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Workmen’s Compensation in Montana

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I. COVERAGE

Nearly twenty years ago, Mr. E. H. Downey, late compensation actuary of the Insurance Department of Pennsylvania, envisaged a future in which “the compensation system should be co-extensive with the exposure to industrial injury. Compulsory compensation,” he said, “should cover all employments, all employers, all employees; and all injuries, whether by accident, or disease, which arise in the course of employment.”

The American Association for Labor Legislation in a recent bulletin has said, “It is believed that sufficient progress has now been made in public education on the problem, and in the development of efficient and economical machinery for insuring the employer against his compensation liability, to justify the inclusion in the system of all employments.”

With the adoption of the Arkansas Act in March, 1939, forty-seven American States now have compensation laws; only Mississippi remains outside. To these are to be added Alaska, Hawaii, Porto Rico, the Philippines, and the Congressional Legislation for United States Government employees, for private employees in the District of Columbia, and for longshoremen and harbor workers. Horizontally, the coverage is now extensive; vertically, it is not so satisfactory.

In 1920, it was estimated that 29.8% of total employees were not covered by compensation legislation in the forty-five states then having compensation laws. Of these, 40.6% were said

1 Downey, Workmen’s Compensation, p. 30; Dodd, Administration of Workmen’s Compensation, p. 746.
3 Laws of Arkansas, 1939, No. 319.
4 Dodd, op. cit., p. 28.
to be excluded through the exemption of agriculture, 35.2% through the exemption of domestic service, 6.2% through the exemption of the small employer, and 16% through the exemption of non-hazardous and other employments.\footnote{UNITED STATES BUREAU OF LABOR STATISTICS BULLETIN No. 275, reprinted as appendix to BLANCHARD, WORKMEN'S COMPENSATION IN THE UNITED STATES.}

Fourteen hundred thousand workers on the vast inter-state railroads remain outside; the Federal Employers' Liability Act is still operative in this field.\footnote{That contributory negligence does not bar recovery under the Montana and Federal Employer's Liability Acts, but is to be taken into account by the jury in apportioning damages, see Kamboris v. Chicago, etc., Railway Co., 62 Mont, 88, 203 Pac. 859 (1921). "Liability and compensation statutes cannot be grouped together, since they are the antipodes of labor legislation, having their foundation in essentially different social and economic ideas." Lewis & Clark County v. Industrial Accident Board, 52 Mont. 6, 155 Pac. 268, (1916).} The President's Committee on Economic Security, in 1935, recommended the passage of Accident Compensation Acts for railroad employees,\footnote{THE PRESIDENT'S COMMITTEE ON ECONOMIC SECURITY, REPORT TO THE PRESIDENT, 1935, p. 46.} but nothing has yet come of the recommendation.

Until recently, the Railroad Brotherhoods have opposed change; the speculative chance of large verdicts which practically eventuate only for the few, and of which attorneys' fees and expenses consume about one-half, has dictated the sacrifice of certain compensation for all or the many. The higher wage scale on the railroads together with a weekly maximum (usually under State Acts about $18.00)\footnote{See XI., Compensation Benefits, post.} has also been a factor; the proposed Wagner Bill would, however, give the railroad employee a weekly maximum of $30.00.\footnote{DODD op. cit., p. 772. That a State Compensation Act rather than the Federal Employer's Liability Act is applicable to a common carrier by motorbus, see DePaul v. Southern Kansas Stage Lines Co., 95 P. (2d) 541 (Kan., 1939).}

The Montana Act is not applied to railroads engaged in interstate commerce although railroad construction work is included.\footnote{Sec. 2931, REV. CODES OF MONT., 1935. Citations of Montana Codes in subsequent notes will be only by section number.} Agricultural laborers, domestic servants, and casual employees are excluded,\footnote{Sec. 2837.} and, although by the amendment of 1925,\footnote{Sec. 2990.} employers engaged in farming, dairying, viticulture, horticulture, stock raising and poultry raising may elect to come under the Act, no penalty is placed on them to compel election.

All American Compensation Acts exclude agriculture ex-
except those of Hawaii and New Jersey. New Jersey alone includes domestic servants. Thirty-seven American states, including Montana, exempt casual employees; ten do not. It has been held that these exemptions are not discriminatory and do not deny the equal protection of the laws. They are, however, believed to be wrong in principle. Farm labor is no less hazardous than other types of employment covered by compensation. In Virginia, where there are 820 industrial classifications for rate-making purposes, 474 classes have a lower insurance rate than farm labor. With respect to the farmer the chief problem is that of insurance. With respect to domestic service the problem is chiefly one of insurance with also a greater degree of inertia than is to be found in the case of any other group; the occupational hazard is, however, ever present. An injury to a casual employee does not involve any less loss than an injury to a permanent employee; the most difficult problem in his case arises in connection with the computation of the wage.

About half the laws contain some numerical exemption running from less than two to less than sixteen employees; the most common number being less than five, found in nineteen Acts. There seems to be no proper basis for treating the small employee differently from the large. The employee or his dependents suffer equally, and the liability to injury is probably greater in the small plant. The Montana Act makes no exception as to the small employer. An employer who has any person in service in hazardous employment is included.

Independent contractors are usually excluded by the statutory definitions of employer and employee. In Montana, however, they are specifically included under the definition of employer. They are specifically excluded from the definition of employee. In Nelson v. Stuckey a building construction

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*SCHNEIDER, WORKMEN'S COMPENSATION LAW, p. 257.
"DODD op. cit., p. 39.
"DODD, op. cit., p. 753.
"SCHNEIDER, op. cit., p. 228.
"Sec. 2862.
"DODD, op. cit., p. 750.
"Sec. 2862.
"Sec. 2863.
"Sec. 2863.
"Sec. 2863.
"Sec. 2863.
"Sec. 2863.

89 Mont. 227, 300 Pac. 287 (1931). In Grief v. Industrial Accident Fund, 108 Mont. 519, 93 P. (2d) 961 (1939), a wrecker's service operator, killed on the highway while signalling passing autos, was held to be a servant of the highway construction company whose employee had called him to assist in getting a trailer out of the ditch; the court rejected the contention that he was an independent contractor on the ground that he submitted himself to the direction of the employer,
foreman was held to be an employee rather than an independent contractor, where he was employed to enlarge an apartment house at a daily wage with a commission of 2% for speeding operations under a contract which made him subject to the will and control of the owner as to the means of accomplishing the work, both having the power to hire and discharge workmen.

II. HAZARDOUS OCCUPATIONS.

Only twelve of the forty-seven State Compensation Acts exclude so-called non-hazardous employments. It is believed that such exclusion is undesirable. An injury received in a department store may be just as severe and cause as much hardship economically as one received in a mine. The hazardous versus the non-hazardous classification also makes for administrative difficulty in some jurisdictions in cases where clerical workers are engaged in hazardous industries. The result is needlessly close decisions of inclusion or exclusion. It would seem that all industries might well be included, and if the risk is low, the cost of compensation will be correspondingly low. New York, starting with a classification restricted to the hazardous, has changed so as to include also the non-hazardous.

The Montana Act applies to inherently hazardous industries. These are enumerated under the following headings; A. Construction work; B. Operation and repair work; C. Factories using power-driven machinery; D. Miscellaneous work. There is a “saving clause” as to hazardous occupations not enumerated, or hereafter arising. It has been held that these must be of the same nature or kind as those enumerated.

The Act provides that an employer having any of his workmen engaged in a hazardous occupation, as listed, shall be considered as an employer engaged in hazardous occupations as to all of his employees, thus avoiding the administrative difficulty which some jurisdictions have experienced at this point.

both as to the details and the means by which the work was accomplished. While an advance agreement as to the price of a certain service without regard to the length of time required to perform it was regarded as a strong indication of the independent contract or relationship, the facts established only that the deceased had said over the telephone that the cost of his assistance would be about six dollars.

U. S. BUREAU OF LABOR STATISTICS BULLETIN 275, p. 21.
Id., p. 9.
Secs. 2848-2852.
Moore v. Industrial Accident Board, 80 Mont. 136, 259 Pac. 825 (1927).
Sec. 2847.
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The statute was held, in Williams v. Brownfield Canty Co.,\(^2\) to require compensation for one whose regular work was carpet-laying, and who was injured while temporarily bill-collating, by falling on icy steps leading to a residence. The Court differentiated the Page and Moore cases,\(^3\) in that, in the Page case, application had been made for enrollment under the Act, and had been rejected by the Board, while in the Moore case, County Commissioners had not been brought under the Act, although the Board had considered the matter and had said that it did not "feel justified in attempting to force these officials to carry compensation upon themselves."

In the Moore case a County Commissioner lost his life in an auto accident while inspecting the highways, and the case was held non-compensable in that the employment was not of an inherently hazardous character.\(^4\)

In the Page case the operation of an electric passenger elevator was held non-hazardous within the meaning of the Compensation Act; also, in common-law action, that deceased was contributorily negligent in running in from the street, opening the elevator door, and jumping in without looking to see if the cage was where he had left it some time before.

III. ELECTION

The fourteenth edition of the Digest of Compensation Laws (1935), lists fifteen States and four territories as having compulsory laws as to some or all private employments, and thirty-one States and four territories as having compulsory laws as to some or all public employments.\(^5\) Montana's law is in keeping with the majority; it is elective in form though apparently not so in substance as to private employments,\(^6\) and com-

\(^2\) 95 Mont. 364, 26 P. (2d) 980 (1933).
\(^4\) Moore v. Industrial Accident Board, 50 Mont. 136, 259 Pac. 825 (1927).
\(^5\) In Betor v. National Biscuit Co., 85 Mont. 481, 280 Pac. 641 (1929), the Court queried as to whether or not the occupation of a traveling salesman could be regarded as hazardous within the meaning of the Act, but decided the case on other grounds. For holdings that the occupation is non-hazardous, see Mandel v. Steinhardt & Bro., 173 App. Div. 615, 160 N. Y. S. 2. (1916), and Singer Sewing Machine Co., v. Industrial Commission, 298 Ill. 511, 129 N. E. 771 (1921). The New York rule was later changed by statute, and Illinois is now in accord with this latter position. SCHNEIDER, op. cit., p. 488. See also Stansberry v. Monitor Stove Co., 150 Minn. 1, 183 N. W. 977 (1921).
\(^6\) DODD, op. cit., p. 747.
\(^6\) Sec. 2841.
pulsory as to public employments." In City of Butte v. Industrial Accident Board," it was held that not only is Compensation Plan No. 3 (i.e., insurance in the State Fund), obligatory as to the city and its employees, but also that the Act was intended to be compulsory as to the city and its employees. "The constitutionality of a compulsory act as to private employers was doubted," said the Court, "but the right of the State to impose the plan on itself was unquestioned."

According to the Montana Law, an employer who elects not to come under the Act shall have his three common-law defenses, assumption of risk, the fellow-servant rule, and contributory negligence, taken away from him." Accordingly, the employer is virtually compelled to accept the Act." After the employer has made his election to be bound by the Act, his workmen are conclusively presumed to be bound, unless they elect not to be bound."

