation for his unemployment. This suspension operates only temporarily and only so long as the cause exists. It is a week to week proposition. For example, if men are out of work in a plant where there is a labor dispute and it is settled, those employees remaining unemployed can then and not until then become eligible for benefits (no other factors intervening), whereas during the labor dispute their eligibility for benefits was suspended. Suspension is a temporary denial, and it does not operate to take away any prior vested rights of the employee

The work of the district examiners is particularly important in building the foundations for the successful treatment and decisions in disputed claims. A great deal of their work is investigational. In cases where the employer denies benefits, the separation contains besides the work history of the employee, his wages and weeks of work—a statement by the employer that he is denying or suspending benefits. The denials or suspensions are couched in terms which are known as “standard eligibility phrases.” It has been found by experience that the use of such phrases clarifies the issues and covers in a uniform manner situations barring or suspending benefit eligibility provided for in the law. Where the phrases relate to facts of an ultimate rather than an evidentiary nature, or where they are not self-explanatory to the employee, a “supporting letter” which sets out evidentiary or descriptive material is called for on the departmental copies of the report sent to the particular field office and the administrative office at Madison if the employer’s contention is to be given any consideration. Following a thorough investigation the field examiner draws up a factual report. It is here that he performs a primary function and it is the making of an analysis of the fact situation. Another such primary function is the making of recommendations on the credibility of the parties. In the report the examiner gives first the employer’s story, then the employee’s, then his own findings of fact, and closes it with a paragraph of remarks on credibility of the witnesses and evidence, together with his recommendation for the disposition of the claim. Thus, by their investigations the examiners help to formulate the issues and by their fact analyses and recommendations they aid the ultimate disposition of disputes. So far as material gathering and report making is concerned, the case is now ready for the initial determination.

The first decision on the claimant’s disputed right to benefits is made by the adjustment section in the central office. That decision is called the initial determination.<sup>18</sup> If controversies arise on any appreciable scale, administrative convenience and expedition disallows extensive hearing in the first phase of the dispute. Cost alone would make such a procedure prohibitive. The method to take the place of hearings in the districts in the first phase of the dispute is the investigational and recommendation functions of the district examiners and a decision

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for benefits in the future based on credit weeks of employment accrued in the past against any of his former employers.

“Termination” of benefits is brought about by the employee who although eligible at the time his unemployment commenced has subsequently committed an act which then makes him ineligible as to all past employers. That is, after he had received compensation payments or during the waiting period before any payments, he has, without good cause, refused suitable employment or refused to apply for suitable employment when referred to it by the Wisconsin State Employment Service and thus disqualified himself.

<sup>18</sup> WIS. STAT. (1937) § 108.09 (2).

on the employee's eligibility for unemployment compensation benefits in a first or initial determination by the central administrative office.

The administration of the Act is based on the belief that the initial determinations must be premised upon a well thought out, uniform interpretation of the law. Uniform treatment of claims can only result from the handling of the initial decisions by a central group. The Wisconsin administrators did not perceive, at least in the early stages of the administration of the Unemployment Compensation Act, how isolated individuals such as district examiners stationed throughout the state could develop a consistent, uniform set of principles relating to the several eligibility provisions of the law. The only alternative was for a central administrative group to perform the function of making the initial determination. The Wisconsin set-up develops benefit principles by the common law methods, that is, through adjudicated cases with some person or small compact group of persons continuously steering the course of development.

Whether or not a claim is contested a standard form is used in reporting the initial determination, but if the claim is contested the initial determination report sometimes has the reason set out in a brief statement.<sup>19</sup> The determinations are mailed promptly to the parties in interest.

