1941

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Recommended Citation
J. Howard Toelle, Progress of Workmen's Compensation in Montana during 1940, 2 Mont. L. Rev. (1941).
Available at: https://scholarship.law.umt.edu/mlr/vol2/iss1/15

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Progress of Workmen's Compensation in Montana During 1940

J. Howard Toelle*

I.
The Medical Problem; Common-Law Liability of Employer for Negligently Selecting Incompetent Physician; Proximate Cause.

The medical problem involving choice of physician is one of considerable difficulty in the administration of a Workmen’s Compensation Law. The relationship of doctor and patient is established, the object of which is restoration of the health of the injured workman and prevention or mitigation of incapacity; in addition, the doctor makes the examinations and reports and gives the expert testimony before board or court which will determine whether or not the employee should receive compensation under the Act. Who should select the physician, and who should pay for his services?

The answer generally given by statute is that the employer or insurer must pay the cost of medical care, and with this burden goes the privilege of choosing the doctor who attends the employee. Only in Massachusetts and Rhode Island do the

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1 If the employer or insurer selects the doctor, and pays for his services the employee may feel that the doctor is to some extent prejudiced in favor of the person who selects and pays him. If the employee makes the selection the employer may feel that the doctor aids in establishing a doubtful claim or in increasing the award on a proper claim. The employer feels that he should select the doctor because he pays the bill; so he should control the service, and he may also have to pay increased money compensation if adequate medical service is not rendered. He desires frequent reports made to him as to the employee’s condition and these will likely be more promptly and better made by a doctor chosen by him. (Dodd, Administration of Workmen’s Compensation (1936) p. 409). Finally the employer or insurer is in a far better position, it is claimed, than is the workman to know which physicians in a community are competent and which are not, and therefore, the quality of service rendered by the employer’s doctor will be superior. But the workman feels that the relationship is a personal one and that he should be attended by a doctor he knows and has confidence in; he relies on the doctor both for recovery and to supply the information in case of contest upon which his claim for money payment rests; if he does not speak English, he wishes all the more to be treated by a doctor of his own choice who speaks his own language; the employee will not desire to be sent back to work before he feels well enough to undertake the task. (Id. at pp. 413, 415).
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Compensation Acts declare that the employee may be treated by a doctor of his own choice at the employer’s expense; in North Dakota and Ohio, where exclusive state insurance funds exist, the funds and not the employers are directly liable for furnishing medical benefits, but the policy of those who administer these funds is to allow the employee free choice of physician at the fund’s expense. In Wisconsin, the employee may select out of a panel (usually five) selected by the employer. By legislative action of 1935, in New York an injured employee may, when care is required, select to treat him any physician authorized by the commissioner to render medical care.

Choice by either employer or employee has defects. The 1935 New York plan of choice by employee from an impartial panel gives high promise of satisfaction to all concerned. If attended with impartial selection of those on the panel and the banishment of political and other considerations by Board or Medical Society responsible for the maintenance of the panel, it would appear to be an acceptable compromise.

The overwhelming majority of jurisdictions have, however, provided that the employer must furnish medical attention. This could be and is interpreted to mean that he must pay for the medical service. But the matter has not stopped there; most jurisdictions also interpret the proviso to mean that the employer has the choice of the physician.

Finally, it should be said that even statutory requirement may not always determine the actual choice; sometimes, this must be determined by the exigency of the situation. Assuming a law giving complete freedom to the employee in choosing the doctor, if the industry is located in a remote area, as the mining or lumbering industries and certain construction projects, the company physician may be the only available doctor. A

2 Id. at p. 419.
3 Id. at p. 504.
4 Id. at pp. 414, 419. "The acts of all but three states (citing Mass., R. I., and Wash.) are construed to give the employer or insurer the right, in the first instance, to choose the medical or surgical attendant." SCHNEIDER, WORKMEN'S COMPENSATION LAW (2d ed. 1932) §491, p. 1622. In the recent case of Kelly v. Montana Power Co. (1940) 106 P. (2d) 339, it was held that where the employer and employee have entered into a hospital contract under R. C. M. 1935, §2907, the employer is not obligated to furnish the employee medical attention by other than the contract physician; in its opinion, at p. 340 of 106 P. (2d), the court said: "But he (the employee) points to no legal duty of an employer to furnish medical or other treatment, except under the Workmen's Compensation Act for industrial accidents . . . No industrial accident is here involved; and if it were, the employer's liability was expressly removed by the Workmen's Compensation Act (§2917), since a hospital contract was made by the employer and accepted by the employee."
workman may be employed in a manufacturing plant in a thickly populated district, but if he is struck on the head and rendered unconscious his freedom of choice would be academic and the plant officials or some hospital in the neighborhood selected by the employer must come to the rescue.\footnote{Dodd, \textit{op. cit. supr}a note 1, at p. 420.}