The Montana Law is, therefore, a product of the opinion generally current when most of the Acts were passed that the elective feature was a device by means of which compensation legislation could be made to stand the test of constitutionality where a compulsory Act would fail. In view of the United States Supreme Court decisions sustaining the constitutionality of the second New York compulsory Compensation Law," and the compulsory Act of Washington," as due process of law, and as not infringing any other provision of the Federal Constitution, it would seem that any further attempt to distinguish

"Sec. 2840. The term "public corporation" does not include the National Forest Service State v. Industrial Accident Board, 87 Mont. 191, 286 Pac. 408 (1930). For a case of "election" by the Federal Emergency Relief Administration, see O'Neill v. Industrial Accident Board, 107 Mont. 176, 81 P. (2d) 688 (1938)."

"Sec. 2836. The only case carried to the Montana Supreme Court in which the employer elected not to comply, and was thus held liable at common law stripped of his defenses, was Chancellor v. Hines Motor Supply Co., 104 Mont. 603, 69 P. (2d) 764 (1937). See, however, the 1930-1932 report of the Industrial Commission of Colorado, calling attention to the increasing number of employers rejecting the Act because of strain of depression; there, 1921-1930, the Act was rejected by 202 employers, but Jan. 1, 1931, to Nov. 30, 1932, it was rejected by 305 employers; part of the latter increase was, however, caused by employees dropping under the required four. Dood, op. cit., p. 750.


between the validity of a compulsory Act and an elective one
with a penalty for non-election, is to indulge in exploded casu-
istry.

The Act provides that the employer may elect whether he
will be bound by either of the compensation plans mentioned in
this Act. It is declared to be the intention of the Act, that be-
fore being bound the employer shall elect to be so bound, where-
as the employee shall be presumed to have elected to be bound,
unless he shall affirmatively elect not to be bound. Under this
language, four cases are possible. Assume that:

(1) Both employer and employee do nothing. Since the
employer is not under the Act, the Act cannot apply and in the
resulting common-law case, it would follow that the common-law
defenses are not available to the employer. Section 2838 pro-
vides that any employer who elects to pay compensation as pro-
vided in this Act, shall not be subjected to the provisions of Sec-
tion 2836 (the Section abrogating the common-law defenses).

(2) The employer elects to be bound, and the employee
does nothing. In this case, both are bound, and the Act is the
exclusive remedy, except for cases of injury by third parties
falling under Section 2839.

(3) The employer does nothing, and the employee elects
not to be bound. In this case, neither is bound; the case must
be one at common law, and the common-law defenses are not
available to the employer.

(4) The employer elects to be bound, and the employee
elects not to be bound. Here the Act cannot be the guide to de-
cision; the employee elected not to be bound. The employee may
sue at common law, but the employer has not been deprived of
his common-law defenses. Section 2838 provides that Section
2836 shall not apply to actions brought by an employee who has
elected not to come under this Act against an employer who has
elected to come under it.

In Miller v. Aetna Life Insurance Co. it was held that ir-
regularities in the name of the employer enrolling under the Act
do not affect the employee’s rights where the name is suffi-
cient to identify the place of business and the employer. The
provisions of the Act relating to filing of the compensation pol-

*Sec. 2841.
"Sec. 2844.
*Sec. 2838.
499 (1917).
"101 Mont. 212, 53 P. (2d) 704 (1936).
In the Board, and an affidavit of posting notices in the place of business, are directory only, and failure to comply with them does not inure to the insurer's benefit.

In Chancellor v. Hines Motor Supply Co. it was held that Section 2836, depriving an employer of the common-law defenses, applies not only to those employers who elect to come under the provisions of the Act, but also to those not so electing, the plaintiff in the latter case being, however, bound to prove that the injury for which he sues was caused by the employer's negligence.

IV. CASUAL EMPLOYMENT

The Act provides that the three common law defenses are not denied employers of persons whose employment is of a casual nature, and such employment is defined as employment not in the usual course of trade, business, profession, or occupation of the employer.

In Miller v. Granite County Power Co., et al, it was held that, since defendant's business was to generate and dispose of electric power, a miner, killed while employed by defendant's watchman to dig a well for use at the watchman's dwelling house, was engaged in employment casual in nature; in the common-law action, the employer could plead assumption of risk as to simple tools and devices, here a link affixing a chain to a bucket used to draw the earth to the surface.

In Industrial Accident Board v. Brown Bros. Lumber Co. the court held that employment may be in the usual course of business of the employer though temporary. In this case a truck-driver stalled the employer's truck in the mud; he was directed to secure help to extricate the truck; the helper so hired was injured and was held to have a compensable case.

In Nelson v. Stuckey it was held that a dentist, who also operated a large apartment house in the construction of an addition to which the employee was injured, owed compensation to the employee; the Court said that a person may be engaged in more than one business, trade or profession, and that the employee was working in the furtherance of defendant's apartment house business.

104 Mont. 603, 69 P. (2d) 764 (1937).
Sec. 2837.
Sec. 2888.
66 Mont. 368, 213 Pac. 604 (1923).
88 Mont. 375, 292 Pac. 902 (1930).
89 Mont. 277, 300 Pac. 287 (1931).
This type of case is difficult for the courts. One may be engaged in more than one business, but could it not have been said, in the Nelson case, that defendant's business was that of renting apartments? Said the Court, "the line of demarcation between what is and what is not employment in the usual course of trade, business, profession, or occupation of the employer, is vague and shadowy. Each case must of necessity, depend on its own facts and circumstances." Lackey v. Industrial Commission was distinguished by the Court in that there the defendant was constructing a building to be used by him in a business new to him; in the instant case, the construction was in furtherance of an established business; defendant was already engaged in the apartment business; the building of an addition was simply to enlarge that business, and was in furtherance of the business in which defendant was engaged.

Counsel argued that to hold the employment other than casual would be to put an unjust burden on the small operator who does a piece of work in an isolated instance, but, said the Court, "such a case would be distinguishable; the renting of one house or more, is not necessarily a business; one has a regular business under the Compensation Act, when it is carried to such an extent as to require a substantial and habitual devotion of time and labor to its management and operation." Here the defendant had fifteen original apartments, and was putting up twenty-three additional ones; his apartment house business was, therefore, of substantial character within the meaning of the rule.

It is believed that the Court reached a correct result in the case under the application of sound principles. Candor compels one to observe, however, that it may be very difficult to draw the line in the application of these principles to the facts of the myriad cases that may arise. In view of the difficulties of interpretation involved, and the fact that an injury to the casual employee causes no less suffering than an injury to a permanent

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89 Mont. at p. 286.
80 Colo. 112, 249 Pac. 662 (1926).
Compare Shrout v. Lewis, 147 Kans. 592, 77 P. (2d) 973 (1938), where the employer spent about one-half his time in renting, repairing, and remodeling apartments after purchase, together with the construction of other buildings, and it was held that he was engaged in business as a builder, although the other one-half of his time was devoted to farming. But in Martin v. Craig, 148 Kan. 882, 84 P. (2d) 853 (1938), defendant was engaged in manufacture in Kansas City; he owned a 38-unit apartment house and a half-dozen single dwellings for rental; two of the dwellings were being shingled, and it was held that defendant was not in the building business, that a substantial part of his time and labor was not devoted to same, and that the renting of houses is non-hazardous.
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employee, it is believed that the numerically larger number of jurisdictions should follow the lead of the minority states, and eliminate, as to employers having regular employees, the exemption as to casual employees."

V. EXTRATERRITORIAL OPERATION

If A contracts with his employer in State X and suffers an accident in State Y, and especially if one of these States has a higher scale of compensation than the other, it is apparent that the factual situation is calculated to be litigious. Three theories have been suggested:

(1) Under the territorial theory, the application of a law is restricted to the confines of the State, and duties cannot be imposed on persons beyond its borders. Under this theory, unless the legislature has indicated expressly or by implication a contrary intent, a Compensation Act will be presumed to have no extraterritorial effect.

(2) In the Minnesota case of Stansberry v. Monitor Stove Co.," the plaintiff's husband, a traveling salesman, was employed in Minnesota by the Minnesota branch of an Ohio corporation and was killed in the course of his employment in North Dakota. It was held that the plaintiff was entitled to compensation under the Minnesota Act. The decision proceeds on the ground that the right to compensation is contractual in character, arising from an agreement implied in fact between the parties.

(3) The New York Courts have, however, refused to allow recovery where the contract was to be performed wholly in

"The American Association for Labor Legislation in its bulletin "Standards for Workmen's Compensation Laws, 1939," says at page 8: "The only exception which should be made, is of casual employees in the service of employers who have only such employees, and who, therefore, cannot fairly be required to carry compensation policies. Such policies, on payment of a small additional premium, are now drawn so as to embrace casual, as well as regular employees. No serious burden is therefore, entailed on employers, even of domestic servants, in making them liable to pay compensation to employees."

"See Mulhall v. Fallon 176 Mass. 266, 57 N. E. 386 (1900).

"In Gould's Case, 215 Mass. 480, 102 N. E. 693 (1913), the plaintiff under a contract made in Massachusetts where he was principally employed, was injured in New York. The Massachusetts Court decided that the Massachusetts Act had no application to injuries received without the State, but said that the law of the State where the injury occurred should control. This is applying in fact a tort theory. No doubt the Massachusetts Court was influenced partly by decisions under the English Act, (1906) Sr. 6 Enw. VII., C. 58; Tomalin v. Pearson & Co., (1909) 2 K. B. 61.

"150 Minn. 1, 183 N. W. 977 (1921).
another state, or in a fixed location outside the state; an intermediate position.***

One Montana case has raised the question. In Loney v. Industrial Accident Board*** the employer was building a road eight miles long, five miles of which were in Montana, the other three extending into Glacier National Park; the employee was injured while within the Park limits. It was held to be a compensable case. Said the Court:

"The employer and employee, citizens of Montana, are governed by a contract made in Montana.*** The weight of authority in this country sustains the assertion that a Workmen's Compensation Act will apply to injuries to workmen employed in the state, and injured while temporarily out of its limits, unless there is something in the Act making it inapplicable.*** The intent of the Act is to afford protection to all Montana employers and employees who comply with its provisions."

This language might be taken to represent an adoption of the third or intermediate theory; however, the facts did not make necessary a holding under the second theory; and, as to the tort or territorial theory, this language is to be found in the opinion:

"The Attorney-General held that the Workman's Compensation Act of this State, has not any extraterritorial operation, that it relates only to accidents accruing within this State, and that, while Glacier National Park is within this State, except as to the limited powers reserved in the Act of Session, this State has not any jurisdiction over it. Whether the State has the right to cede jurisdiction to the extent it assumed to cede it, or whether Congress has the right to assume jurisdiction to the extent to which it has assumed it, is not necessary to be determined in this proceeding. It may someday become a subject of constitutional controversy."

The Court then assumed for purposes of the decision that the Park is outside of Montana and found the contract theory as above limited adequate for the decision of the case.

Formerly, a tendency on the part of States having an elective Act to adopt a contract theory was noted, whereas the ten-

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**7 Mont. 191, 286 Pac. 408 (1930).

**7 Mont. at pp. 195 and 197.

dency in jurisdictions having compulsory laws was to adopt a tort theory. Such efforts at distinction have now largely disappeared. In Alaska Packers' Association v. Industrial Accident Commission of California Mr. Justice Stone said, "the liability under Workmen's Compensation Acts, is not for tort. It is imposed as an incident of the employment relationship, as a cost to be borne by the business enterprise, rather than as an attempt to extend redress for the wrongful act of the employer."