The right to appeal from these determinations is absolute.<sup>20</sup> Rule 400 of the *Commission Rules* declares that, "Either party may request a hearing, pursuant to section 108.09(2) of the statutes, as to any matter contained in the deputy's initial determination or decision, except the employer may not request a hearing with respect to benefits already paid in accordance with his concession of liability. Such request for hearing before an appeal tribunal shall be filed only with the representative of a district public employment office in person or by letter and shall specify separately the grounds on which the party considers the initial determination or decision to be in error \* \* \*".<sup>21</sup> The request for hearing must be made within seven days after the mailing of the initial determination.<sup>22</sup> If the party wishing to appeal from an initial determination comes to the employment office and asks for a hearing, an application form is made out and signed by that party.<sup>22</sup> Otherwise requests can be made by letter to the examiner in the district employment office.<sup>23</sup>

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<sup>19</sup> Where the claim is uncontested, Wisconsin Industrial Commission, Form UC-270A; where the claim is contested but where the claim is granted, Wisconsin Industrial Commission, Form UC-270B; where the claim is contested and where it is not granted, Wisconsin Industrial Commission, Form UC-270C.

<sup>20</sup> WIS. STAT. (1937) § 108.09 (3).

<sup>21</sup> WIS. STAT. (1937) § 108.09 (2).

<sup>22</sup> Wisconsin Industrial Commission, Form UC-400.

<sup>23</sup> COMMISSION RULES, No. 400.

The examiner who directs the work of the appellate section has as his first concern upon receiving a request for a hearing the determination as to whether or not the request is timely, that is, made within the time allowed by statute, namely seven days from the time the initial determination was mailed to the last known address of the party requesting the hearing.<sup>24</sup> If so, the next consideration is whether or not the employee has a compensable week of benefits accrued in his favor. Before there can be a compensable week, the employee must have served out his waiting period and one week beyond. If there is no compensable week, the parties are informed that an appeal hearing will not be scheduled until a compensable week has been established.<sup>25</sup> In the waiting period, before the employee would have benefits due him, assuming his claim would be allowed, he might be re-employed and thus have no right to benefits. That would preclude the necessity for an appeal hearing in regard to a claim against his former employer. After there has been a compensable week, a hearing before an unemployment compensation tribunal is arranged.

To hear and decide disputed claims the commission has established appeal tribunals. An appeal tribunal may consist of a full-time salaried examiner or commissioner; or it may consist of an appeal board composed of one full-time salaried examiner or commissioner, who shall serve as chairman, and of two other members appointed by the commission, namely, an employer or representative of employers and an employee or representative of employees. The chairman of an appeal board may act for it in the absence of one or both other members provided they have had due notice of the hearing.<sup>26</sup> The statute before amended in July, 1937, provided for an appeal tribunal of three members, and the chairman could act alone only if one or both other members were absent, provided they had due notice of such session.<sup>27</sup>

The three man tribunal with its employer and employee representatives performs a very necessary function in the developmental stages of this new quasi-judicial function of the commission. The policy concepts to be applied to contested claims are in the process of formulation. The fact that employer and employee representatives serve on the tribunals aids in developing good feeling towards the administration of the Act among the respective groups concerned. The parties affected by the Act appreciated the fairness of the disposition of claims by these tribunals when they discovered

<sup>24</sup> WIS. STAT. (1937) § 108.09 (2).

<sup>25</sup> Wisconsin Industrial Commission, Form UC-1006.

<sup>26</sup> WIS. STAT. (1937) § 108.09 (4).

<sup>27</sup> WIS. STAT. (1937) § 108.09 (4).

that of the one hundred some decisions by appeal tribunals in the first year of benefit payments, only eleven were not unanimous.

One of the reasons for the change by the 1937 amendments to the Act providing for a one man tribunal was the necessity for expediting hearings where it was previously found difficult to get representatives of employers or employees to sit, and where it would be costly for the commission to have the other members come from far distances. The use of the one man tribunal is optional with the Chief of Claims and the Director of Unemployment Compensation Department. Under the present practice the use of the one man tribunal is infrequent, being limited to situations where under the facts reported by the field examiner there is Wisconsin precedent controlling the case and where it appears that one party cannot disprove the case of the other by credible evidence. Where the questions are purely of law, the expense of a full tribunal may be out of proportion to the amount involved and therefore not justified. Employer and employee representatives for service with the Wisconsin appeal tribunal were selected as follows: The commission requested the Wisconsin Manufacturers' Association to submit a list of men recommended to serve on appeal tribunals. Such a list was submitted and from it the commission made up panels for the different districts throughout the state. Additions to the original list of employer representatives were made in the summer of 1937. The State Federation of Labor likewise was requested to submit a list of eligible labor representatives. From that list the commission chose panels as it did for the employer representatives. The Railroad Brotherhoods requested the commission to give them representation on the employees' panels and the commission complied.