In \textit{Vesel v. Jardine Mining Co.}, an employee of a mining company brought a common-law action against his employer to recover damage caused by negligent treatment of plaintiff’s eye. The lower court sustained defendant’s demurrer to the complaint. From judgment of dismissal, plaintiff appealed. The Supreme Court reversed and remanded the case with directions.

The complaint alleged that while plaintiff was working in defendant’s mine a fragment of steel was chipped from the drill operated by him and struck plaintiff in the eye, that defendant voluntarily and gratuitously assumed to render medical aid and attention to plaintiff, that, acting at defendant’s main office where plaintiff had reported his injury, defendant directed and took plaintiff to one X for examination and treatment, that defendant maintained near the mine a first aid station in charge of X for the treatment of employees, that X took a piece of cotton and rubbed it across the eyeball negligently pressing the steel fragment beneath the surface of the eyeball (with the result that a subsequent operation by the Mayo Clinic failed), that defendant knew or should have known X to be an incompetent person, and that plaintiff has lost the sight of his eye by the negligence of defendant in causing plaintiff to be treated by an incompetent person. It is then alleged that both plaintiff and defendant had elected to be and were bound by the Montana Workmen’s Compensation Act. Plaintiff sought no compensation for the original injury, but sought damage because of negligence of defendant subsequent to the industrial accident. Defendant maintained that the Workmen’s Compensation Act is exclusive of every cause of action except those saved by the Act, and that plaintiff’s is not so saved; that therefore, his remedy is under the Compensation Act.

The Court cites R. C. M. 1935, Section 2839, but to what end is not clear. Shortly, the statute provides that the Workmen’s Compensation Act shall be exclusive, except where the employee receives an injury while working caused by the act or omission of some person or corporation other than his employer; in such case, the employee shall in addition to the right to

\footnote{(1940) 110 Mont. 82, 100 P. (2d) 75.}
receive compensation under the Act have a right to prosecute any cause of action he may have for damages against such person or corporation causing such injury. The Act then provides for subrogation by the employer or insurance carrier paying compensation to the extent of one-half the gross amount received as compensation. Now, obviously, the exception applies to a common-law action against a third party wrongdoer; the employer could not be subrogated to a cause of action against himself, and the wording is otherwise clear, "caused by the act or omission of some person or corporation other than his employer." The conclusion from this statute, therefore, is that the exception does not apply, and that the Act is the exclusive remedy if the case is one of injury arising in course of and out of the employment. In passing one might observe that the statute would appear to authorize a common-law action against the negligent doctor, and that the employer, insurer or board would be entitled to subrogation to this cause of action under conditions indicated in the statute.

As against the alleged negligent employer, the court appears to rest its decision on three propositions: first, that the Montana Act does not impose a duty on the employer to render medical aid to his injured employee; second, that this is the true ground of the decisions in other states holding aggravation by treatment of original injury also compensable; and, third, that assuming "injury" here which "arose out of" the employment, the injury did not arise "in course of the employment", that the three tenets are used conjunctively in the Act, that the case is non-compensable under the Act, and that, therefore, conditions are right for holding the employer under principles of common-law negligence.

That one who acts even though gratuitously is under a duty to act carefully, is a well recognized principle in tort law.

1 R. C. M. 1935, §2839, further provides that if the employee does not sue the third party wrongdoer in a first period of six months after the injury, the employer or carrier may bring the action and keep all the proceeds of recovery up to the amount paid as compensation under the Act; all over that amount to be paid the employee. The expense of the action is to be borne by the party suing.

2 See cases cited in 82 A. L. R. 932. While there is some conflict in the decisions regarding common-law liability of the negligent physician, this may to considerable extent be explained by differences in the provisions of the Compensation Acts.

