Judicial Construction of Certain Provisions of the Workmen's Compensation Act

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FOR many years prior to 1911 the Wisconsin Supreme Court urged the state legislature to pass a Workmen's Compensation Act. The development of the use of high powered, high speed machinery of all types had seriously increased the dangers of employment. When one of these machines broke down and refused to function, no expense was spared to replace it or repair it. But when the health of a workman broke down under the strain and stress of labor at high speed, or when through inadvertence he became injured, all of the loss through his enforced unemployment fell on his shoulders. The industry paid nothing except in cases when the workman was able to establish in the courts that his loss of health or injury was solely caused by the negligence of the employer. With the defenses of contributory negligence, assumption of risk and the fellow-servant rule, it was not an easy matter for the workman to collect damages in those days; and when recovery was had it entailed considerable expense, both for the workman and the employer.

To relieve this situation the legislature in 1911 passed the Workmen's Compensation Act. If one is not informed as to the merits of that legislation, let him read the opinion of Justice Marshall in the case of Milwaukee v. Miller. The learned jurist there justified the Act in these words:

“No considerate person will indulge the thought of even a partial backward step toward the old system, characterized by incalculable waste to the detriment of every consumer of the products of human energy; by distressing unequal distribution of misfortunes incident to necessary industrial pursuits, particularly misfortunes to employees by personal injury losses; by a lowering tendency of moral standards in the making and enforcing claims for such losses, and by perversion of human perceptions of individual responsibility in such cases. The law is a long step towards an ideal system requiring every consumer of any product of human industry, as directly as practicable, to pay his ratable proportion of the fair money cost of those things which he necessarily or reasonably destroys in conserving his life and welfare,—personal injury losses, not intentionally incurred,—losses whether through the fault of the employer or employee, or without fault of either, being considered as legitimately an element of such fair money cost as expenditures for raw material, for machinery or wages.”

1a 154 Wis. 652, 144 N.W. 188 (1913).

* Member of the Milwaukee Bar.

1a 154 Wis. 652, 144 N.W. 188 (1913).
With that clear declaration of its understanding of the sympathetic human element involved, our courts have proceeded to construe the Act, in all of its provisions, with great liberality—keeping uppermost at all times as the dominant rule of construction that labor should be reasonably compensated for all losses incident to industry.

It is not the purpose of this article to give much consideration to the administrative feature of the Act. The statutes are clear and explicit, and we give a brief outline of some of the outstanding features. The Industrial Commission is charged with the duty of administering the law. That body has broad powers, fixes rules and regulations for safeguarding industrial workers in their places of employment, investigates manufacturing plants and places of employment, receives reports of all industrial accidents and hears and determines all unadjusted claims for compensation under the Act.\(^1\) The state and municipalities and their various subdivisions and departments, and all private employers, excepting farmers, employing three or more employees and others who may voluntarily elect to accept the provisions of the Act, are required to pay compensation to employees suffering disabling injury while employed.\(^2\)

Employers under the Act are required either to carry insurance against liability under the Act or to satisfy the commission of financial ability to meet such liability.\(^3\)

Persons employing contractors who are not subject to the Act or who have failed to insure against liability are liable for compensation to the employees of such contractor.\(^4\)

Compensation is based upon the average earnings or earning capacity of injured employees.\(^5\) No allowance is made for pain and suffering.

The employer is required to meet all necessary expense for medical, surgical and hospital care and treatment. Employers are required to keep a list of physicians from which the employee may select his attending physician. Provision is made for employees who prefer Christian Science or Chiropractic treatments, but the employer is given the right to elect not to be subject to such provision.\(^6\)

The amounts to be paid for compensation are fixed by statute to which reference should be had in every instance. Space does not permit setting forth the schedules here.\(^7\)

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\(^1\) Chapter 101, Wis. Stats.
\(^2\) Sec. 102.04, Wis. Stats.
\(^3\) Sec. 102.28, Wis. Stats.
\(^4\) Sec. 102.06, Wis. Stats.
\(^5\) Sec. 102.11, Wis. Stats.
\(^6\) Sec. 102.42, Wis. Stats.
\(^7\) Sec. 102.43 to Sec. 102.62 inclusive, Wis. Stats.
In most instances the compensation to injured employees is taken care of by the employer or his insurance carrier without the aid of the Industrial Commission. Whenever a controversy arises between the employee and the employer, or his insurance carrier, either as to liability of the employer or the amount of compensation, any party in interest may file an application with the commission, which fixes a time for hearing the application, not more than forty days after the date of filing such application. The commission establishes the necessary rules of practice, but the hearing is conducted in much the same manner as trials by a court without a jury. Application by an employee must be made within six years from the date of injury or death.