The Committee on Workmen's Compensation Legislation of the International Association of Industrial Accident Boards and Commissions, in 1932, recommended a uniform act to provide as follows:"

"Where the injury occurs outside of this State, the provisions of this Act shall apply if the contract of hire was made in this State: Provided, however, that if the injury occurs in a State that has provided workmen's compensation for such employee and his dependants, an election of benefits under the law of such other State shall be held to waive the claimant's rights under the provisions of this Act. Such an election to waive the benefits of this Act shall be evidenced by an instrument in writing, to be signed by the injured employee, indicating his acceptance of the

"294 U. S. 532, 55 Sup. Ct. 518, 79 L. Ed. 1044 (1934). "The right to workmen's compensation is not a cause of action for injury sounding in tort, but is economic in character, and is based on the wage obligation imposed on the employer as a part of the contract of employment, to become a party to an insurance policy, created by law, to compensate in an amount measured, not by injury suffered, but on the basis of the employee's relative economic position in the community as shown by his wages." Chisholm v. Vocational School for Girls, 103 Mont. 503, 64 P. (2d) 838 (1936).

"For a case involving application of the full faith and credit clause of the Federal Constitution, see Pacific Employer's Insurance Co. v. Industrial Accident Commission, 306 U. S. 493, 59 Sup. Ct. 629, 83 L. Ed. 940 (1939). In that case, California, the jurisdiction of the employee's injury, was held entitled to apply the California Act as against Massachusetts, the jurisdiction of the place of contract, notwithstanding the compulsory, exclusive character of the Acts and provisions in both drawing them into direct conflict. California was found to have a sufficient domestic policy to warrant the preference accorded to its own law; of considerable influence was the lien protection given by the California Act to hospitals and doctors for debts incurred by the injured employee. The previous case of Bradford Electric Co. v. Clapper, 286 U. S. 145, 52 Sup. Ct. 571, 76 L. Ed. 1026 (1932) was distinguished on the ground that, in that case involving death of an employee in New Hampshire under a contract made in Vermont, there was nothing in the statute or decisions of New Hampshire, nor in the circumstances of the case, inimical to the application of the Vermont Act, which was, therefore, held to be the Act governing the award of compensation.

"U. S. BUREAU OF LABOR STATISTICS BULLETIN NO. 977 (1932), pp. 15-16.
provisions of the law of such other State, which election shall be binding after approval by the Industrial Commission of this State. Credit shall be given an employer or insurer under this Act for all benefits paid or furnished to an employee, or his dependants, under whatever assumption made."

VI. RATIONALE

The underlying argument" for workmen's compensation cannot be better expressed than by Mr. Justice Holloway, in *Lewis & Clark County v. Industrial Accident Board*. Said he:

"The common law of England and America, and the Civil Code of Continental Europe, furnished but a single remedy for a servant's injury—an action for damages in

"The Restatement of Conflict of Laws of the American Law Institute treats the subject as follows:

"Sec. 398. A workman who enters into a contract of employment in a state in which a Workman's Compensation Act is in force, can recover compensation under the Act in that state for bodily harm arising out of and in the course of the employment, although the harm was suffered in another state, unless the Act provides in specific words, or is so interpreted as to apply only to bodily harm occurring within the state.

"Sec. 399. Except as stated in Sec. 401, a workman may recover in a state in which he sustains harm under the workmen's Compensation Act of that state, although the contract of employment was made in another state, unless the Act provides in specific words or is so interpreted as to apply only when the contract of employment is made within the state.

"Sec. 400. No recovery can be had under the Workmen's Compensation Act of a state if neither the harm occurred nor the contract of employment was made in the state.

"Sec. 401. If a cause of action in tort or an action for wrongful death, either against the employer or against a third person has been abolished by a Workmen's Compensation Act, of the place where the contract of employment was made, or of the place of wrong, no action can be maintained for such tort or wrongful death in any state.

"Sec. 402. Proceedings may be brought in a state under the Workmen's Compensation Act of that state, if it is applicable, although the Act of another state also is applicable.

"Sec. 403. Award already had under the Workmen's Compensation Act of another state, will not bar a proceeding under an applicable Act, but the amount paid on a prior award in another state, will be credited on the second award."

"The theory of compensation statute is that the loss to employee be borne directly by industry (Detor v. National Biscuit Co., 85 Mont. 481, 280 Pac. 641 (1929)), and indirectly by the public (Kerns v. Anaconda Copper Mining Co., 87 Mont. 546, 289 Pac. 563 (1930)), that employee is to be guaranteed compensation for all injuries incident to particular employment received in course of employment (Clark v. Olson, 96 Mont. 417, 31 P. (2d) 283 (1934)), and requires industry to relieve society of care of manpower wrecked in industry (Chisholm v. Vocational School for Girls, 103 Mont. 503, 64 P. (2d) 838 (1936))."

"52 Mont. 6 at p. 9, 10, 155 Pac. 268 (1916)."
which it was made to appear that the negligence of the master was the proximate cause of the injury. The harshness of the rule was emphasized when there was ingrafted on it the defenses of contributory negligence, fellow-servant's negligence, and assumption of risk.

"With the increasing hazards consequent upon the use of high explosives, complicated and dangerous machinery, and the powerful agencies of steam and electricity, the percentage of injured employees having justiciable claims rapidly increased, until relief was sought in liability statutes which modified or eliminated some or all of the common-law defenses. But, whether the remedy was sought at common law or under an employer's liability statute, the actionable wrong of the master or wrong for which the master was liable under the maxim respondent superior, was the gist of the claim for damages and the basis of any right to recover. Experience demonstrated that more than one-half of all industrial injuries resulted from inevitable accident or from the risks of the business for which no one could be held responsible, that neither the common law nor employer's liability statutes, furnished any measure of relief to more than twelve or fifteen percent of the injured, and that further appreciable improvement from the modification of existing laws could not be expected, so long as the element of negligence was the foundation of legal liability. • • •

"The fundamental difference between the conception of liability and compensation is found in the presence in the one, and the absence from the other, of the element of actionable wrong. The common law and liability statutes furnished an uncertain measure of relief to the limited number of workmen who could trace their injuries proximately to the master's neglect. Compensation laws proceed upon the theory that the injured workingman is entitled to pecuniary relief from the distress caused by his injury, as a matter of right, unless his own wilful act is the proximate cause, and that it is wholly immaterial whether the injury can be traced to the negligence of the master, the negligence of the injured employee, or a fellow-servant, or whether it results from an act of God, the public enemy, an unavoidable accident, or a mere hazard of the business which may or may not be subject to more exact classification; that his compensation shall be certain, limited by the impairment of his earning capacity, propor-

tioned to his wages, and not dependent upon the skill or eloquence of counsel or the whim or caprice of a jury; and that too, without the economic waste incident to protracted litigation * * * ."

VII. INJURY ARISING IN COURSE OF AND OUT OF EMPLOYMENT

Thirty American States, including Montana, took the English Act as their model in defining the injuries to be comprehended under their laws and confined them to those arising by accident out of and in the course of employment. Since the Act of our sister State of Washington has been drawn in question by counsel in Montana adjudications, it should be noted that the Washington Act more closely resembles the German system with compulsory State insurance and compensation to employees "injured on the premises."

In Stertz v. Industrial Insurance Commission a discharged workman waylaid the logging train and killed the foreman. The Washington Court held the foreman's widow to have a compensable case. The Court, observing that the Washington statute most closely resembles the German system, ruled out precedents from England and states having the wording "arising in course of and out of the employment." Under Washington law it is only necessary that the workman be "injured on the premises;" the Court refused to read into the statute by way of interpretation the more restrictive words of the English statute.

The Montana Act provides compensation to an employee, or to his beneficiary, major or minor dependent, in case of death, who has elected to come under the Act, and who shall receive an injury arising out of and in the course of his employment.

Dodd, op cit., p. 39.
Bruce v. McAdoo, Director-General, 65 Mont. 275, 211 Pac. 772 (1922), and Black v. Northern Pacific Ry. Co., 66 Mont. 538, 214 Pac. 82 (1923).
91 Wash. 588, 158 Pac. 256 (1916).
Sec. 2911.

It is not necessary that death result immediately in order that one's case be compensable. Thus, in Ryan v. Industrial Accident Board, 100 Mont. 143, 45 P. (2d) 775 (1935), the workman on an oiled street suffered heat prostration, from which he died eleven days later. It was held to be a compensable case. And in Birdwell v. Three Forks Portland Cement Co., 98 Mont. 483, 40 P. (2d) 43 (1935), it is said that if the accident is one of the contributing causes without which the injury which actually followed would not have followed, the employee is entitled to compensation.
(a) Lightning Cases

In Wiggins v. Industrial Accident Board, an employee of a county was struck by lightning and killed while operating a metal road-grader along a highway. Counsel stressed that metal attracts lightning, but this view was rejected by the Court; a lightning-rod is used, not because it attracts lightning, but because it is a good conductor and generates little heat in the process; lightning is more likely to be attracted by tall objects; the case was held non-compensable since the tenet "arising out of" the employment was not satisfied.

It is a leading case for discussion of "injury," "arising in course of," and "out of," the employment. Said the Court:

"The phrase injury means that to warrant payment of compensation the facts must disclose that the injury or death, as the case may be, resulted from an industrial accident, arising out of and in the course of the employment. These terms are employed conjunctively and not disjunctively, and the burden of proof is upon the claimant to establish, by a preponderance of the evidence, that the three of these conditions are met."

Injury may result from an "Act of God." Thus, death to a county employee killed by lightning while at work on a public road, is death resulting from an industrial accident, but there can be no recovery therefor without proof that the injury causing death arose out of and in the course of the employment.

The words "out of" point to origin or cause of the accident. An injury to a workman arises out of his employment, if it is the result of exposure to a hazard peculiar to the employment, or of exposure to more than the normal risk to which the people of the community generally are subject.

It arises "in course of" employment if it occurs while the employee is doing the duty which he is employed to perform. The words refer to the time, place, and circumstances under which the accident took place. The employee must be doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time.

In Herberson v. Great Falls Wood and Coal Co., it was said of the case before the Court, that it

"is dangerously near the border line, and that it is difficult to reconcile our conclusions reached herein with the

54 Mont. 335, 170 Pac. 9 (1918).
53 Mont. 527 at p. 538, 273 Pac. 294 (1929).
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decision of this Court, in the case of Wiggins v. Industrial Accident Board, supra. Suffice it to say, that . . . we are not favorably impressed with the conclusion reached in the Wiggins Case."

And in Sullivan v. Roman Catholic Bishop," et al, it is said:

"The decision in the Herberson Case was predicated upon the mandate of the Compensation Act," requiring liberal construction of the Act. We would not say that the Court at that time believed, or now believes, that the language of the Wiggins opinion may be fairly interpreted as meaning that a bar was erected by the Court sufficient to prevent recovery in lightning cases generally. In any event, we specifically declare that such is not the true rule. The criticism of the Wiggins Case as contained in the Herberson opinion, was in reality a warning against taking the general statement therein made, as embodying an arbitrary and inflexible rule for the government of all such cases, or perhaps in future decisions."

In the Sullivan case an employee of a cemetery was killed while going about his duties; it was held to be a compensable case. There were tall trees and projecting poles in the cemetery, making an atmospheric break-down there more likely; the boss had ordered the employee to carry a long ten-foot pipe to another place in the cemetery, and he was carrying it at the time of the accident; the proximity of wire fences, and the fact that according to the evidence lightning struck about the cemetery more frequently than elsewhere in Butte; all were held to make the risk of deceased peculiar to the employment, or greater than that of the normal person in the community. Arguendo, if struck by lightning while at work on the Eiffel Tower, or the Washington Monument, it would be a compensable case; if, as a clerk, or as a messenger boy, on the ground, it would be a non-compensable case."