3 Restatement, Torts, §323 provides: "(1) One who gratuitously renders services to another, otherwise than by taking charge of him when helpless, is subject to liability for bodily harm caused to the other by his failure, while so doing, to exercise with reasonable care such competence and skill as he possesses or leads the other reasonably to believe that he possesses. (2) One who gratuitously renders services
Admitted also is the principle that if a case is non-compensable under the Compensation Act, the employee has the right to common-law action against the negligent employer." A good example of the latter would be the occupational disease cases, interpreted by most courts as not meeting the conditions for "injury", since the malady results from the slow contraction of disease;" in such cases the right to common-law action remains. Granted both principles, has the plaintiff here alleged a good cause for common-law action? As against general demurrer, we shall accept the allegations of the complaint as true, keeping in mind that it is alleged that both parties elected to come under the Compensation Act, of the various provisions of which the court should take judicial notice."

At page 92 of 110 Mont., page 80 of 100 P. (2d), the Court says:

"There was no duty imposed by statute or contractual obligation upon the respondent to render medical care or attention to appellant, but once having gratuitously assumed to render such services, respondent was bound to the exercise of reasonable care in the performance of the services so voluntarily assumed."

And again at page 104 of 110 Mont., page 85 of 100 P. (2d),

"The Act does not require the employer to furnish medical aid, and there is no hospital contract between appellant and respondent. In jurisdictions where the Act to another, otherwise than by taking charge of him when helpless, is not subject to liability for discontinuing the services if he does not thereby leave the other in a worse position than he was in when the services were begun." See also RESTATEMENT, TORTS, §324 for duty of one who takes charge of another who is helpless, and §325 for failure to perform gratuitous undertaking to render services.

"See for a collection of cases; 100 A. L. R. 519; 121 A. L. R. 1143. In the latter it is said: "In harmony with the great weight of authority as shown in the earlier annotation, it is held that the Workmen's Compensation Acts do not constitute an exclusive remedy so as to bar an action at common law, or under a statute, to recover for an injury or disease which was not compensable under the Act." Typical is Triff, Admx. v. National Bronze & Aluminum Foundry Co. (1939) 135 Ohio St. 191, 20 N. E. (2d) 232, in which in the course of the employee's work the atmosphere was filled with silica in amounts harmful to health; the employee's administratrix was allowed common-law recovery for death by reason of the occupational disease of silicosis contracted by decedent in the employment.

"R. C. M. 1935, §2870, "'Injury' or 'injured' refers only to an injury resulting from some fortuitous event, as distinguished from the contraction of disease.""

"That the courts take judicial notice of the general and public domestic statutes, see Kelley v. John R. Daily Co. (1919) 55 Mont. 63, 181 P. 826 (Pure Food Act)."
requires the employer to furnish medical aid, or where the employee submits to the employer's selected physician or surgeon, it has been held that the Workmen's Compensation Act is exclusive, on the theory, it would seem, that if the employer is bound to furnish medical aid, or the employee submits to the employer's selected physician, then the employer should be protected and the Compensation Fund should pay the employee for any additional or new injury sustained. In our opinion the Workmen's Compensation Act of Montana cannot be so construed."

But Section 2917 of the Act provides that during the first six months after the happening of the injury, the employer or insurer or the board, as the case may be, shall furnish reasonable services by a physician or surgeon, and reasonable hospital services and medicines when needed, not exceeding in amount $500. As previously indicated, most jurisdictions interpret "shall furnish" to mean not only "shall pay for" but also "may select the doctor." Section 2906 of the Act provides that whenever in case of injury the right to compensation under the Act would exist in favor of any employee, he shall, upon the written request of his employer or the insurer, submit from time to time to examination by a physician, who shall be provided and paid for by such employer or insurer, and shall likewise submit to examination from time to time by any physician selected by the board. Section 2909 provides that neither an employer, an insurer, nor the board, shall be liable for any malpractice in treatment or care by physician or hospital or attendant furnished by such employer, insurer, or the board.

In Oleszek v. Ford Motor Company, the employee received a slight wound on the leg; germs entered from the oiled floor; fellow-employees treated the wound, but the infection spread, and the employee lost his leg. In a common-law action, he alleged negligence by the employer in not giving proper aid at the time of the original injury. The Michigan Compensation Act provided that during the first three weeks after an injury the employer should furnish or cause to be furnished reasonable medical or hospital service and medicines when needed. It was held that the employee could not recover in this action, but that he must take his compensation under the Act for loss of the leg. The Michigan statute would appear to be comparable to R. C. M., 1935 Section 2917, and the alleged negligence of the employer is hardly distinguishable, in legal effect, from the negligence alleged in the principal case.