After the completion of its hearing the commission makes and files its findings of fact together with the award of compensation. The commission may reopen the case within three years if it appears a mistake has been made in the award when the employee in fact was suffering from an occupational disease.

Either party may have judgment on such award, without notice, by presenting a certified copy of the award to the circuit court of any county.

Any party aggrieved by the award may within thirty days from the date of the award commence an action against the commission in the circuit court for Dane County for review. On such review the findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive, and the award of the commission can be set aside only on the grounds (a) that the commission acted without or in excess of its powers, (b) that the order or award was procured by fraud, or (c) that the order or award is not supported by the commission's findings of fact. An appeal from the decision of the circuit court in such action may be taken, but without filing undertaking for costs, within the time and in the manner provided for an appeal from the order of the circuit court, that is within thirty days from date of service of notice of entry of the circuit court order.

It must be borne in mind that the court in the action to review is limited strictly to a review of the commission's record. The commission's findings of fact, though against what may appear to be the great weight or clear preponderance of the evidence, cannot be disregarded.

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8 Sec. 102.16, 102.17, Wis. Stats.
9 Sec. 102.17 Subd. (4) Wis. Stats.
10 Sec. 102.18 Wis. Stats.
11 Sec. 102.20, Wis. Stats.
12 Sec. 102.23, Wis. Stats.
13 Sec. 102.25, Wis. Stats.
14 Sec. 274.04, Wis. Stats.
if there is some credible evidence to support the finding.\textsuperscript{15} Before com-
mencing an action to review an award the attorney should give careful
consideration to the fact that the powers of the court are so limited.\textsuperscript{16}

One of the prime considerations for the adoption of the legislation
was the advisability of eliminating litigation in connection with in-
dustrial injuries, primarily for the protection of injured employees.

It is deemed of interest, however, to the student to make a study of
those features of the Act which have been subject to judicial construc-
tion. It should be noted that the legislature, in its wisdom, has limited
the fees which attorneys may charge for services in the prosecution of
claims under the Act to such an extent that many attorneys decline to
accept such cases.\textsuperscript{17} Comparatively few cases require the employment
of counsel by the injured employee, or his representatives, but every
attorney should know how the law should be applied, and no attorney
should refuse his aid in solving doubtful questions. Four questions will
be considered here:

(1) Who is an employee?
(2) What is "service growing out of and incidental" to employ-
ment?
(3) What is included within the term "injury"?
(4) How is the liability of third persons affected by the Act?

**Who is an Employee?**

There is omitted from the discussion of this question consideration
of the law so far as it affects employees of the state and municipalities.

Sec. 102.67 (4) and (5) defines employees of private employers as
follows:

"Every person in the service of another under any contract of hire,
express or implied, all helpers and assistants of employees, whether
paid by the employer or employee, but not including farm laborers,
domestic servants and any person whose employment is not in the
course of a trade, business, profession, or occupation of his employer,
unless such employer has elected to include them" and "a working
member of a partnership receiving wages irrespective of profits from
such partnership shall be deemed an employee."

(a) Distinction between Employee and Independent Contractor:

The relation of employer and employee exists where one, perform-
ing work for another, does so under a contract, express or implied,
which compels the one performing to do work under the control of the

\textsuperscript{15} Tesch \textit{v. Ind. Comm.}, 200 Wis. 616, 229 N.W. 194 (1930); \textit{Gerue v. Medford
Bridge Co.}, 205 Wis. 235, 236 N.W. 528 (1931).