Section 108.09(4) declares that, "No person shall hear any case in which he is a directly interested party." The category of "directly interested" parties seemingly includes those working in the same factory or place of business, probably those in the same craft on the same job, or those workers whose own right, because of similar circumstances affecting them, would be determined by the decision of the case up for consideration. Neither the employer of a former employee claiming benefits or any of his agents could be a member of the appeal tribunal hearing a case. If the decision of a contested claim would affect a large group of employers having similar businesses and a similar interest in the outcome, none of them presumably would be eligible to hear the case, as their interests would be directly affected. The officials have encountered no difficulty in getting men to hear cases who have no direct interest in them.

A separate file is kept for every man who has served upon an appeal board. The supervisor of the Appellate Division has an informal method of rotation in picking the men. The compensation granted these men is ten dollars per day, and any "necessary expenses" they incur are assumed by the commission.<sup>28</sup> The men chosen are notified by a form letter<sup>29</sup> and they are requested to return to the department an enclosed postcard indicating their acceptance.

Prior to the regular notice of hearing the parties are informed by means of especially designed form letters of certain substantive and legal rights in connection with the hearing.<sup>30</sup> They are informed that they may be represented by an attorney, that there are certain limits on the amount of the fee that can be allowed an employee's attorney, that if necessary the department will attempt to present the case for them. The letter also tells them of their responsibility to see that necessary witnesses are present, to make relatively certain by conferences with the district examiner that they understand the law in relation to the claim, and that the appellant may withdraw his request for a hearing before the actual time of the hearing.

If the respondent does not appear at a hearing, it is conducted with the appellant testifying, and upon the basis of the existing record plus the appellant's testimony, the case is decided, unless within ten days the respondent makes satisfactory explanation for his failure to appear.<sup>31</sup> If the appellant fails to appear without notification, he is given ten days to show good cause why he was not present, and if he does not do that, the examiner may dismiss the appeal.<sup>32</sup>

The fee allowed an agent or attorney appearing for an employee is generally limited to ten per cent of the maximum amount of benefits involved; nevertheless, the commission may, in unusual and isolated cases meriting special consideration, allow a slightly larger fee.<sup>33</sup> There is no limit upon the amount an employer can pay an agent or attorney. Consequently the parties appear with counsel in only about twenty per cent of the cases appealed, and employers are more frequently represented by counsel than employees. The chairman of the tribunal is charged with the responsi-

<sup>28</sup> WIS. STAT. (1937) § 108.09 (4).

<sup>29</sup> Wisconsin Industrial Commission, Form Letter, No. 283.

<sup>30</sup> Wisconsin Industrial Commission, Form UC-1001C for respondent, and Form UC-1001B for appellant.

<sup>31</sup> Wisconsin Industrial Commission, Form UC-410.

<sup>32</sup> WIS. STAT. (1937) § 108.09 (3); Wisconsin Industrial Commission, Form UC-409.

<sup>33</sup> WIS. STAT. (1937) § 108.10.

bility of conducting each hearing in such a manner that each party's case is adequately presented.

The chairman of the appeal tribunal opens each hearing by stating what he thinks is the issue involved and he asks each party whether or not he concurs. He swears the employer or the employer's witnesses, and the testimony and evidence for the employer is presented. The employee claimant is given an opportunity to question the employer and his witnesses after the appeal tribunal has asked its questions. Then the employee and his witnesses are sworn and they testify. The employer is given an opportunity to question the employee and his witnesses. By subpoenas the commission can compel the attendance of witnesses and production of any necessary and convenient documentary evidence. The expenses of witnesses may be allowed out of the administrative fund.<sup>34</sup>

In general, the chairman, who is conversant with legal methods conducts the hearing and is primarily responsible for adducing the necessary testimony. The points brought out in the field examiner's investigation may well and generally do form the bases for the majority of the questions put by the chairman. By covering the points the employer has brought up in his letter submitted in support of his denial of benefits,<sup>35</sup> the points the district examiner has raised in his report, the appeal tribunal elicits testimony from the parties which logically and completely covers the case. That testimony is made a part of the record.