"(1922) 217 Mich. 318, 186 N. W. 719."
In *Fitzpatrick v. Fidelity & Casualty Co. of New York,* a plumber sustained a back injury; he was treated by his personal physician who applied a cast to his back thus immobilizing the affected vertebrae; the insurance carrier shortly thereafter insisted on the employee coming to San Francisco to be examined by the carrier's investigator; he protested his inability to travel the required distance, but thereafter, and pursuant to such compulsion, went to San Francisco. Defendant's investigator removed the cast over the protest of deceased, and applied a new cast, but in so doing negligently placed the same so as not to immobilize the affected vertebrae. In a common-law action for wrongful death, a general demurrer was sustained to the complaint. The court held that the employee is entitled to compensation for a new or aggravated injury resulting from medical treatment of an industrial injury, the court saying it is immaterial whether the doctor is furnished by employer, insurer, or is selected by the employee. Section 16 of the California Compensation Act provided that whenever the right to compensation under this Act would exist in favor of any employee, he shall, upon written request of his employer submit from time to time, as may be reasonable, to examination by a practicing physician. Thus the California Statute is comparable to Section 2906 Revised Codes.

In *Lincoln Park Coal & Brick Co. v. Industrial Commission, et al.,* plaintiff was accidentally injured in the employment and paid compensation. He returned to work, but claimed further compensation. He was then required to submit to examination by the company doctor during which he was severely burned by the negligence of the doctor. It was held that he was entitled to compensation for the aggravated injury. The Illinois Statute was similar to R. C. M. 1935, Section 2906; it provided that the employee should submit to examination by a doctor of the employer's selection, and that if he refused to do so his compensation would be suspended.

In view of the Montana Statutes cited, and interpretations of similar statutes by courts in other jurisdictions, it does not seem that the court is warranted in dismissing the decisions from other jurisdictions holding aggravation of the original injury also compensable by saying that the employer is under those Acts bound to furnish medical attention while the Montana Act does not so require.

However, the true principle has been summarized as fol-

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"(1936) 7 Cal. (2d) 230, 60 P. (2d) 276.
"(1925) 317 Ill. 302, 148 N. E. 79."
"In Sarber v. Aetna L. Ins. Co. (C. C. A. 9th, 1928), 23 F. (2d) 434, 435, the court declares that: "Under the great weight of authority the employer is liable for all legitimate consequences following an accident, including unskilfulness or error of judgment of the physician furnished as required, and the employee is entitled to recover under the schedule of compensation for the extent of his disability, based on the ultimate result of the accident, regardless of the fact that the disability has been aggravated and increased by the intervening negligence or carelessness of the employer's selected physician." In Williams v. Grayola Merthyr Co. (1925) 132 L. T. N. S. (Eng) 227, C. A., it appeared that a miner was incapacitated by an industrial disease affecting his knee, and was under medical treatment. Unknown to the doctor, who lanced the knee, the miner's wife had applied a poultice of cow manure, and germs entered the incision and caused his death from tetanus poisoning. It was held that there was no break in the chain of causation, and that the death resulted from the industrial disease. In National Rolling Mill Co. v. Kish (1923) 80 Ind. App. 331, 139 N. E. 454, it appeared that an employee of the rolling mill company was injured in an accident; that a physician of the company attended him, and, after taking an X-ray picture decided that an operation would have to be performed in order to remove a stone from his kidneys, which the physician declared had resulted from the accident; that an operation was performed, and the employee died from the shock of the operation. It developed that the diagnosis was wrong, the trouble with the kidney being something entirely different and in no way connected with the original injury. It was held that there was no break in the chain of causation, the death resulting from the original injury, due to the acts of the defendant's surgeon, and a recovery was allowed. And in Kirby Lumber Co. v. Ellison (1925 Tex. Civ. App.) 270 S. W. 920, a recovery was denied employee for aggravation caused to his injured leg by the alleged mistreatment of doctors furnished by the employer, on the ground that his proper remedy was under the Workmen's Compensation Act, since the aggravation was directly connected with the original injury for which the employer was liable and was not due to independent causes. In Brown v. Sinclair Refining Co. (1922) 86 Okla. 143, 206 P. 1042, the employee fell from a scaffold and sustained injury for which he was paid compensation; he then brought a common-law action against the employer for negligence of the employer's selected physician in setting his shoulder; it was held by the Oklahoma Court that he could not recover, the Act being exclusive. In Gunnison Sugar Co. v. Industrial Commission of Utah (1929) 73 Utah 535, 275 P. 777, the employee sustained injury to his back in course of employment; he was held entitled to compensation for loss by reason of extraction of teeth on the advice of a physician erroneously diagnosing his condition as rheumatism. In Hoehn v. Schenck (1927) 221 App. Div. 371, 223 N. Y. S. 418, the receipt of an award of compensation under the Workmen's Compensation Act by an injured employee was held not to preclude him from maintaining a malpractice action against a physician who treated his injury; the court, holding that the employer and the physician were not joint tort-feasors, stated that "the distinct liabilities were as pronounced as though the employee whose left leg was injured in the course of his employment, shortly thereafter suffered an injury to his right leg, which a physician negligently and unskilfully treated." Compare with the language of the Montana court in Vesel v. Jardine Mining Co., at p. 99 of 110 Mont., and at p. 83 of 100 P.
men's Compensation Acts, the rule seems to be that an injured employee may recover compensation for a new injury, or an aggravation of his injury, resulting from medicinal or surgical treatment of a compensable injury, when there is no interven-