\textsuperscript{16} \textit{International H. Co. v. Ind. Comm.}, 157 Wis. 167, 147 N.W. 53 (1913).

\textsuperscript{17} Sec. 102.26, Wis. Stats.
employer and at the same time gives to the employer the right to direct the other's conduct, to dismiss him from the service, and to have at all times authoritative control over the work. So that when a relationship is established between two, under which in order to maintain the relationship, one is subject to the direction of the other, such other having the responsibility and right of control of the work, the one is an employee and the other an employer.¹⁸

One, however, who undertakes, for compensation, to perform service for another, in the performance of which the contracting party uses his own tools and material with liberty to pursue any means deemed proper and desirable on the work, the details of which are left to his judgment, is not an employee but an independent contractor,¹⁹ and this is true even though the party for whom the work is done reserves such supervision as is reasonably necessary to see that the ultimate result contemplated by the contract is produced.²⁰

Where one accepts employment with another for agreed wages, there is of course no problem, but in situations where the employment is not of a continuous and fixed character the line of demarcation is far from clear. One, who for an agreed price, undertakes to paint the house of another, is an independent contractor, and if injured while performing such work is not entitled to compensation under the Act.²¹ But if the painter is employed by a general contractor as one of his workmen, and the general contractor reserves the right to direct the work, the painter would be deemed an employee of the general contractor and may recover compensation under the Act.²²

The practicing attorney will meet the question as to whether or not a claimant for damages because of personal injury is to be classified as an employee or as an independent contractor most frequently in cases where the injuries are claimed to have been suffered by reason of the negligence of the person for whom the work was done.

The employee of an independent contractor may recover damages for an injury in a common law action against the person for whom the employer is performing services, where the negligence of such person proximately caused the injury.²³

(b) Manner of Employment:

It is only essential to recovery under the Act that the employee at the time of the claimed injury was performing services for the em-

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¹⁸ Neitz v. Kraft (Wis., 1932), 242 N.W. 163.
²⁰ Medford Lbr. Co. v. Mahner, 197 Wis. 35, 221 N.W. 390 (1928).
²¹ Weyauwega v. Ind. Comm., 180 Wis. 168, 192 N.W. 452 (1923).
²² C. R. Meyer & Sons Co. v. Grady, 194 Wis. 615, 217 N.W. 408 (1928).
employer in the usual course of the employer's business. Where one employer lends the services of one of his employees to another employer, and the employee, expressly or impliedly, consents thereto, the second employer is liable for compensation, although he does not pay the employee for his services. In such case the latter employer is known as the "special employer." 

Under the Act "helpers and assistants of employees" are entitled to compensation for injury from the principal employer. The rule seems to be that if the principal employer accepts valuable services of such helper, there is a resulting implied promise on the part of the employer to make reasonable compensation therefor, and therefore the relation of employer and employee exists within the contemplation of the Act.

In reaching a proper determination of this question of whether the relation of employer and employee exists in any given case, it is important to remember that the liability to compensation does not depend on the length of time of employment—the only requirement being that the services are such as are usually performed by an employee. Thus where the superintendent of a power company instructed his wife to procure the services of some one to repair a defect in a lighting system, and the wife called in a volunteer who was killed in performing the service, such volunteer was held to be an employee who came within the provisions of the Act, and therefore an action at law for damages resulting from his death could not be maintained. While the employment may be merely temporary, if the work to be done is in the usual course of the employer's business, the injured workman is entitled to compensation.

Where an outsider is called in by a regular employee to assist in the performance of an emergency service for the employer, such outsider becomes an employee and as such is entitled to compensation. The care which an attorney must use in choosing the proper remedy in cases of this class is best illustrated in the case of Johnson v. Wisconsin Lumber & Supply Company. There a truck driven by an employee of a lumber company was mired in the highway.