Section 108.09(5) declares that "\* \* \* the conduct of hearings and appeals shall be governed by general commission rules (whether or not they conform to common law or statutory rules of evidence and other technical rules of procedure) for determining the rights of the parties. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing shall be taken down by a stenographer, but need not be transcribed unless either of the parties requests a transcript \* \* \*" The general commission rules pertaining to appeals are two, one having to do with the request for hearing, and the other having to do with the petition for commission review.<sup>36</sup> Other than that there is no written codification of rules. The senior examiners and the chief of claims, however, do have a common understanding as to how hearings are to be conducted.

Since the Supreme Court of Wisconsin has not ruled on what evidence is required to sustain a decision in an unemployment compensation case, the commission from the beginning has treated

<sup>34</sup> WIS. STAT. (1937) § 108.09 (8).

<sup>35</sup> Wisconsin Industrial Commission, Form UC-203.

<sup>36</sup> COMMISSION RULES, No. 400, 420.

such cases in a manner similar to what the court has required in workmen's compensation cases. The decisions of the commission, the appeal boards or its deputies must be based on credible evidence, and if they are, they must be upheld (no other factors intervening).<sup>37</sup> They need not follow strict technical common law rules of pleading and evidence. Objections of irrelevancy, incompetency, and immateriality of the evidence are seldom made. Unless the examiner feels that such evidence will prejudice the case for either party, he is not likely to order the witness to stop giving his testimony; he may, however, put the witness back on the proper issue. The best evidence rule is relied upon. There is comparatively little documentary evidence offered at these hearings. Infrequently such exhibits as a union agreement, a time card, and examples of the employee's workmanship including pieces of machinery or material, are presented as evidence. The records which are compiled from the reports sent to the Unemployment Compensation Department before the hearing are used by the examiner in charge primarily for the purpose of guiding the hearing. That record is not sent to the parties in interest before the hearing, but it can be examined in the central office pursuant to the department's consent.<sup>38</sup> Benefit liability reports<sup>39</sup> and the record of the employee's registration and claim<sup>40</sup> are considered a part of the evidence in the case.

At the close of the hearing the appeal board considers the disputed claim. The notes of the tribunal jotted down during the hearing, the record as brought to the hearing, any exhibits, and the stenographer's notes of the testimony are referred to. The employee and employer representatives give their respective attitudes and views. Sometimes they may be able to decide a question of misconduct by relying upon their own expert knowledge which was gained by their having worked in the same line of employment. The issues are analyzed. The applicable sections of the Unemployment Compensation Act are discussed in relation to the issues, and the credibility of the witnesses is evaluated. Each member of the appeal board renders his opinion as to the employee's eligibility. This opinion is generally in the form of a sentence to the effect that the employee did or did not quit, or some similar finding. The opinions of these men are made part of the record. It has been the practice of the appellate examiners to talk over the appealed cases with other office examiners and the chief of the claims division, before

<sup>37</sup> *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N.W. 209 (1911); *Milwaukee Western Fuel Co. v. Industrial Commission*, 159 Wis. 635, 150 N.W. 998 (1915).

<sup>38</sup> WIS. STAT. (1937) § 108.14 (7).

<sup>39</sup> Wisconsin Industrial Commission, Form UC-203.

<sup>40</sup> Wisconsin Industrial Commission, Form UC-260, 261.

the formal decision is written up. The pressure of being under the surveillance of unemployment compensation administrators in other states has made them particularly careful in the writing of such decisions. More important, there is the necessity for writing decisions which will serve as useful precedents.