(b) Fire in Mine

In Wirta v. North Butte Mining Co." a miner sued at common law, for injuries by gas, following a fire in the mine; he alleged that after termination of the eight hours (permissible under the eight hour law), he was falsely imprisoned, that the employment was terminated, and the relationship of employer

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"103 Mont. 117 at p. 124, 61 P. (2d) 838 (1936).
"Sec. 2964.
"64 Mont. 279, 210 Pac. 332 (1922).
and employee under the Act ceased to exist. The Court, however, held that plaintiff must seek his remedy under the Act, that the relationship of employer and employee could not be ended for the purpose of the Act, and the relationship of master-servant follow for the purpose of a common-law action. The workman was said to be in course of employment, if he is doing what he may reasonably do at a place where he may reasonably be; thus, if he has reached the employer’s premises on the way to work though actual work has not begun, and if he is still on the premises on the way home though actual work has ceased, the condition is satisfied.

(c) Explosion in Bunk-house

In Landeen v. Toole County Refining Co., employees of an oil-refining company were required to sleep in the company’s bunk-house near the plant; a faulty pipe connection, dating back to the preceding summer, resulted in a gas explosion as they lit a match preparatory to getting breakfast; some were killed; others injured; they were held to have compensable cases because of the extra duties placed upon them though the actual work-day had not started.

(d) Street Accidents

Where the employer furnishes the conveyance and the employee is injured while riding in same, it is generally held to be a compensable case. Thus, in Chisholm v. Vocational School for Girls, it was held that injury to the matron of a State School for Girls, from collision of auto with a truck while she was riding on the employer’s bus, was compensable. And in Kearney v. Industrial Accident Board the cook of a timber company was directed to go to Kalispell to purchase kitchen supplies, and was

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"In Tweedie v. Industrial Accident Board, 101 Mont. 256, 53 Pac. (2d) 1145 (1936), the evidence was held to sustain the finding that death of the employee who sustained severe bruises when the ceiling in a coal mine fell on him, and who died about three and one-half years later from poisoning resulting from diseased kidneys, was caused by such accidental injury and was compensable. In Woin v. Anaconda Copper Mining Co., 99 Mont. 163, 43 P. (2d) 663 (1935), it was held that workman’s returning to work at successively lighter jobs after receiving injury and suffering pain in such work, should be considered in determining whether total permanent disability after six years resulted from injury. In Doty v. Industrial Accident Board, 102 Mont. 511, 59 P. (2d) 78 (1936), the evidence was held to support the finding of the Board that the industrial accident did not cause pneumonia from which the employee died.

"55 Mont. 41, 277 Pac. 615 (1929).

"103 Mont. 503, 64 P. (2d) 838 (1936).

"90 Mont. 228, 1 P. (2d) 69 (1931).
killed by an auto collision on the city street; her beneficiary-husband was awarded compensation.

In *Herberson v. Great Falls Coal & Wood Co.* the workman was killed by being struck by an auto as he alighted from a street car at about 7:20 A. M. The main entrance to the defendant’s plant was through the south gate which would have meant three blocks farther for the employee to walk. The north gate was occasionally used in defendant’s business; the employer had given the employee the key thereto, and the Court regarded it as an extra duty placed on him to open this gate in the morning. He was held to have a compensable case, injury on the public highway being sufficient where the employee was subject to hazard to an abnormal degree.

(e) Nervous Ailments

In *Sykes v. Republic Coal Co.* claimant appealed from an order of the Board ending his partial disability payments, May 1, 1931; the District Court admitted additional testimony and found that the Board’s declaration as to the duration of the disability was unwarranted; doctors testified that there was nothing apparent from a physical standpoint to prevent Sykes from doing light work, but they agreed he suffered from a mental or neurotic condition. The Supreme Court, in sustaining the District Court finding, held that a workman is not deprived of the right to compensation though, but for want of will power, he could throw off his condition brought about by hysteria and neurosis caused by the injury.

In *Best v. London Guarantee & Accident Co.* the claimant fell a distance of about four feet, striking a “two-by-four” on his abdomen; later his gall-bladder was removed; he had an uneventful recovery, but did not get well; the doctor later diagnosed his ailment as neurosis of the stomach; other doctors opined that a condition of the liver due to some systemic disease of long standing was at fault; the Board then rendered a de-

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83 Mont. 527, 273 Pac. 294 (1929). “The general rule which excludes from compensation injuries suffered by an employee while using the public highway for the purpose of going to or returning from work, is subject to certain exceptions based on the terms of the contract of employment such as (1) where the employer requires the employee to travel on the highway; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firemen, and (4) where the employee is using the highway in doing something incidental to his employment with the knowledge and approval of his employer.”

94 Mont. 239, 22 P. (2d) 157 (1933).

100 Mont. 332, 47 P. (2d) 656 (1935).
cision adverse to claimant; the District Court reversed the Board, awarding $18.00 weekly, and the Supreme Court affirmed the District Court on the ground that the weight of testimony showed claimant suffering from neurosis, and neurosis resulting from injury received in an industrial accident is compensable.

In *O'Neil v. Industrial Accident Board* it an employee was assisting in building a fence while employed by the Federal Emergency Relief Administration. He lifted a pole, dropped it, felt pain over the left kidney. His testimony was contradictory in details, and the Mayo Clinic report by which he had agreed to be bound indicated no positive findings to corroborate claimant's statement that he could not work; local physicians reported claimant suffering from a post-traumatic psycho-neurosis. The Board denied the claim; the District Court, after additional testimony, awarded compensation as for total permanent disability, and the Supreme Court affirmed the action of the District Court under the rule that neurosis resulting from an injury in an industrial accident is compensable.

Street accidents, accidents going to and from work, and lightning cases, are among those that give difficulty for the Courts. The acts are constantly being given a more liberal interpretation. At the same time, it is essential to continually strive for a government of laws. One careful student of the problem, after a review of cases in all jurisdictions, concluded that, after segregating certain general groups, there remain some cases not classifiable under general principles; where the human mind is unable to formulate a rule to fit the exigencies of the occasion; that the trend is toward an absolute liability, if at the time of the accident, the employee was in course of employment; and that only by legislating accordingly could a definitely logical and universal rule be provided. He queried whether or not this would be constitutional under the Fourteenth Amendment.

Another authority has suggested that if the legislature

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*107 Mont. 176, 81 P. (2d) 688 (1938).*

*Ray A. Brown, "Arising Out of and in the Course of the Employment" in Workmen's Compensation Laws, 7 Wis. L. Rev. 15, 37 and 8 Wis. L. Rev. 133, 217. "This Court has heretofore stressed the fact, that our Compensation Act does not contemplate that an employer, who comes within the provisions of the Act, shall be the Insurer of his employee at all times during the period of employment, that the Act is not founded on the theory of life insurance, and that it is not a social insurance law.” Sullivan v. Roman Catholic Bishop, et al, 103 Mont. 117, 61 P. (2d) 838 (1936).*

*Dodd, op. cit., p. 686.*
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would enact a presumption of liability where the employee is in the course of employment, it would do much to relieve present uncertainty, at the same time preserving the causal relation between injury and employment, and that without hardship, it would simply put it up to the employer to disprove the relationship.

With the Act reading as at present, however, one may observe that the Court is on firmer ground in giving due weight to the mandate of liberal construction in cases where there can be little or no doubt about the genuineness of the injury, as in the cases of death by lightning and street accidents, than in cases of neurosis. As to cases of the latter type, it should not be lost sight of that the claimant or beneficiary must establish by a preponderance of the evidence an industrial accident arising in course of and out of the employment.

Cases of nervous injury are increasingly difficult. Expert evidence is to a degree discredited; the experience of the last few years has indicated no little increase in the number of feigned claims brought forward in tort cases; the difficulty of differentiating the spurious from the genuine is such that many very respectable jurisdictions operating in tort cases outside the Act,⁶ are evidencing no desire to change their rule denying liability where the genuineness of the claim is not guaranteed by some impact on the person; with the added ease whereby the layman under the non-technical procedure of Industrial Accident Boards may bring forward and make an issue of his nervous ills, actual or supposed, it is not believed that Accident Boards and Courts are calculated to be more fortunate in their experience with cases of this kind, than the Courts applying common law in tort cases generally. It is notorious that, in times of uncertain employment and reduced earnings, there is considerable malingering, and that too many of those out of work try to make capital out of old injuries, claiming aggravation or a recurrence thereof. The canon of liberal construction does not dictate that Board or Court be otherwise than duly cautious in such cases to the end that encouragement not be given to the preferring of claims other than for genuine injuries.

(f) Of “Horseplay” Cases and Others

With respect to “horseplay” and “slapstick” frolics by employees, on the premises, out of which injury arises, it is generally held that the case is non-compensable since the tenet “aris-

See Torts Restatement of the American Law Institute, Sections 312, 313 and 436, and explanatory notes to Tentative Draft, Sections 304, 311.
ing out of" the employment is not satisfied. If, however, the employee is performing the work he is employed to do, and is assaulted because of the work, incidents connected with it, or the manner of doing it, and receives injury, it is an accident arising in course of and out of the employment. The latter branch of the rule was applied in *Willis v. Pilot Butte Mining Co.* There a mine foreman shot and killed the station-tender; the deceased had signalled the engineer to hoist the cage to the surface instead of to the 2400-foot level as desired by the foreman; there was also evidence of bad feeling growing out of the discharge of an employee. It was held to be a compensable case, as an altercation or quarrel growing out of or connected with the employee's duties.

**Pre-existing Conditions**

With respect to a pre-existing condition the view generally taken is that an employer takes the employee subject to his condition when he entered the employment, and that compensation is payable for the whole of the disability although a part of it may result from the pre-existing condition.

Thus, in *Nicholson v. Roundup Coal Co.* a miner predisposed to heart disease died from shock as a result of passing from the high temperature of the mine (about 60 degrees), to the low temperature outside (28 degrees below zero), and was held to have a compensable case. Acceleration or aggravation, through the employment, of a sub-normal ailment satisfies the conditions of accident arising in course of and out of the employment, and it was no defense that the employee should have waited for the elevator since contributory negligence is not a defense under the Act. Likewise, in *Bardwell v. Three Forks Portland Cement Co.* it was held to be a compensable case where the employee suffered heat prostration while working, resulting in death, even though the employee had heart trouble at the time of the accident. And, in *Best v. London Guarantee & Accident Co.* one with a dormantly diseased gall-bladder, rendered active by injury to the liver incurred in the employment, was held to have a compensable case.

In *Murphy v. Industrial Accident Board* a workman unexpectedly encountered poisonous fumes due to dynamite set off a half-hour later than usual, the mine not having fully cleared. Bronchial irritation and illness followed, infection found its way

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*58 Mont. 26, 190 Pac. 124 (1920).*

*79 Mont. 358, 257 Pac. 270 (1927).*

*98 Mont. 483, 40 P. (2d) 43 (1935).*

*100 Mont. 332, 47 P. (2d) 656 (1935).*

*93 Mont. 1, 16 P. (2d) 705 (1932).*
into the blood stream, resulting in the workman's total disabil-
ity. His case was held to be compensable though he may have
been suffering from lung infection or latent condition which
was "lighted up" or "accelerated" by the fortuitous event oc-
curring in course of the employment.