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25 National Film Service v. Ind. Comm., 206 Wis. 12, 238 N.W. 904 (1931).
26 Heist v. Wis.-Minn. L. & P. Co., 172 Wis. 393, 179 N.W. 583 (1920).
28 Conveyors Corp. v. Ind. Comm., 200 Wis. 512, 228 N.W. 118 (1930).
29a 203 Wis. 304, 234 N.W. 506 (1931).
The driver, under instructions from his employer, called in the plaintiff, a neighboring farmer, to assist him. The plaintiff was seriously injured and brought suit against the employer claiming negligence on the part of the driver. The court held that plaintiff was an employee of the defendant, and that his exclusive remedy was under the Workmen's Compensation Act and dismissed the action. The Supreme Court said, "If the plaintiff were here claiming under the Workmen's Compensation Act, we should be obliged to overrule a long line of prior decisions of this court if it were to be denied him. While in this case, the plaintiff having been engaged in rendering friendly assistance, it may operate to his financial disadvantage, that is one of the consequences which follows from the very broad and general language of the statute and the very liberal construction which has been placed upon it. Where an injured workman would, in the absence of the Act, have a right of action at common law for damages, his possible damages are no doubt reduced by the application of the Act. On the other hand, in a very much larger number of cases, workmen are given compensation where at common law they would be entitled to none. The Legislature must have weighed the benefits and detriments of this situation and made the provision of the law broad and inclusive, as it is, in order to do the greatest good to the greatest number, and enjoined upon the courts a liberal construction of the Act to secure the ends for which it is adopted."

WHAT IS "SERVICE GROWING OUT OF AND INCIDENTAL" TO EMPLOYMENT?

Generally speaking, an employee can recover under the Act whenever he is injured while performing services under the employer's control and under his direction. Many cases have arisen, however, where the courts have been called upon to determine the scope of the Act in this particular—a few of such examples are noteworthy.

A painting contractor requested one of his workmen, hired as a painter, to haul some furniture to the contractor's summer cottage and while engaged in that work, the employee was injured. The court held that, because there was an existing employment, to wit, that in connection with the painting business, the employee should not be excluded from compensation merely because he was injured while temporarily performing services not usual to the employment.\(^\text{29}\) The court distinguishes that case from one where compensation under the Act was refused to a workman who was temporarily employed by an implement dealer to cut down a tree on property belonging to the employer, on

the ground that in the latter case there was no existing employment of the injured man, but he was hired merely for the tree cutting, which was not work in the usual course of the employer's trade or business. It would seem that if the tree cutter in the latter case had been a regular employee in the usual course of business, he would have been entitled to compensation. An employee who went from his place of employment to another part of a plant to assist in extinguishing a fire was held to be entitled to compensation. An employee injured on the employer's premises while making a tool box for his own tools used in his employment is performing work incidental to his employment. Recovery was had by an employee putting up cordwood on the employer's premises for his own use where as part of his compensation he was to have "wood and house rent free."

An employee who is traveling primarily on business or pleasure of his own, but who performs some incidental service for his employer, is not entitled to compensation if injured on the trip, but if an employee is on a trip undertaken on behalf of the employer and is injured while on such trip, he is entitled to compensation, even though during the course of the trip he transact some personal business.

The testing and repairing of an automobile used in the business of an employer is a service within the scope of the employment, regardless of the fact that the automobile is not owned by the employer but is merely used by him to transact his business.

Under this head, we should also examine the cases construing that portion of the Act which provides "Every employee going to and from his employment in the ordinary and usual way, while on the premises of his employer, shall be deemed to be performing service growing out of and incidental to his employment."

An employee going to work, injured while walking on a public sidewalk twenty feet from the entrance to employer's plant was held not to be on the employer's premises. But where the employer uses as a part of his premises a piece of ground which has been dedicated to the public as a public highway, an employee who was injured on such part

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30 Ploetz & Co. v. Ind. Comm., 194 Wis. 603, 217 N.W. 325 (1928).
31 Belle City M. I. Co. v. Rowland, 170 Wis. 293, 174 N.W. 899 (1919).
34 Barrogar v. Ind. Comm., 205 Wis. 550, 238 N.W. 368 (1931).
37 Sec. 102.03, Wis. Stats.
while riding a bicycle on his way home after work was allowed compensation.  