(2d) where the Court refers to the employer and the doctor as joint tort-feasors. Query, didn't they act independently?

To support its decision in the principal case, the Montana Court cites Ruth v. Witherspoon-Englar Co. (1916) 98 Kan. 179, 157 P. 403. But the view of this case has been apparently abandoned by the Kansas Court in the decision of Bidnick v. Armour & Co. (1923) 113 Kan. 277, 214 P. 508. In that case it appeared that the plaintiff while employed by defendant suffered a hernia; that he was treated by the defendant's surgeon and sent to a hospital, where he was operated on by the defendant's chief surgeon. Two weeks after the operation, he developed a "milk leg" from the effects of the operation. Having received certain compensation from the defendant, he signed a release of all claims against it, but on finding that the condition of the leg instead of being temporary would exist for a long time, he filed a petition for additional compensation. The court held that, although he had signed a release, he was entitled to additional compensation for the new injury, which resulted from the operation, and which was directly traceable to the original accident.

Support for the decision in the principal case is found in Ellamar Mining Co. of Alaska v. Possus (C. C. A. 9th, 1918) 247 F. 420, where the Court said: "We are of the opinion that under the Act the plaintiff could not recover for aggravation to his injuries as pleaded in his second count... An injury arises out of the employment if there is a causal connection between the working conditions and the injury." Is not the Federal Court taking too limited a view of that which arises out of the employment? Likewise, in Ashby v. Davis Coal and Coke Co. (1924) 95 W. Va. 372, 121 S. E. 174, 33 A. L. R. 1201, negligence of the employer in selecting a person of improper skill was alleged; the court upheld the employee's right to common-law action. The court said: "Plaintiff does not sue for damages resulting from injuries sustained while working in defendant's mine, but for the alleged permanency of his injuries as a result of the neglect or wrongful act of defendant's physician, whom it is alleged the defendant knew to be incompetent and unskilful at the time." Is not the court here taking too limited a view of "injury arising in course of and out of the employment"? Not cited by the Montana Court is Aetna Life Ins. Co. v. Watts (1931) 148 Okla. 28, 296 P. 977, where the employee suffered a broken leg while drilling an oil well. It was alleged, in common-law action, that the insurer was negligent in removing the employee from an emergency hospital where his leg was mending in a cast, and transporting him over the rough streets of Seminole to the railway station enroute to a larger and less expensive hospital in Oklahoma City. The court said there would be common-law liability on the part of the insurer if, contrary to the advice of physicians of the emergency hospital, it directed the removal. But query, was it not a dependent intervening act, and so within the requirements of legal cause? For additional cases, see Wildwood Title & Trust Co. v. Gelsenhoner (1933) 11 N. J. Misc. 871, 168 A. 751; Valatalo v. Thomas (1928) 262 Mass. 383, 160 N. E. 269; McDonough v. National Hospital Assn. (1930) 134 Ore. 451, 294 P. 351; Ross v. Erickson Construction Co. (1916) 89 Wash. 634, 155 P. 153, L. R. A. 1916 F. 319, and collection of cases in 127 A. L. R. 1093-1120.
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...ing independent cause to break the chain of causation between the new injury, or aggravation, and the original injury."