In Moffett v. Bozeman Canning Co. it was recognized that
one might have a slight condition of gonorrhea in the system,
but if a weakened condition brought about by the work caused
it to take hold it would be held to be a compensable case.

But in Kerns v. Anaconda Copper Co. an employee was
held not entitled to compensation where for seven years he had
suffered from an ulcer on the leg, and about three weeks before
the accident in question, had a doctor perform a skin graft; the
Court decided that the rock alleged to have hit him after return-
ing to work, did not introduce the germs, but that the infection
was there before the accident, and that the cause of death was,
therefore, dehors the employment.

(h) Occupational Diseases

The usual interpretation of injury arising in course of and
out of the employment is that occupational disease is not cov-
ered by this language. The Montana Act provides that injury
refers only to an injury resulting from some fortuitous event
as distinguished from the contraction of disease. In Wiggins v.Indus-
trial Accident Board it was said to be synonymous with in-
dustrial accident. In Nicholson v. Roundup Coal Mining Co. this
view was affirmed, and it was said that accident includes (1)
cases of external mishap, as an explosion or collision, (2) cases
where a man injures himself internally, as a rupture or strained
back, or (3) cases where the workman is subject to special or pe-
culiar danger from the elements. No Montana case has interpret-
ed injury to include occupational diseases. Massachusetts is one

*95 Mont. 347, 26 P. (2d) 973 (1933).
*79 Montana 546, 289 Pac. 563 (1930). See also Anderson v. Amalgamated
Sugar Co., 98 Mont. 23, 37 P. (2d) 552 (1935); the case was held to be
non-compensable where the employee died from an infection of the
nose; aside from a deposition of a co-worker that a handle came off
a lever and hit the deceased on the nose, there was no direct evidence
that an accident occurred; both the Board and the District Court held
against claimant, and the Supreme Court invoked the rule that the
findings of the Board and the Court are not to be disturbed unless the
evidence clearly preponderates against them.
*Sec. 2870.
*54 Mont. 335, 170 Pac. 9 (1913).
*79 Montana 358, 257 Pac. 270 (1927).
*Evidence held to support finding of the Board that industrial acci-
dent did not cause pneumonia from which employee died, Doty v.
Board, 102 Mont. 511, 59 P. (2d) 782 (1936).
jurisdiction that has reached this result by decision, and broad legislation providing compensation has been passed in California, Connecticut, Illinois, Indiana, Hawaii, Missouri, New York, North Dakota, the Philippines, Wisconsin, Arkansas, and under the three Federal Laws, and to a limited extent in Delaware, Michigan, Kentucky, Minnesota, Nebraska, New Jersey, North Carolina, Ohio, Pennsylvania, Porto Rico, Rhode Island, Washington, and West Virginia."

Two types of statutes are found in different jurisdictions—a broad type applying to any occupational disease, and a narrower type confining coverage to a "schedule" setting out diseases which are typical of certain occupations and generally restricted to industrial activity. New York formerly limited compensation to twenty-seven specified occupational diseases; in 1935, Governor Lehman signed the Coughlin-McCaffrey Bill providing compensation for death or disability resulting from any occupational disease.

Few cases formerly arose at common law as to an occupational disease based on negligence of the employer, but proof of negligence was not limited to any one specific method. If the compensation law does not cover such injury it would appear to be the purpose of the law to preserve the common-law right. The trend is now, however, toward coverage in the Compensation Act. With the increased use of chemicals in industrial processes, it has become apparent that certain types of disease are as truly attributable to the circumstances of employment as are accidental injuries. A man who suffers from lead poisoning is as much the victim of his occupation as the man whose arm is severed by a high-powered machine. The chief problem now is whether there shall be complete coverage of all diseases or a limited coverage by schedule. Some State schedules cover only a small proportion of occupational diseases; no schedule covers


20American Association for Labor Legislation Bulletin Standards for Workmen's Compensation Legislation (1939), p. 9. The recently enacted Arkansas statute has both a general coverage proviso in its definition of "injury" (Sec. 2) and a schedule (Sec. 14) setting forth 15 diseases deemed occupational, including poisoning, under 24 subheads, anthrax, silicosis, miner's nystagmus, etc. Laws of Arkansas, 1939, Act 319, p. 777. New York also retains the schedule, Dodd, op. cit., p. 771.

21See Jones v. Rhinehart & Dennis Co., 113 W. Va. 414, 168 S. E. 482 (1933), and Barrencotto v. Cocker Saw Co., 266 N. Y. 139, 194 N. E. 61 (1932).
all; new ones develop. The story of the radium victims in New Jersey and of their experience under the occupational disease schedule of that state is illuminating. Many schedules omit diseases of the lungs caused by dust. The writers of these schedules, say some critics, knew all about silicosis, and deliberately omitted coverage. On the other side, a general coverage statute has not escaped criticism; litigation as to whether the disease is occupational in origin develops, and the advantage of swift action without recourse to legal tangles is largely lost. General coverage statutes will, however, probably become the rule, unless complete and flexible schedules are adopted.

VIII. THIRD PARTY LIABILITY: HEREIN OF SUBROGATION

In all but three states, namely New Hampshire, Ohio, and West Virginia, the compensation laws contain provisions regarding third party liability, and in these three the Courts recognize the right of the injured party to sue the negligent third party for damages. A third party act should not militate against immediate medical or hospital service for the injured employee, nor prompt commencement of and full compensation under the Compensation Act; at the same time, the employer should not be penalized because his employee is injured through the negligence of a third party. Less clear is the right of the employee to control the third party suit, and his right to an excess over the compensation paid under the Compensation Act. If the employee both has the right to an excess, if there is one, and the employer is also to bear a deficiency, if there is one, between what is recovered in the third party suit and what others suffering the same injury receive under the Compensation Act, the third party statute is, at any rate on this point sufficiently liberal from the standpoint of the employee.

Nineteen jurisdictions have third party liability statutes which, in large measure, advance the purposes herein indicated. Among these should be classed the 1933 Montana Act. Thirteen jurisdictions have statutes where the purpose, with variation as to details, is an election of remedy as in the 1915 Montana Act. In nine, election is necessary, except that, if the employee sues the third party, the employer remains liable for any deficiency between the amount of recovery in the third party

See 24 American Labor Legislation Review, p. 120 (1934).
suit and the compensation provided under the Act. There are more or less individual variations in other jurisdictions. In the history of this subject, three chapters are to be noted in Montana. From 1915 to 1925 the act was made the exclusive remedy unless the injury to the workman occurred away from the plant of his employer and was based on the negligence or wrong of another not in the same employ; in the latter case the workman might elect whether to take under the Act or seek his remedy against the third party. "Plant of the employer" was defined as including the place of business of a third person while the employer had access to or control over such place of business for the purpose of carrying on his usual trade, business, or occupation. Under this state of the law arose the common-law tort actions of Bruce v. McAdoo, Director-General, and Black v. Northern Pacific Ry. Co., in which the Court denied recovery against the railway defendant, since the employer coal company had access to the railway property on which the accident occurred as a part of the coal company "plant," from which it followed that the Workmen's Compensation Act was the exclusive remedy to be applied.

In 1925 the legislature abolished the elective provision under the limitations of the earlier Act and from 1925 to 1933 the Act constituted the exclusive remedy for all cases irrespective of place or cause of the accident. In this state of the law arose the case of Clark v. Olson, in which it was held that a city street cleaner who was run over by an auto while at work on the city streets had no common-law right to sue the negligent third party, such right having been abolished.

In 1933 the law was amended to provide anew for third party liability. This legislation declares the Act to be the exclusive remedy except for an accident caused by the act or omission of some person or corporation other than the employer under the following limitations: Where the employee receives injury while performing the duties of his employment, and the cause of the injury has no direct connection with the employee's regular employment, and does not arise out of same, or necessarily follow as an incident of his regular employment. In such case, it is provided that the employee, or his representative, shall, in addition to the right to compensation under the Act,

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106 See the statutes classified in Dodd, op. cit., p. 607.
107 Sec. 2833.
108 Sec. 2889.
109 85 Mont. 275, 211 Pac. 772 (1922).
110 66 Mont. 538, 214 Pac. 82 (1923).
111 96 Mont. 417, 31 P. (2d) 283 (1934).
have a right to prosecute a damage action against the person causing the injury. But the claimant must bring the action within six months of the time the injury was received, and the expense of the action is to be borne by the claimant. The employer, or insurance carrier, is to be subrogated to the extent of one-half the gross amount received by the claimant as compensation under the Act, and this is declared to be a lien on the proceeds of recovery. If the action is not brought by the employee, or his representative, within the stated six months period, the employer, or insurance carrier, may thereafter sue the third party in a common-law action, and so become entitled to all the amount received in such action, up to the amount paid the employee under the Act; all over that amount to be paid the employee."

Under this state of the law arose the case of Kopfang v. Sevier, holding that the widow of a highway flagman, who was struck by a passing auto while working, could maintain a common-law tort action against the driver of the car. Counsel, in brief and argument, devoted much time to analyses of the phraseology "cause of such injury," "caused by the act or omission of some person... other than his employer," "no direct connection with his regular employment...," and "does not arise out of or necessarily follow as an incident thereof." Said the Court:

"We do not attach great importance to this technical phase. The words must be understood in the light of the full context of the chapter and construed in accordance with the statutory rules already mentioned. To put it in another way, they must be taken to mean something practical, reasonable, and consonant with the declared intention of the legislative body. An important feature of compensation is that industry should care for its own man power wrecked by labor in the industry, just as it must bear the expense of wreckage of machinery, but industry need not always stand the expense of wreckage by independent tortfeasors, or workmen under the Act be held to waive or forego causes of action arising out of something foreign to the risk involved in their ordinary duties.""
The 1933 Montana Act is more favorable than most from the standpoint of the employee; it does not sacrifice the principle of certainty and promptness of full compensation benefits and payments under the Compensation Act; it allows the employee to control the third party action for a first period of six months, thus obviating compromise by employer, or carrier, at precisely the compensation figure; it furnishes an incentive to the employee to exercise this control in the speculative chance of a common law recovery, subject only to the employer's taking out one-half the compensation paid, and subject to the employee's bearing the expense of the action; after the six months' period, the employer controls the action, but the employee is entitled to any excess recovered over the compensation paid under the Compensation Act. These are believed to be substantial gains. The Act has, however, the disadvantage of defective draftsmanship. The cause of action must necessarily have direct connection with the workman's regular employment, and it must arise out of that employment; otherwise, the workman would not be entitled to compensation under the Act. Yet having secured his compensation under the Act, the legislation provides that he may sue the third party if the cause of the injury has no direct connection with his regular employment, and does not arise out of same; a contradiction in terms. If the intent was to differentiate stranger third parties and employees or others also under the Compensation Act, apt language could have been used to that end without introducing a seeming impasse to compensation under the Act and suit against the third party. It is believed that the Court wisely placed its decision on the ground of the full context of the chapter and the wider purposes of the legislation.