There are cases where the nature of the work does not call for use of premises owned by the employer, such as the employment of a traveling salesman. In that class of cases the employee is deemed to be engaged in his employment while on his way to call on customers. Employees of a municipality are deemed to be engaged in their employment while using streets of the municipality after reporting for duty in going to and from work.

Where the employment contract includes transportation to and from work the relationship of employer and employee exists during the act of such transportation.

But where a city street cleaner is going to the place where he is required to report for duty, he is not considered to be on his employer's premises within the meaning of the statute.

A paid city fireman going to report for work at his engine house over a city street is not considered to be on the premises of his employer, but a volunteer fireman responding to a fire alarm is deemed to have entered upon his employment.

The test therefore seems to be that where the place of employment is ambulatory in its nature, the employee is deemed to be engaged in his employer's business from the moment he starts for work; while if the place of employment involves what may be termed fixed headquarters, the employee is not deemed to be at work unless he is actually on the employer's premises, or has first reported there and is at the time of injury engaged in the employment.

An employee after finishing his work, going for his pay to a place designated by the employer, but using means of transportation furnished by the employer is held to be performing a service within the scope of his employment.

An employee eating his lunch on the employer's premises, pursuant to custom, is held to be performing service growing out of his employment.

59 Northwestern Fuel Co. v. Ind. Comm., 197 Wis. 48, 221 N.W. 396 (1928).
61 Milwaukee v. Ind. Comm., 185 Wis. 311, 201 N.W. 240 (1924); Monroe Co. v. id. Ca',nm., 184 Wis. 32, 198 N.W. 597 (1924).
63 Caravella v. Milwaukee, 194 Wis. 190, 215 N.W. 911 (1927).
64 Hornburg v. Morris, 163 Wis. 31, 157 N.W. 556 (1916).
66 Hackley-Phelps-Bonnell Co. v. Ind. Comm., 165 Wis. 586, 162 N.W. 921 (1917).
67 Racine Rubber Co. v. Ind. Comm., 165 Wis. 600, 162 N.W. 664 (1917).
WHAT IS INCLUDED IN THE TERM "INJURY"?

Under the express provisions of the statute "injury" is mental or physical harm to an employee and is extended to and includes diseases growing out of and incidental to the employment. This provision of the statutes has received a very liberal construction by the Industrial Commission and by the courts. Only a few of the specific cases will be treated here.

(a) Occupational Diseases:

The term "occupational disease" has been applied to "diseases growing out of and incidental" to the employment. It is obvious that if the industry should compensate labor for accidental injury causing disability, that it should also compensate labor for the suffering and disability caused by an occupational disease. Certain employments particularly have been found to be attended with decided risk to health, such as granite cutting and foundry work. In those employments workmen inhale much dust which in time injures the lungs and makes the subjects peculiarly susceptible to tuberculosis and allied diseases. Diseases of that nature, however, do not ordinarily become disabling until several years exposure. In many cases employees, having actually incurred the disease under one employer, take up service with a subsequent employer. In other cases, though the same employer is continued, that employer carries his compensation insurance in different insurance companies.

The very troublesome question then arises as to which employer or which insurance carrier shall pay compensation. The first rulings of the Supreme Court were to the effect that the employee suffering from an occupational disease should be deemed not entitled to compensation until he was forced, because of disease, to give up his employment, and therefore the employer or insurance carrier on that date was compelled to pay compensation.

It will be seen that such ruling was illogical in that it threw the entire burden of loss on the last employer or insurance carrier, without any consideration of the extent to which the diseased employee has been exposed by such last employer or during the period of insurance coverage. The Supreme Court therefore gave the whole matter full consideration and finally announced this rule.