The form of the decision is usually in three sections. The first section is a short history leading up to the appeal. This section states the employee's reason the employer denied benefits and his reasons for denying benefits and the disposition of the claim as made by the initial determination. The second section contains the findings of fact of the appeal tribunal. The third section is the decision awarding or denying benefits.

Copies of the decision are sent to the parties to the case and to appeal tribunal members. The members of the appeal tribunal are given the opportunity to file concurring or dissenting opinions.<sup>41</sup> Specially prepared copies of the decision with the names of the parties and appeal tribunal members deleted are mimeographed for general circulation. It may be said that hearings before the appeal tribunals are conducted in an efficient and orderly manner.

#### COMMISSION REVIEW

Section 108.09(6) (a) of the Act declares that "At any time before a deputy's determination or an appeal tribunal's decision on a claim is mailed to the parties, the commission may transfer the proceedings on the claim from such deputy or appeal tribunal to itself." Pursuant to the above section the commission may transfer proceedings from the appeal tribunal before the tribunal has handed down a decision, or the commission may transfer the case to itself even before there has been a hearing before an appeal tribunal. The supervisor of the appellate section takes the initiative in calling to the attention of the commissioners cases which involve novel or far-reaching questions. The appellate examiners may recommend that the commission take original jurisdiction over the latter type of case when administrative feasibility or the public interests would be better served by a prompt commission ruling. If such jurisdiction is taken, and no prior hearing has been held, one of the industrial commissioners conducts a hearing and a commission decision is rendered.

Where a case has been removed to the commission on its own motion (with or without recommendation of removal by an appellate examiner) after a hearing has been held but before a decision has been rendered, the commission discusses the case with the

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<sup>41</sup> Wisconsin Industrial Commission, Form UC-408.

supervisor of the appellate section, the examiner who conducted the hearing, and frequently with the chief of claims. The transcript from the appeal tribunal hearing and the record which was available to the appeal tribunal are before the commission. The commission has authority either to review the case on the evidence as presented or to direct the taking of additional testimony before rendering its decision.<sup>42</sup>

Section 108.09(6) (b) declares that, "Either party may petition the commission for review of an appeal tribunal decision, pursuant to general commission rules, within ten days after it was mailed to his last know address. Within ten days after the filing of such a petition, the commission may affirm, reverse, change, or set aside such decision, on the basis of the evidence previously submitted in such case, or direct the taking of additional testimony." This section provides for commission review where one of the parties appeals. The procedure in handling such reviews is the same as for a review where the case is brought before the commission upon its own motion after a tribunal hearing but before a tribunal decision. The record is scrutinized, inadequacies in evidence are noted, errors in procedure are observed (although it has not been necessary to send back any cases because of wrong procedure). Upon the basis of the record, with or without the taking of additional testimony, the commission makes its decision. In cases where the appeal tribunal is reversed, the commission may make a new finding of fact. In cases where the appeal tribunal is affirmed no new finding of fact is necessary.

Sometimes the parties will waive a hearing before an appeal tribunal or stipulate to facts. In one case<sup>43</sup> where the question was, "should the employee be denied benefits because he was working on a fixed monthly salary basis"<sup>44</sup> the commission based its decision (having removed the case for its consideration by motion after hearing by an appeal tribunal was waived) on the employer's benefit liability report and supporting letter. In another case the employer waived formal hearing before an appeal tribunal and stipulated to certain facts.<sup>45</sup> The question presented was whether an employee was entitled to partial unemployment benefits by virtue of having received earnings from a self-employment.<sup>46</sup> It was for the commission to decide whether an employee's earnings from self-employment were included in the term "wages" as used in

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<sup>42</sup> WIS. STAT. (1937) § 108.09 (6) (b).

<sup>43</sup> Wisconsin Industrial Commission Decisions, No. 37, C-19.

<sup>44</sup> WIS. STAT. (1937) § 108.04 (5) (d).

<sup>45</sup> Wisconsin Industrial Commission Decisions, No. 37, C-25.