IX. TIME LIMITATIONS ON CLAIMS

Prior to 1935 the Act provided that claims must be presented within six months of the date of the happening of the accident. By the 1935 Amendment, the period was made twelve months. Compensation scale in cases under the Employer's Liability Act, see Chenoweth v. Great Northern Ry. Co., 50 Mont. 481, 148 Pac. 330 (1915). In Chancellor v. Hines Motor Supply Co., 104 Mont. 603, 69 P. (2d) 764 (1937), the Court held that since the element of pain and suffering is not taken into account in fixing compensation under the Act, the awards allowed under it do not furnish a "yardstick" to measure damages in a common law case where the employer had elected not to come under the Act. A judgment of $3000 for loss of finger and impaired use of hand was affirmed.

For text of the third party acts, see SCHNEIDER, op. cit., p. 343.

Sec. 2899.
months. Under the six months limitation period arose Chmielew ska v. Butte & Superior Copper Co. In this case, the widow of a Pole, who resided near Warsaw, Poland, was held not to have a compensable claim, the papers having been filed with the Board, October 16, 1925, her husband having died January 12, 1925. The Court said there was no room for construction of the Act, the six months proviso being mandatory. A case of delayed application such as this was, however, to be differentiated from a case of bona fide, though defective, application; in the latter case the defect could be corrected after the lapse of the limitation period. In Chisholm v. Vocational School for Girls, et al, the original claim within six months was unverified; it was held that, after correction of the defect, it could be returned after the six months period.

In Lindblom v. Employers' Liability Assurance Corporation it was held that the insurance carrier was equitably estopped to set up claimant's failure to file within the six months period, since defendant's agent repeatedly advised claimant that his claim would be taken care of, leading claimant to believe that a written claim would not be required until it was too late to file it.

In Williams v. Anaconda Copper Co. claimant sought to show waiver by defendant of the necessity of filing within the statutory period, but the Court held waiver to be a matter of intent, and the facts disclosed no intent to waive by defendant.

The Act requires notice in writing to employer, or insurer, within thirty days of the accident, for injuries not resulting in death, unless the employer, his managing agent, or superintendent, has actual notice of the accident. In Maki v. Anaconda Copper Mining Co. this provision was held mandatory; failure to give the notice, in a case where the evidence failed to establish actual notice on the part of the persons named, barred the injured workman of recovery.

The Act provides for adjustment of compensation in case

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1181 Mont. 36, 281 Pac. 616. (1927).
11103 Mont. 503, 64 P. (2d) 883 (1937).
11188 Mont. 488, 205 Pac. 1007 (1930).
11196 Mont. 294, 29 P. (2d) 649 (1934).
111Sec. 2935. Actual knowledge is the equivalent of service, Roundup Coal Mining Co. v. Industrial Accident Board, 94 Mont. 386, 23 P. (2d) 253 (1933); but mere knowledge that employee became sick while at work is not actual knowledge; likewise, as to doctor's certificate that employee was sick and unable to work. Magelo v. Industrial Accident Board, 102 Mont. 455, 59 P. (2d) 785 (1936).
11187 Mont. 314, 287 Pac. 170 (1930).
111Sec. 2923.
of further injury to a workman already receiving compensation, or who has previously received compensation. In McDaniel v. Eagle Coal Co. et al., it was held that a miner was entitled to compensation as for a total permanent disability (500 weeks less previous payments) where, in course of employment, he lost his left eye, receiving therefor full compensation under the Act, and nine years later while working under another employer he suffered an accident destroying the vision of his right eye. The Court indicated that the canon of liberal construction required this result, notwithstanding Section 2920, which provides that proof of the loss of both eyes in one accident makes a strong prima facie case of total permanent disability, and another provision of Section 2920, that total blindness of one eye entitles claimant to award of not more than 100 weeks.

The Act provides for adjustments in the rate of compensation where aggravation, diminution, or termination of disability takes place after the rate of compensation shall have been established.

In Shugg v. Anaconda Copper Mining Co., it was held that this provision did not permit a renewed application for compensation, on a new theory of injury, and that in any event the claimant was barred by Section 2952, providing that the Board shall not have power to rescind, alter, or amend any final settlement or award more than two years after it has been made.

In Meznarich v. Republic Coal Co. is was held that no case in which compensation has been awarded shall be finally closed until the maximum period of payments for the disability for which the award was made has expired, except with respect to a final settlement after the expiration of two years from date of the order awarding compensation and in cases involving a compromise settlement.

It is provided in the Act that if one receiving compensation for injury dies thereafter, as a result of the accident, compensation shall be paid as though death occurred immediately after the injury, but the period for death benefit shall be reduced by the period during which compensation was paid for injury; also his beneficiary or dependent, major or minor, shall be determined as of the date of the accident.

1Mont. 309, 43 P. (2d) 655 (1935).
2Sec. 2924.
3100 Mont. 159, 46 P. (2d) 435 (1935).
4101 Mont. 78, 53 P. (2d) 82 (1935).
5Sec. 2905
X. PROVISION FOR MEDICAL CARE

About twelve western states have adopted some form of contract provision under which medical care is furnished employees on the basis of pay-roll deduction. Such a plan is calculated to work well for industry in isolated communities where the inducement to physician or hospital would otherwise be rather meagre.

The Montana Act provides that no assessment for hospital contracts shall exceed $1.00 per month for each employee, and they shall be filed with the Board, and are subject to its approval. The Act further provides that the contract must provide for medical and hospital attendance for sickness contracted during the employment, except venereal disease, and as a result of intoxication, as well as for injuries arising out of and in course of the employment. In Murray Hospital v. Angrove an employee was struck by an auto enroute to his work though he was over a mile away from the employer’s plant at the time. He entered the Murray Hospital which had a hospital contract with the employer; later the hospital sued and recovered a $25.00 judgment against the employee for an alleged hospital bill. On appeal to the Supreme Court, the decision was reversed. It was held that “sickness,” in Section 2907, should be interpreted in its popular significance; that it is, therefore, any affection of the body which deprives it temporarily of its power to fulfil its usual function, or a condition interfering with usual avocations, and that it was not to be limited to an injury arising in course of and out of the employment. The Montana Act was regarded as peculiar and exceptional in extent, and an advanced measure in providing wide coverage hospitalization for “sickness.” The Court was careful to point out that Section 2917 of the Act provides that, during the first six months after an injury to an employee, medical and hospital services not to exceed $500.00 are to be furnished by the employer, the insurer, or the Board, but that this would be limited to injury arising in course of and out of

192 Mont. 101, 10 P. (2d) 577 (1932). In Sample v. Murray Hospital, 103 Mont. 105, 62 P. (2d) 241 (1936), the jury returned a verdict of $3000 for failure of the hospital obligated under a hospital contract to receive the deceased; the Supreme Court held that under Sec. 2910 it is a question of law whether or not the hospital and its doctor improperly refused to receive the patient; if the failure to receive was on sound and reasonable grounds in that the patient was too sick to move, there would be no liability; the case was reversed because trial of the issue should have been by the Court.

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the employment. The inducement to employees to enter into hospital contracts and permit deduction from their pay-checks, must, therefore, be found in the wider interpretation to be given to "sickness" as found in Section 2907.

An intermediate position appeared possible in that, though not limited to injury arising in course of and out of the employment, "sickness" might be interpreted in its technical scientific sense as arising from a pathological condition, and affecting the organs of the human body; breaking a leg would be compensable under an accident policy but not under a sick benefit policy, it was said. It is believed that the Court properly rejected this view and interpreted sickness according to common understanding and especially according to the understanding of the insured.

XI. COMPENSATION BENEFITS

At the beginning of 1932, twenty-six states granted 60% or more of wages; Wisconsin having the highest percentage at 70, while the generally accepted standard was 66⅔%. Porto Rico was the only territory allowing under 60%, and all three Federal Laws gave 66⅔%. Eighteen states, three Federal Laws, and one territory, had a weekly maximum of $18.00 or more. The states of Wisconsin and Arizona, and the territory of Alaska, were the only jurisdictions which did not place any fixed maximum upon the weekly amount of compensation possible. The presence of such a fixed maximum has the effect of greatly reducing the scale of compensation benefits even in the most liberal jurisdictions.12

What of the Montana Law?

(1) In cases of death, the Act13 provides, for one beneficiary, 50% of the wage received at the time of injury, subject to a $15.00 weekly maximum; for two beneficiaries, 55% of such wage with a $17.00 weekly maximum; for three beneficiaries, 60% of such wage with an $18.00 weekly maximum; for four beneficiaries, 62½% of such wage with a $19.00 weekly maximum; for five beneficiaries, 65% of such wage with a $20.00 weekly maximum; for six or more beneficiaries, 66⅔% of such wage with a $21.00 weekly maximum. The maximum number of weeks allowed is 400; thus, $21.00 times 400 or $8,400.00 is the maximum award in case of death. The minimum weekly award is $8.00. The awards are, however, less liberal for beneficiaries

12Dodd, op. cit., p. 48.
13Sec. 2913.
residing outside the United States, and they are also less liberal for major and minor dependents (limited to such residing in the United States) than for beneficiaries.\(^2\)

(2) In cases of permanent total disability,\(^2\) the amount varies from a low of 50% of the weekly wage and a maximum of $15.00 per week, to a high of 66 2/3% of the weekly wage and a maximum of $21.00 per week, depending partly on residence within or outside the United States, and largely on the number of children, if any, together with surviving spouse, or father, mother, brothers, and/or sisters, who would be entitled to compensation in case of death. The compensation is to be paid during the period of disability, but for not longer than 500 weeks. Thus, the maximum is $21.00 times 500, or $10,500 for total permanent disability.

(3) In cases of temporary total disability,\(^2\) the amount varies from a low of 50% of the weekly wage subject to a $15.00

\(^2\) The Act, Sec. 2892, provides that the right to compensation of beneficiaries, or major or minor dependents, ceases upon death, or if the widow or widower remarry. The contingency of a widow's remarrying was held in Cogdill v. Aetna Insurance Co., 90 Mont. 244, 2 P. (2d) 292 (1931), to be a factor to be taken into account in estimating the present worth of a lump sum settlement. In Davis v. Industrial Accident Board, 92 Mont. 503, 15 P. (2d) 919 (1932), it was held that a widow who had remarried was without power to sign an application for conversion into a lump sum settlement, being no longer a beneficiary under the Act.

\(^2\) Sec. 2913. In Dosen v. E. Butte Copper Mining Co., 78 Mont. 579, 254 Pac. 880 (1927), it was held that disability is not total where claimant's earning power is not wholly destroyed; in such case he must make an active effort to procure work which he can still perform. In Sykes v. Republic Coal Co., 94 Mont. 239, 22 P. (2d) 157 (1933), and Meznarich v. Republic Coal Co., 101 Mont. 78, 53 P. (2d) 82 (1935), disability is held to be permanent if it be shown that injured party will suffer disability for an indefinite period; that it will be long continued, not necessarily eternal or everlasting. See also McDaniel v. Eagle Coal Co., et al, 99 Mont. 309, 43 P. (2d) 655 (1935) (a case involving loss of both eyes).