"Upon a full reconsideration of the entire matter, it is considered that it should be held that the 'time of accident' within the meaning of

\[48\] Sec. 102.01, Wis. Stats.

the statute in occupational disease cases should be the time when dis-
ability first occurs; that the employer in whose employment the in-
jured workman is and the insurance carrier at that time are liable for 
the total consequences due thereto. So that if the end result, whatever 
it may be, is inevitably due to exposure already complete, that employer 
and that carrier become liable accordingly. If the disability is partial 
and there is a recovery and a subsequent disability with subsequent 
exposure, then it will be necessary for the commission to determine 
whether the subsequent disability arose from a recurrence or is due to 
a new onset induced by a subsequent exposure. If it finds that the dis-
ability is due to a new onset, the employer and the carrier on the risk 
at the time the total disability manifests itself shall be liable accord-
ingly. If, however, there is no subsequent exposure which contributes 
to the disability and the disability is a recurrence of the former occu-
pational disease, then the employer in whose employment the employee 
is when the recurrence takes place is not liable and so the insurance 
carrier upon the risk at that time is not liable on that account.\textsuperscript{50}

The court has pointed out that the rule thus announced does not 
take care of cases where the diseased employee succumbs to the disease 
during a period of unemployment: "We take this occasion to empha-
size again, as we have many times in the past, that the right of an em-
ployee to compensation for an occupational disease hangs by a slender 
thread, in view of the very cursory statutory provisions upon which 
that right must rest. It has required no little judicial ingenuity to save 
the right in many cases when the Legislature seemed to intend compen-
sation to be made. It is realized full well here that most any time 
judicial ingenuity will be baffled, and there may come a time when a 
worthy employee must go uncompensated because of the failure of the 
Legislature to grapple with the subject in a specific and definite way.\textsuperscript{51}

Such an exceptional case very recently came to the Supreme Court. 
The employee had been employed by one company for thirteen years 
as a sandblaster. During the last two years of such employment he 
noticed that he coughed and became short of wind but did not at any 
time quit work on that account. The company ceased operations, and 
after a period of idleness the man undertook work of a nature which 
did not contribute to lung trouble and after working there for a short 
time became ill and was found to have diseased lungs due to his long 
exposure to dust in the first employment. The employee sought compen-
sation from his first employer. The court held that no compensation 
could be allowed, because the employee did not actually become dis-
abled while in such first employment.\textsuperscript{52} As to occupational diseases,

\textsuperscript{50} \textit{Zurich etc. Ins. Co. v. Ind. Comm.}, 203 Wis. 135 at p. 146, 233 N.W. 772 (1930).
\textsuperscript{51} \textit{Nordberg Mfg. Co. v. Ind. Comm.}, (Wis. 1932), 245 N.W. 680 at p. 681.
\textsuperscript{52} \textit{Mass. etc. Ins. Co. v. Ind. Comm.}, (Wis. 1933), No. 28, p. 5, Jr. St. Gov't Serv-

ice, Mar. 11, 1933.
therefore, the present judicial construction of the statute is to base the liability to pay compensation upon disability and not upon exposure.\textsuperscript{53} The suggestion made by the court to the legislature no doubt will be heeded, and we may look for some amendment of the statute which will give the Industrial Commission authority to determine, with the aid of medical testimony, what particular employment during the years of development of an occupational disease was responsible for such disease, with, perhaps, provision made for an apportionment of the loss among successive employers whose work exposed the employee to hazard both in the inception of the disease and its development.

Where an employee is working for two or more employers concurrently, all are liable to pay compensation for disability arising during the period of concurrent employment, and they may be assessed in proportion to the time the employee gives each employer.\textsuperscript{54} There have been a number of cases considered by the court involving diseases or ailments which result from a single exposure. In this class it is frequently difficult to prove that the ailment was caused by the employment. The general rule of law that a finding of liability cannot rest upon mere speculation and conjecture frequently defeats such claims.\textsuperscript{55}

Where it is shown that an employee during the course of his employment, drank water furnished by the employer, and that such water was polluted with bacteria from which the employee contracted typhoid, such disease is deemed attributable to accident and for the resulting wage loss to the employee the employer must pay compensation.\textsuperscript{56}

In all cases where disease follows as the natural and probable result of an accident, the employee is entitled to compensation under the Act.\textsuperscript{57}

In one case, an employee sustained an injury to his leg by reason of which he was confined to a hospital, where he developed smallpox from which he died. There was testimony by the physician in charge that his death was partially induced by the accident. An award of compensation was made by the commission and affirmed by the circuit court. On appeal to the Supreme Court, only six judges heard the