Under this view, the employee receives compensation for the additional injury resulting from the mistakes, negligence, or malpractice of the physician, and it is generally held that he may not in addition sue the employer or insurance carrier for damages for the added injury for which he is entitled to compensation or has already received compensation. This result is based primarily upon the view that a new injury or an aggravation of injury resulting directly from medical or surgical treatment is part of the primary "injury which arose out of and in the course of the employment." The question as to who furnished the medical service or who was obligated to do so, is, therefore, beside the point. It is believed that this result is properly reached whether the doctor is furnished by employer, by employee, or selected by the employee from a panel of employer's or board's selection. The additional injury or aggravation is compensable not because the employer has violated a duty to furnish adequate medical services, but because the additional injury is due to the industrial accident. The additional liability for compensation is not limited to jurisdictions in which the employer chooses the physician, but applies in England, where the employer is under no duty to render medical service, and in Massachusetts where the employee may choose the physician. In Atamian's Case, death was held to be the proximate cause of an accident, when the injured employee died from an operation advised by a physician of the injured employee's own choice, although the two doctors of the insurer had advised against the operation.

Cases vary. One may involve substantial injury originally with slight aggravation by doctor's treatment; another may involve slight initial injury with substantial aggravation by doctor's treatment. It would obviously be unfair to hold the employer liable to compensate for the injury occasioned by improper medical care and also liable to suit for damage because of injury resulting from such improper care. All should be kept under the Compensation Act as long as the requirements of proximate cause are present. The advantages of

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"Annotation: 39 A. L. R. 1278; Dono op. cit. supra note 1, at p. 503. 
(1928) 265 Mass. 12, 163 N. E. 194. In Atamian's case, the employee suffered a hernia in course of employment. The insurer's doctor advised against an operation. The employee sought a doctor who advised an operation. The employee was operated on, and died from a blood clot though it was impossible to tell whether same was formed about the hernia or about the removed appendix which had been taken out at the same time. Held: a compensable case.
prompt payment, continuing jurisdiction of the board, avoidance of litigation and attorney's fees, the security of a responsible insurance company or state fund rather than the chance of an uncollectible common-law judgment, are equally as persuasive in cases of aggravation as in the usual compensation case.

In the principal case, the Montana Court says that the injuries sustained by the employee were out of the course of the employment, that this phrase does not cover the time going to or from work after or before regular or extra working hours. Further, says the court, at page 100 of 110 Mont., page 83 of 100 P. (2d), "We do not pass on the question which might arise where the employee remains on the premises."

This suggestion is interesting. While it is well recognized that "in course of" employment refers to the time, place, and circumstances under which the accident took place, it is not believed that the fact that the treatment here took place off the premises is an important consideration. If the court should hold that aggravation of injury by first-aid negligently administered at the mine-mouth or in a building on the premises adjacent to the mine-mouth is also compensable, it is submitted that, on the question of the place of treatment only, the result should not differ in the principal case. In fact, it is here alleged that the negligent act of the employer—namely the decision to send the employee to the first-aid station removed from the premises, and the act of placing the employee in a conveyance bound for a destination off the premises—took place on the premises. To be sure, as a study in proximate cause, if the employee suffers a slight injury while working on the premises, and the employer negligently runs him down as he crosses a downtown street the next day, the act of the employer may well be held outside the chain of causation as a non-foreseeable independent intervening act wholly superseding.¹⁹

¹⁹But where the new injury, or the aggravation of the original injury resulting from medical or surgical treatment, is not directly traceable to the original injury, but arises instead from the intervention of an independent cause, there can be no recovery of compensation therefor. 30 A. L. R. 1279. In Upham's Case (1923) 245 Mass. 31, 139 N. E. 453, it appears that an employee suffered an injury to his spine, and was taken to a hospital. While there he suffered severe abdominal pains which were diagnosed as arising from appendicitis, and, being operated on for appendicitis, died a few days later from complications arising from the operation. It was held that the appendicitis was not in any way the result of the original injury, and that there could be no recovery for the death. In Charles v. Walker, Ltd. (1909) 25 T. L. R. (Eng.) 609, 2 B. W. C. C. 5, C. A.; where a workman suffered an injury to his hand which required the amputation of a finger, and was recovering, when the surgeons decided to remove a bad tooth, and his
In this case, however, we are dealing with a dependent intervening act which is not superseding or isolating. The employee's need of treatment caused the employer to send him to the hospital. His act was defensive and preventive; humanitarian considerations aside, the employer has an interest, first, in restoring an injured employee as nearly as possible to complete health so rendering him able to work, and second, in effecting this restoration as rapidly as is consistent with the employee's welfare. Only in this way does he avoid the disability provisions of the Act for payment of continuing or recurring compensation. Aggravation of injury by honest though negligent treatment should, therefore, as to the employer, be treated as is the original injury as arising in course of and out of the employment.