\(^2\) Sec. 2912. In Dosen v. E. Butte Copper Mining Co., 78 Mont. 579, 254 Pac. 880 (1927), it was held that the period of temporary total disability, for which compensation is prescribed by Sec. 2912, is the temporary period immediately after the accident during which the employee is totally incapacitated for work by reason of the illness attending the injury, the healing period; if complete recovery then ensues, compensation ceases; if that total disability proves permanent, payment is governed by Sec. 2913; if only partial, he is also entitled to compensation provided for in such a case within the limitations prescribed. In Lunardello v. Republic Coal Co., 101 Mont. 94, 53 P. (2d) 87 (1935), and Meznarich v. Republic Coal Co., 101 Mont. 78, 53 P. (2d) 82 (1935), it is held that if one is not still able to earn something as wages, disability is total. In Sullivan v. Anselmo Mining Co., 82 Mont. 543, 268 P. 495 (1928), claimant was, on the facts, limited to $15.00 weekly for 50 weeks, for temporary total disability.
weekly maximum, and running to a high of 66\(\frac{2}{3}\)\% of the weekly wage with a maximum of $21.00 weekly, under conditions similar to those set forth in (2), \textit{supra}. The compensation is payable during the period of disability, but for not longer than 300 weeks. Thus, the maximum is $21.00 times 300 weeks or $6,300.00 for temporary total disability.

(4) \textit{In cases of partial disability,}\textsuperscript{19} the amount varies from a low of 50\% of the difference between the wage received at the time of injury, and the wage the employee is able to earn thereafter, subject to a $15.00 weekly maximum, and running to a high of 66\(\frac{2}{3}\)\% of this difference with a maximum of $21.00 weekly, under conditions similar to those set forth in (2), \textit{supra}. The compensation may not run for more than 500 weeks in cases of permanent partial disability, nor for more than 50 weeks in cases of temporary partial disability.

(5) \textit{Under the loss of member section of the Act,}\textsuperscript{20} thirty-seven specific injuries are specified; compensation is awarded running from three weeks for loss of the fourth finger at the distal joint, to 200 weeks for loss of the leg at or near the hip joint, or of the arm at or near the shoulder, and varying from 50\% of weekly wage to 66\(\frac{2}{3}\)\% thereof, under conditions varying as in (2), \textit{supra}.

The Montana scale of compensation, therefore, compares favorably with that to be found in our sister States. The \textbf{American Association for Labor Legislation} in its \textit{1939 Standards for Workmen's Compensation Laws},\textsuperscript{21} however, suggests a $25.00 maximum weekly for total disability (minimum $10.00),

\textsuperscript{19}Sec. 2914. In Novak v. Industrial Accident Board, 73 Mont. 196, 235 P. 754, (1925) Sec. 2914 was construed as providing a maximum for permanent partial disability, through an injury to the arm from the elbow down, of $12.50 weekly for 180 weeks, the amount to be divided into payments over a period of not to exceed 150 weeks. Sykes v. Republic Coal Co., 94 Mont. 239, 22 P. (2d) 157 (1933) (partial disability, permanent in character where there is loss of a member of the body, is compensated under Sec. 2920; such disability caused by injury other than loss of member of body is covered by Sec. 2914).

\textsuperscript{20}Sec. 2920. Dosen v. E. Butte Copper Mining Co., 78 Mont. 578, 254 Pac. 880 (1927) (where amputation of a member of body becomes necessary, the compensation provided by Sec. 2920 is exclusive, but is in addition to that before paid under Sec. 2912 for temporary total disability); Rom v. Republic Coal Co., 94 Mont. 250, 22 Pac. (2d) 161 (1933) (for loss of a foot, the compensation under Sec. 2920 is in lieu of any other compensation, and therefore additional compensation during the "healing period" may not be allowed); Dosen v. E. Butte Copper Mining Co., 78 Mont. 578, 254 Pac. 880 (1927) (compensation for permanent partial disability and also for specific loss of use of member of body under Sec. 2920 cannot be awarded where both result from the same injury).

\textsuperscript{21}Pages 4 to 6.
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a $25.00 maximum weekly for partial disability (subject to adjust-
ment), and a weekly maximum of $37.50 for death (mini-
mum $15.00); also that aliens should be placed on the same foot-
ing as other dependents.

XII. BENEFICIARY AND MAJOR
AND MINOR DEPENDENTS

The present law, as amended in 1925, provides in case of
death, awards in the following order:

(1) To a beneficiary or beneficiaries of the deceased, de-

fined as including the surviving spouse, and a surviving child
or children under eighteen, and an invalid child or invalid chil-
dren over eighteen, if dependent on the deceased for support
at the time of injury.

(2) If there be no beneficiary, award is to be made to a
major dependent or major dependents, if any, defined as the
father or mother, or the survivor of them if actually dependent
on decedent at the time of the injury and to the extent of the
dependency, not to exceed, however, the maximum compensation
provided in the Act.

(3) If there be no beneficiary or major dependent, award
is to be made to a minor dependent or minor dependents, de-

fined as brothers and sisters under eighteen, and invalid broth-
 ers and sisters over eighteen, if (as to the invalid brothers and
sisters) they are actually dependent on decedent at the time of
the injury. Minor dependents are to be awarded compensation
to the extent of the dependency, not however, exceeding the
maximum compensation provided in the Act.

(a) Beneficiaries. In Kearney v. Board the Court held
a surviving husband a beneficiary under Section 2865. The evi-
dence showed that for a year the husband had depended on the
wife's earnings for support, he having no property or independ-
ent income. He was afflicted with rectal trouble and was totally
disabled. While he might be cured by an operation, the Court
invoked the principle that it was not the possible future but the
existing situation as of time of the accident which should con-
trol.

In Elliot v. Industrial Accident Board the claimant was

Sections 2865 to 2867, Inc. LAWS OF MONTANA, 1937, ch. 53, p. 93,
amends the statute to include orphan children or brothers and sisters
under twenty-one.
90 Mont. 228, 1 P. (2d) 69 (1931).
101 Mont. 246, 53 P. (2d) 451 (1936).
held entitled to compensation as widow of the deceased, on the
ground that she had entered into a common law marriage with
him after having previously divorced him, continuity of the mar-
rriage from the date of the original ceremonial marriage, said the
Court, was not required.

In Goodwin v. Elm Orlu Mining Co., et al,\textsuperscript{14} the widow of
decedent had not been living with him for four years prior to
his death. The Court recognized that, though unsupported by
him at the time of the injury, if she was legally entitled to his
support, she had a compensable case. The holding was, however,
that her refusal to return to her husband, because he declined to
keep her son by a former marriage who was capable of caring
for himself, was unreasonable and constituted desertion on her
part; that she was not, therefore, legally entitled to his support.
A decree that compensation should be paid to the mother of de-
cedent followed.

(b) Major dependents. In Ross v. Industrial Accident
Board\textsuperscript{15} the father and mother were awarded $40.00 monthly as
major dependents, the Court defining “dependent” as one who
looked to deceased for support in some measure or to some ex-
tent, this not depending on whether the claiming dependent
could support himself without decedent’s earnings or reduce his
expenses so as to avoid assistance, but whether he was, in fact,
supported in whole or in part by decedent’s earnings under cir-
cumstances indicating the intent of deceased to furnish the sup-
port, the need of claimant being more important than the ex-
tent of contributions theretofore made.

In Edwards v. Butte & Superior Mining Co.\textsuperscript{16} a mother was
held entitled as major dependent to 400 weeks compensation at
$15.00 weekly, where with two minor children her monthly ex-
penses were $100; her only income consisting of a $16.00 monthly
pension and intermittent earnings of one of the children
amounting occasionally to $7.00 weekly; her health not permit-
ting her to secure employment.

In Betor v. National Biscuit Co.\textsuperscript{17} it is said that to be a “de-
pendent” actual dependency is indispensable; this does not in-
clude the maintenance of others to whom one is not legally obli-
gated, nor contributions to the donee to enable him to save mon-
ey; dependency is judged according to the class and position in
life of the alleged dependent. It was, therefore, held that a
mother could not receive compensation as a dependent of her

\textsuperscript{14}83 Mont. 152, 269 P. 403 (1928).
\textsuperscript{15}106 Mont. 486, 80 P. (2d) 362 (1938).
\textsuperscript{16}83 Mont. 122, 270 Pac. 634 (1928).
\textsuperscript{17}85 Mont. 481, 280 Pac. 641 (1929).
son where she was living with her husband who was amply able to support her, though the deceased had occasionally contributed sums of money for her use.

(c) Minor Dependents. In Morgan v. Butte Central Railway Co. it was held that a forty-nine year old brother was not a minor dependent (i.e., an invalid) where the evidence showed that for six weeks before the accident he was employed at $4.00 per day in a clerical position. The Court again found that on the question of dependency it is not the problematical future of the claimant, but the existing situation at date of accident, or the past, slightly before that date, which constitutes the test; also, that voluntary contributions of $30.00 per month are not evidence of dependency.

XIII. PLANS OF INSURANCE

Under the Montana Act three plans of insurance are available to the employer:

Under plan 1st he may carry his own insurance. This is dependent on his satisfying the Board of his solvency and financial ability to meet prospective claims; the Board may also require security of the employer in the form of state, local government, and corporation bonds, or undertaking with two or more sureties.

Under plan 2nd the employer shall file with the Board a policy or policies of insurance issued by a private casualty company adequate to take care of prospective claims for the ensuing fiscal year. Moreover, the insurer is required to deposit with the treasurer of the Board $5000 to $20,000 worth of United States, Montana State, or Montana Local Government Bonds, in amount to be determined by the Board within these limits, as security for the payment of claims.

Under plan 3rd the employer may pay into the State Industrial Accident Fund a sum computed on the basis of his total annual pay-roll, calculated to take care of prospective claims, and based upon the type of business in which the employer is engaged.

Eleven states give the employer a choice of three methods by which to insure his compensation liability. Twenty-four states and Hawaii give him only two alternatives, that of self-insurance

1458 Mont. 633, 194 Pac. 496 (1920).
147Sec. 2970.
144Sec. 2974.
145Sec. 2978.
150Sec. 2990.

Speaking more than ten years ago, Mr. E. H. Downey said:

"The respective advantages and defects of these several forms of insurance—state monopoly, state competitive, private stock and private mutual—are debated with much passion by advocates whose zeal in the public good is sharpened by pecuniary interest. Spurious arguments, drawn from irrelevant social theories, are made to do yeoman duty in the cause of propaganda, and the pertinent facts are obscured by the dust of controversy."

Rates are important; so also, is prompt payment; security is all-important. It has been estimated that stock company insurance is four times as expensive as monopoly insurance in a state fund, and more than twice as expensive as competitive mutual insurance; that the administration of an exclusive state fund will cost 15% of benefits, while it costs not less than sixty cents to carry one dollar of compensation to the injured workman, or dependents, through stock companies, and not less than twenty-five cents to pay one dollar of compensation through competitive mutuals. But state funds have been known to sacrifice adequate service because of reduced personnel. And more important than rates or service is security.

During the depression years, especially from 1931 to 1933, the failure of eighteen stock companies resulted in appalling suffering for thousands of wage earners, their families, and survivors. The record discloses few failures of mutual companies, but they write a much smaller proportion of compensation insurance than the stock companies. No losses have been sustained through state funds, either monopolistic or competitive, although Washington and West Virginia have, at times, made loss payments in warrants instead of cash. But state funds have not always been on a safe actuarial basis; political rather than actuarial considerations have, at times, influenced the rate. If, however, a state fund either monopolistic or competitive, were unable to meet its obligations, the interested groups would almost certainly have enough strength to obtain payment from the public treasury. While politics is a weakness, it is probably also a safeguard against loss to the employee.