\textsuperscript{53} Kunlick Rug Corp. v. Stansfield, (Wis. 1933), 246 N.W. 424.
\textsuperscript{54} Schaefer v. Ind. Comm., supra.
\textsuperscript{55} Voelz v. Ind. Comm., 161 Wis. 240, 152 N.W. 830 (1915).
\textsuperscript{56} Vennen v. New Dells Lbr. Co., 161 Wis. 370, 154 N.W. 640 (1915).
\textsuperscript{57} Scott & Howe Lbr. Co. v. Ind. Comm., 184 Wis. 276, 199 N.W. 159 (1924); Heileman v. Ind. Comm., 161 Wis. 46, 152 N.W. 446 (1915); Eagle Chem. Co v. Nowak, 161 Wis. 446, 154 N.W. 636 (1915); A. Breslauer Co. v. Ind. Comm., 167 Wis. 202, 167 N.W. 256 (1918).
case. Three of the judges favored affirmance and three were for reversal, so under the rule the award was confirmed.58

Hernia may be caused by constant lifting and consequent strain, and an employee suffering from that ailment caused in that manner may recover compensation, hernia there being treated as an "occupational disease."59 In cases where it is claimed the hernia was caused by a single accident, the Supreme Court has approved the practice of requiring definite proof that the hernia was caused by accident, that the accident was such as might cause it, that the hernia appeared immediately after the accident, followed by pain disabling the applicant.60

Predisposition to a certain ailment or disease which becomes active by reason of an accident does not defeat the claim to compensation.61 But where one employee becomes disabled by an occupational disease which is due to a former employment and which is not aggravated or accelerated by employment under a subsequent employer, the latter cannot be held liable for compensation.62

(b) Miscellaneous Hazards:

Death or injury to an employee resulting from lightning has been held to be compensable under the Act where such hazard is deemed incidental to the employment. Thus where the employee was forced to take shelter under a tree, or in a building, during a storm and was there struck, he was held entitled to compensation,63 though in an earlier case where the employee was struck while working in the rain on a dam, it was held that the hazard of lightning was not increased by reason of his employment.64 The student may have some difficulty in harmonizing these cases, but it must be noted that the Supreme Court bases its decisions upon the rule that it cannot disturb what the Industrial Commission has found as a fact.

Freezing has likewise been held to be a risk which may be considered incidental to particular employments.65

Where a teamster had taken his horses to the barn as a storm came up and was killed in the collapse of the barn due to the storm, the Supreme Court sustained the denial of compensation on the ground.

60 Meade v. Wisconsin M. Co., 168 Wis. 250, 169 N.W. 619 (1918).
61 Casper Cone Co. v. Ind. Comm., 165 Wis. 255, 161 N.W. 784 (1917); Hackley-Phelps-Bonnell Co. v. Ind. Comm. 173 Wis. 128, 179 N.W. 590 (1921).
62 Hayes v Ajax R. Co., 202 Wis. 218, 231 N.W. 584 (1930).
63 Newman v. Ind. Comm., 203 Wis. 358, 234 N.W. 495 (1931); Nebraska Seed Co. v. Ind. Comm., 206 Wis. 199, 239 N.W. 432 (1931).
64 Hoenig v. Ind. Comm., 159 Wis. 646, 150 N.W. 996 (1915).
that the hazard was one common to the public and not peculiar to the employment, 66 but the Supreme Court in a later case criticized the use of the words "peculiar to the employment," holding that compensable injuries may result from "hazards inseparably connected with the employment and therefore incidental to it." 67

The Supreme Court affirmed an order of the Industrial Commission denying compensation to a coal heaver who suffered a sunstroke while at work on the ground that the stroke was not due to a "hazard incidental or peculiar to his employment." 68 Again it will be noted that the Supreme Court merely held that it could not ignore the findings of fact of the Industrial Commission. In view of the later decisions, injury by sunstroke suffered during an outdoor employment may more properly be considered compensable.

It will be therefore observed that no hard and fast rule of law governs the question of compensation for injury or death caused by such events as lightning, sunstroke, freezing and storms, but, in each instance liability rests upon what the fact may be as to the causal connection between the employment and the exposure to such hazards.