The study being one in proximate cause, it would seem to be immaterial whether the negligent treatment occurs on or off the premises. If this case did not have in it the intermediate element of alleged negligence on the part of the employer in sending the injured employee to an incompetent person; if the employer carefully selects a reputable physician who, in a death resulted from the administration of an anaesthetic, it was held that the death did not result from the accident, and his widow was denied a recovery against the employer.

Where the chain of causation is not broken by a novus actus interveniens, it is not material that the immediate cause of injury or death is due to the mistake or negligence of attending physicians, where they act honestly." SCHNEIDER, op. cit. supra, note 3, p. 1641. See RESTATEMENT, TORTS, §441. An intervening force may be dependent or independent. A dependent, intervening force is one which operates in response to or is a reaction to the stimulus of a situation for which the actor has made himself responsible by his negligent conduct. An independent force is one the operation of which is not stimulated by a situation created by the actor's conduct. See further RESTATEMENT, TORTS, §457 to the effect that if the negligent actor is liable for another's injury, he is also liable for any additional bodily harm resulting from acts done by third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or negligent manner. So long as the mistake or negligence is of the sort which is recognized as one of the risks which is inherent in the human fallibility of those who render such services, the rule applies. Thus, there is liability for, (1) an improper diagnosis and the consequences of an unnecessary operation, or (2) a proper diagnosis and a necessary operation carelessly performed, or (3) if the nurse scalds the patient owing to an improperly stoppered hot-water bottle, or (4) if the chart of C is negligently substituted for the chart of B, and the doctor operates on the wrong patient. But there is no liability for additional injury or death if, (1) the nurse contrary to orders and unable to see the patient suffer further gives him a hypo which she knows will be lethal, or (2) if the patient's manners annoy a male nurse and he attacks the patient out of revenge, or (3) the patient breaks a leg and he takes advantage of his hospital stay to secure a hernia operation which is unsuccessful.
hospital off the premises, negligently treats the employee who is injured on the premises, would the court be willing to say, contrary to the great weight of decision, that the aggravation is not compensable under the Compensation Act? And yet, if the court answers in accord with most decisions, it must say that the aggravation is also injury arising in course of and out of the employment. Is it not clear, therefore, that the fact that the negligent treatment occurred off the premises is not decisive?

In conclusion, may it not be said that the court is in error: (1) in holding that the Montana Compensation Act does not require an employer to render medical aid or attention to his employee, (2) in holding that such requirement is essential as the true ground for making compensable aggravation by treatment of an injury arising in course of and out of employment, (3) in holding that aggravation by negligent treatment off the premises of injury received while working on the premises is non-compensable in that it is not an injury arising in course of and out of the employment?

"If we look elsewhere than in New York, we find no support for the theory of special proximity." Beale, The Proximate Consequences of an Act, 33 Harv. L. Rev. 633, 642 (1920).

In annotation to Vesel v. Jardine Min. Co., in 127 A.L.R. 1093, 1120, only two other cases are cited as involving employer's alleged negligence in selecting an unskilled physician, namely, Kirby Lumber Co. v. Ellison (Tex. Civ. App. 1925) 270 S.W. 920; and Aetna Life Ins. Co. v. Watts (1931) 148 Okla. 28, 296 P. 977. As to Kirby Lumber Co. v. Ellison, it should be noted that the holding sustains an award of compensation, but says the A.L.R. annotation, "There is an implication that an employer might be liable for an aggravation of injuries sustained by an injured employee in the course of his employment through the malpractice of a physician who was paid out of funds reserved from the employees' wages, in the absence of a showing that the employee failed to exercise care in the selection of the physician or place of treatment." In re Aetna Life Ins. Co. v. Watts, the A.L.R. annotation reads: "It was held that an employer or an employer's insurance carrier who provides medical attendance and hospitalization for an injured employee is not liable for damages in the selection thereof if he exercises reasonable care in designating a competent physician and a suitable hospital equipped to render the necessary medical aid. But it was held that the compensation act contemplated the selection by the employer of competent physicians and hospitals, and that the injured employee would be treated under their direction and not under the direction of the employer, and that where the employer attempts to control their action he violates the rights of the injured employee, and that for such injury the Act provides no remedy, and that the employer is liable to action at law for damages in so far as the damages are not cognizable under the Workmen's Compensation Act." While it may be said that an attempt by the employer to control the action of the physician would appear to go beyond the fact situation in the principal case, the basic question is nevertheless believed to be one of
Rather, may we not regard as the true principle that irrespective of who chooses or has right to choose the physician, the Compensation Act covers both original injury and aggravation thereof by negligent treatment as long as the elements of proximate cause are present precluding in such case the possibility of a common-law action against the employer? Under the Workmen's Compensation Act, the employee's original injury may have been based on Act of God, negligence of fellow-servant, negligence of employer, or an ordinary risk of the business for which no one is responsible; the employee may have been contributorily negligent, or the defense of assumption of risk may have been applicable at common-law; all are compensable; none are obstacles to compensation under the Act. If the employer has been negligent in connection with the original injury, his negligence in choice of a doctor is simply added negligence. These conclusions do not, however, negative the right to common-law action against the negligent doctor, and in such case, the employer, carrier, or board, may be subrogated to the right of action under conditions set forth in R. C. M. 1935, Section 2839.