<sup>46</sup> WIS. STAT. (1937) § 108.04 (5) (g).

the Act, clearly a question of law arising from an agreed set of facts.<sup>47</sup>

In another case,<sup>48</sup> where a party appealed from a tribunal decision claiming he had been prejudiced before the tribunal because of the lack of witnesses and counsel, the commission declared that, "The commission further finds that the decision of the appeal tribunal was based on written exhibits introduced by both parties and conceded by the employee to be correct and therefore that the employee was not prejudiced by the absence of witnesses or counsel at the appeal tribunal hearing." This language seems to indicate that it is not necessary to have a hearing where the facts have been agreed upon and stipulated, nor is it necessary to have witnesses where other factors adequately supply the evidence.

Upon a request for review there can be an automatic statutory affirmance of the appeal tribunal decision by virtue of the failure of the commission to act on petition to review.<sup>49</sup> This, however, has not yet occurred.

Section 108.09(6) (c) declares that, "Within ten days after expiration of the right of the parties to request a hearing by an appeal tribunal or to petition for review by the commission or within ten days after a decision of the commission was mailed to the parties, the commission may on its own motion reverse, change, or set aside the determination or decision, on the basis of evidence previously submitted in such case, or direct the taking of additional testimony." This provision in the statutes serves at least a two-fold purpose. One has to do with the mechanics of administration. Suppose, for example, the commission members were out in the state holding hearings, generally engaged in the multifarious duties of their offices and were unable to return to Madison so that they could on their own motion take over a case before the ordinary time limit for appeals and motions had expired.<sup>50</sup> In such event, by virtue of the authority of this section, the commission could act on the case at a later time, within the authority of the statutes.

Suppose also, there was another factor in issue not considered in making the decision in the first instance because it was not clearly recognized as an issue. When brought to its attention the commission pursuant to Section 108.09(6) (c) may reconsider the

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<sup>47</sup> It was held that the term "wages" under Section 108.02 (6) requires an employer-employee relationship.

<sup>48</sup> Wisconsin Industrial Commission Decisions, No. 37, C-5.

<sup>49</sup> WIS. STAT. (1937) § 108.09 (6) (b).

<sup>50</sup> The functions of the Industrial Commission are listed by it as follows: Safety and Sanitation, Workmen's Compensation, Woman and Child Labor, Apprenticeship, Painters' Licenses, Wage Collection, Statistics, Employment Service, and Unemployment Compensation.

entire case, and thus make an equitable disposition of the claim. To date the commission has found no occasion to act under this section of the statutes.

Section 108.09(7) provides that, "Either party may commence judicial action for the review of a decision of the commission hereunder provided said party has commenced such judicial action within ten days after a decision of the commission was mailed to his last known address \* \* \* Any judicial review hereunder shall be confined to questions of law, and the other provisions of Chapter 102 with respect to judicial review of orders and awards shall likewise apply to any decision of the commission reviewed under this section \* \* \*" There has been no decision by a court going to the merits of a contested benefits case. Since benefits became payable in 1936 there have been but five appeals to the courts, two of which have been dismissed and three of which are now pending. It is apparent that there will be very little resort to judicial review as provided for in the statute.

A probable deterrent in the matter of petitioning for judicial review is the cost of suit in comparison with the amount of benefit involved. The maximum amount of benefits to which an employee may become eligible is only one hundred and ninety-five dollars.<sup>51</sup> Another probable reason for not seeking judicial review is the fact, which should be apparent to attorneys, that the commission's decisions are arrived at in a fair and judicious manner and would be difficult to reverse.

#### CONCLUSION

There can be little doubt but that the administrative law procedures in the unemployment compensation department are as judicious as is necessary for the equitable determination of any case and as simple and informal as is necessary for practical purposes of expeditiously handling appeals. The close contact maintained between the central office and the field representatives, the cooperation between the examiners and the chief of claims in deciding their problems, the zeal for thoroughness in respect to problems in each case, the feeling of serious objectives in treating both employer and employee according to their just desserts—all help to make for an efficient and fair-minded administration.

<sup>51</sup> WIS. STAT. (1937) § 108.06.