LIABILITY OF THIRD PARTIES

The statute now provides that injured employees or personal representatives may maintain an action for damages against a third party for the same injuries for which the employee may receive compensation, but opportunity must be given to the employer or insurance carrier, upon whom liability rests to pay compensation, to join in such action. In the event of recovery of damages against such third party, after deduction of the reasonable costs of collection, one-third of the remainder goes to the employee or his dependents in any event; the employer or insurance carrier shall be repaid out of the other two-thirds such amounts as may have been paid for compensation and any balance shall be paid to the injured employee or his dependents.

The employer or insurance carrier who has paid compensation may also maintain such an action against a third party, and if reasonable opportunity has been given to the compensation beneficiary, the liability of the third party to him shall also be determined. The division of the proceeds is the same.

Any settlement of such a claim and the distribution of the proceeds shall have the approval of the Industrial Commission or the court.

67 Eagle River, etc. Co. v. Ind. Comm., supra; See also Schroeder & Daly Co. v. Ind. Comm., supra.
68 Lewis v. Ind. Comm., 178 Wis. 449, 190 N.W. 101 (1922).
The employee may also maintain an independent action against any physician or surgeon for malpractice in treatment of the injuries or disease, but there shall be deducted from the damages such compensation as may have been paid to the employee.\textsuperscript{69}

Prior to Chapter 132 of the Laws of Wisconsin, 1931, the Act provided that the making of a claim for compensation against the employer operated as an assignment of the whole claim to the employer or insurance carrier, who then had the first right to commence such action. If such action was not commenced by either of them, then the employer or his representatives were given the right to demand the commencement of the action and unless commenced within ninety days, or right to commence waived, the employee or his representatives were given the right to institute the same.\textsuperscript{70} The former statute also provided that the employee could elect whether to seek compensation under the Act or pursue his remedy against the third party, and that if he elected to take the latter course he waived his right to compensation.\textsuperscript{71} Attention is called to these changes to avoid confusion.

The term "third party" includes a principal contractor and the employee of a subcontractor may sue such principal contractor for damages in a tort action, notwithstanding the fact that such principal contractor would be liable for compensation to such employee in the event the subcontractor carried no insurance or did not pay the compensation.\textsuperscript{72}

An injured employee may also sue a negligent co-employee.\textsuperscript{73}

As an employer's liability, even for accidents caused by his negligence, is limited to compensation provided by the Act, the employer cannot be interpleaded as a joint tort-feasor in an action against a third party whose negligence also contributed to the accident. The reason for this rule is that there is no common liability to the injured employee and therefore no legal claim for contribution by the negligent third party against the negligent employer.\textsuperscript{74}

In conclusion, it might be said that the Supreme Court has given a liberal interpretation to the provisions of the Act in accord with the spirit which prompted its passage. Some difficulties in construction have arisen, and some apparently contrary decisions. The Act has in

\textsuperscript{69} Sec. 102.29, Wis. Stats.
\textsuperscript{70} Powlak v. Hayes, 162 Wis. 503, 156 N.W. 464 (1916); Saudek v. Milwaukee, 163 Wis. 109, 157 N.W. 579 (1916).
\textsuperscript{71} Miller Scrap Iron Co. v. Boucher, 173 Wis. 257, 180 N.W. 826 (1921).
\textsuperscript{72} Cermak v. Milwaukee A. P. P. Co., supra.
\textsuperscript{73} McGonigle v. Gryphon, 201 Wis. 269, 229 N.W. 81 (1930).
\textsuperscript{74} Dansbery v. N. S. P. Co., 188 Wis. 586, 206 N.W. 882 (1926); Buggs v. Wolf, 201 Wis. 533, 230 N.W. 621 (1930).
a few places proved too inflexible, and its provisions have failed to cover all the situations which apparently merit relief, chief among these being the troublesome question of occupational diseases; but it has nevertheless been on the whole quite adequate and represents a distinct advancement of the theory that labor should be given security by those who enjoy its benefits.