[DODD, op. cit., p. 514.]
[DOWNEY, op. cit., p. 117. See also p. 88.
[DODD, op. cit., p. 557.
[25 DODD, op. cit., p. 560.]
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XIV. LUMP SUM CONVERSION

Fifty-two Compensation Acts provide in some form for lump sum settlements; in all the Acts except the Philippines, such settlement must have the approval of Board, Commission, or Court. Thirteen provide that there may be such settlement when for the best interest of both parties; fourteen, when for the best interest of either party; seven, when for the best interest of the insured or the beneficiary.16

What is needed in these cases is adequate investigation of the necessity for lump sum payments and adequate follow-up to the end that the money be wisely invested or expended. A wage-earner, or his family, has had little experience with the handling of considerable sums of money.

Too often settlements have been made because an insurance carrier feared a disability might recur or increase; or because an attorney desired a fee; or because of the interest of runners, pseudo-friends, or leeches; or simply because worker or beneficiary wanted the money.

The New York Commission17 has a rehabilitation division, whereby need is not only adequately investigated, but a constructive supervised plan is worked out for the recipients' handling of the money. About fifty such recipients each year have been placed on dairy, poultry, or vegetable farms; some have been encouraged to buy homes, and the division has investigated the circumstances of title, mortgage, and value of the property. If the money is placed in savings or commercial banks, oftentimes consent of the worker or beneficiary is asked to the end that signature of a member of the division along with that of the beneficiary be secured when the money is withdrawn. In such ways, the division has helped materially in keeping the money out of the hands of swindlers.

The Montana Act18 gives the Board authority to convert the monthly payments into a lump sum in whole, or in part; the lump sum payment shall not exceed the estimated value of the present worth of the deferred payments capitalized at the rate of five per cent per annum; the injured workman or beneficiary, or dependent, must make written application for the conversion, and the matter then rests in the discretion of the Board.

16Id., p. 721.
18Sec. 2926.
In *Davis v. Industrial Accident Board* it is said that the legislative intent was that the monthly payment plan should be the rule and the lump sum settlement the exception. There, a widow, having two minor children, remarried, and thereafter wrote the Board a letter applying for a lump sum settlement so that she could buy a farm; the Board granted the request; later she died, having in the meantime dissipated the lump sum settlement money, and leaving no provision for the minors. It was held that she was no longer a beneficiary after her remarriage, and that compensation must be awarded the minors upon the application of a guardian appointed for them. Said the Court:

"No particular form of application is prescribed. Certainly, an application containing a comprehensive statement of the facts upon which it is based, and naming those entitled to receive compensation would be much more satisfactory. The application must be signed by the beneficiary."

"One month's payment may be squandered, and yet the dependents not become public charges; in the lump sum settlement plan, if the whole compensation be squandered an entirely different situation results, and the very purposes of the Act defeated. A parent, may under Section 2898, receipt for one month's payment, and such receipt protects the Board, but it does not follow that the same parent will judiciously invest or carefully husband and expend the moneys derived from a full lump sum settlement."

In *Cogdill v. Aetna Life Insurance Co., et al.*, counsel re-
lied on the decisions in five sister states to the effect that the consent of the parties is necessary to a lump sum conversion, but the Court held that the Act reads differently, making it discretionary with the Board on written application of the person entitled regardless of consent or objection of insurer or employer. There, a widow applied for lump sum conversion, alleging her need of medical and surgical attention without Montana; she contemplated going to a doctor in Portland, Oregon. The Court noted that fraternal statistics show that more than fifty per cent of the insurance money paid to widows and orphans reaches the hands of swindlers, and reversed the District Court judgment which affirmed the action of the Board. The higher Court took the position that the right of applicant’s ten-year old child must be safe-guarded; that Section 2898 does not authorize treatment of the entire amount due them as belonging to the mother alone, nor conversion thereof into a lump sum at the mother’s request, since an undivided portion thereof belongs to the child.

Said the Court, "Deferred payments in Section 2926, mean such payments as would ordinarily become payable in the natural course of events, taking into account the expectancy of the beneficiary; commutation may not be made where the weekly compensation sought to be commuted may never exist." Decision was reserved on the question of whether a widow may in the ordinary case (i.e., where the matter is not complicated by children), have the monthly payments converted into a lump sum; if so, it was agreed, that the contingency of remarriage would be a prime factor in the evaluation to be placed on the lump sum settlement as determined by reference to tables of vital statistics, or remarriage tables, in quite the same way that mortality tables are used to measure life expectancy.

It is believed that the Court wisely regards lump sum conversions to be the exception. A fund payable in installments similar to, and in lieu of, the weekly pay-check should be the rule. The public also has an interest; increased operating costs are passed on to it under the compensation system. If the worker or beneficiarly unwisely invests or squanders a lump sum and must apply anew to the Board or resort to public charity, the public is to that extent saddled with an additional burden.

XV. TRIALS DE NOVO

In Montana, the statute¹ provides for certifying the record of the hearing before the Board to the District Court which tries

¹Sec. 2960.
the case de novo on that record, unless, for good cause shown, the Court allows the introduction of additional evidence within the Court’s discretion; if additional evidence is admitted, the District Court’s decision is to be based on the record plus the additional evidence. It is unusual to speak of trying the case de novo on the record made before the Board. What is intended is that the Court arrive at its conclusion independently of the Board’s findings. The trial is a re-examination and re-determination; if upon the record of the Board, it is in the nature of review; if the Court permits additional evidence, the trial is to that extent de novo.

In Willis v. Pilot Butte Mining Co. it was said that the function of the District Court is more that of review than trial anew. But in Dosen v. E. Butte Copper Mining Co. and Nicholson v. Roundup Coal Co. the Court gave expression to the rule, as followed in later cases, to the effect that if the Court permits additional evidence the trial is to that extent de novo. It is the duty of the District Court to render its own judgment; preferably the Court should set aside the Board’s findings and make a finding of its own on the Board’s record, when new evidence is introduced before the Court.

The question will be presented as to whether the trial Court has validly exercised its discretion in allowing the introduction of additional testimony, and the Supreme Court has indicated that the statute in no case permits a full trial de novo; that an informal presentation of persuasive reasons why additional testimony should be taken, made in the presence of opposing counsel who thus has an opportunity to be heard, is a sufficient showing of good cause.

XVI. ATTORNEY’S FEES

The Act formerly provided that the Board shall have the power to fix and determine the amount of attorney’s fees to be allowed in proceedings had before it, where an attorney appears

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58 Mont. 26, 190 Pac. 124 (1920).
78 Mont. 579, 254 Pac. 880 (1927).
79 Mont. 358, 257 Pac. 270 (1927).
Rom v. Republic Coal Co., 94 Mont. 250, 22 P. (2d) 161 (1933).
Sykes v. Republic Coal Co., 94 Mont. 239, 21 P. (2d) 732 (1933). Where there is conflict in the evidence before the Board, the District Court may not reverse the Board, unless the evidence clearly preponderates against the findings of the Board. Kelly v. West Coast Construction Co., 106 Mont. 463, 78 P. (2d) 1078 (1938).
Sec. 2953.
before it. In *In re Maury, et al.*, it was held that by failing to provide as to what fund the fee shall be paid from, or in whose favor, or against whom it shall be allowed, the legislation is so vague and uncertain as to be void. In 1937 the Act was amended so that it now provides that "whenever the claimant or plaintiff is represented by an attorney, either before the Board, or the Courts, the Industrial Accident Board, may, in its discretion, or upon the application of the claimant or plaintiff, fix the amount of the attorney fee of the attorney representing the claimant, or plaintiff, and the fee fixed by the Board shall be paid by the claimant or plaintiff."

**XVII. EXECUTION CREDITORS’ RIGHTS**

A claimant cannot enforce payment of a compensation award by issuance of an execution against property of the employer, since the method prescribed by statute which authorizes collection of the award from securities deposited by the insurer with the Accident Board is exclusive. It is also provided that no payments under the Act shall be assignable, subject to attachment, or garnishment, or be held liable in any way for debts.

**XVIII. CONCLUSION**

Montana Workmen’s Compensation decisions are a study in progressive liberal interpretation. If the early decisions are sometimes difficult on principle when compared with the later ones, the difficulty inheres in the more individualized nature of tort law, together with a wider conception and acceptance of the compensation principle. A study of state acts reveals considerable diversity. Caution must be used in transferring precedents from jurisdiction to jurisdiction because of difference in statutory wording. Many of the early acts were prepared experimentally and to obviate constitutional difficulties real or supposed.

After some thirty years experience we now have a considerable body of informed opinion as to the most desirable principles. It would seem that the situation is ripe for a model Act similar in character to the Uniform State Laws, as also for a

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*m97 Mont. 316, 34 P. (2d) 380 (1934).*

*m1937 Ch. 162.*

*State ex rel. Murray Hospital v. District Court, 102 Mont. 350, 57 P. (2d) 813 (1936).*

*Sec. 2927.*
restatement of principles comparable to that being worked out in other fields by the American Law Institute. Toward these objectives, the International Association of Industrial Accident Boards and Commissions, the American Association for Labor Legislation, the United States Bureau of Labor, and the American Federation of Labor, have made valuable contributions."

"The following cases enunciate the canon of liberal construction: Dos-en v. E. Butte Copper Mining Co., 78 Mont. 579, 254 Pac. 880 (1927); Herberson v. Great Falls Coal & Wood Co., 83 Mont. 527, 273 Pac. 294 (1929); Maki v. Anaconda Copper Mining Co., 87 Mont. 314, 287 Pac. 170 (1930); Kerns v. Anaconda Copper Mining Co., 87 Mont. 546, 289 Pac. 563 (1930); Murray Hospital v. Angrove, 92 Mont. 101, 10 P. (2d) 577 (1932); Sykes v. Republic Coal Co., 94 Mont. 239, 21 P. (2d) 732 (1933); Tweedie v. Industrial Accident Board 101 Mont. 256, 23 P. (2d) 1145 (1936). That the Act should be liberally construed in favor of the employee or beneficiary, see McDaniel v. Eagle Coal Co., et al, 99 Mont. 309, 43 P. (2d) 655 (1935) and Miller v. Aetna Life Insurance Co., 101 Mont. 212, 53 P. (2d) 704 (1936). But the Court cannot insert that which has been omitted, Page v. New York Realty Co., 59 Mont. 305, 196 Pac. 871 (1921). Nor can it disregard rules relating to the time when various steps should be taken, Shugg v. Anaconda Copper Mining Co., 100 Mont. 159, 46 P. (2d) 435 (1935); Chisholm v. Vocational School for Girls, et al, 103 Mont. 503, 64 P. (2d) 838 (1936); nor ordinary rules of practice and procedure, Best v. London Guarantee & Accident Co., 100 Mont. 332, 47 P. (2d) 656 (1935); nor the plain statutory provisions, Magelo v. Industrial Accident Board, 102 Mont. 455, 59 P. (2d) 785 (1936). The Board is a ministerial and administrative body with quasijudicial powers, and strict rules of pleading do not apply in compensation proceedings, Shugg v. Anaconda Copper Mining Co., 100 Mont. 159, 46 P. (2d) 435 (1935); Magelo v. Industrial Accident Board, 102 Mont. 455, 59 P. (2d) 785 (1936). The primary function of the Board is to ascertain material facts and to render decision thereon, disregarding niceties of ordinary procedure in courts, Williams v. Anaconda Copper Mining Co., 96 Mont. 204, 29 P. (2d) 649 (1934)."