proximate cause involving differentiation between dependent and independent intervening activity, as to which, see notes 16, 19 and 20, supra.

"It might have been argued that, in cases where the original injury was not caused by any actual 'wrong' on his (the employer's) part, the employer, though liable for compensation for the original disability, should be free from liability for the extra period of disability caused by the negligent surgeon. The courts have not so held, however. Our question is answered, then, as to the rights of the servant against the employer; the latter is liable, on a claim for compensation, for the entire period of disability." Leidy, Malpractice Actions and Compensation Acts, 29 Mich. L. Rev. 568, 569 (1930-31), citing cases.

The American Association for Labor Legislation in its bulletin Standards for Workmen's Compensation Laws (1939) p. 9, says: "One of the weightiest arguments against the outworn system of employer's liability is that it causes vast sums to be frittered away in law suits that should be used in caring for the victims of accidents. To avoid this waste the compensation provided by the Act should be the EXCLUSIVE REMEDY. If the employer has been guilty of personal negligence, even going to the point of violating a safety statute, his punishment should be through a special action prosecuted by the State factory inspection bureau. Likewise if he has failed to insure, he should be penalized by being made subject to a penal action prosecuted by the accident board and by increasing his liability for compensation." It is added that suits for damages are not permitted under any circumstances in Alabama, Alaska, Hawaii, Idaho, Louisiana, Maine, Pennsylvania, Vermont and Wisconsin.
II.

THE ADMINISTRATIVE PROBLEM; SCOPE OF APPEAL; POWER OF THE COURT TO TRY A CASE IN THE ABSENCE OF A HEARING BY THE INDUSTRIAL ACCIDENT BOARD; THE CODE CAUSE OF ACTION AND THE PROBLEM OF RES ADJUDICATA.

One of the primary objects of the Workmen's Compensation Law was the substitution of a simple procedure for the slow and expensive litigation of the common law. It was thought that an administrative board would be comparatively cheap in operation, speedy of determination, more expertly manned by those with special training in a limited field of the law, and more flexible in the discharge of its functions than could be true of the regular courts of law. At the same time, general oversight of the courts was deemed essential to prevent arbitrary and discriminatory rulings by the board and to provide an independent agency for the interpretation of the Compensation Law. If the system works well, the action of the administrative board should be final in the overwhelming majority of the cases; it should be necessary to appeal only a limited number of cases to the courts.1

As doubtful points are cleared up, and the function of interpretation wanes, the task of the court, in the small minority of cases appealed, should be to protect against abuse of authority by the board. Such protection does not require a review of the facts, nor the taking of additional testimony, nor trial de novo by the courts. A power to scrutinize the facts may be preserved under the broad construction often given by the courts as to their power to review issues of law.2

Broadly speaking, that system is best which provides for finality to the finding of the board on issues of fact. Review by the courts should be review of the law only, and the administrative action should be sustained unless there is no evi-

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1See Dodd, op. cit. supra note 1, at p. 115. 1926-7 was a normal industrial year; Illinois, in that year, out of 57,535 compensable accidents showed writs of certiorari to the circuit court in only 237 cases or in about four-tenths of one percent of the total number reported. Its experience may be regarded as typical, but the number of appeals increases in depression years. By letter of date January 30, 1941, the writer is informed by Mr. George Niewoehner, Secretary of the Industrial Accident Board, that in the fiscal year June 1, 1939 to June 1, 1940, at least 1,866 claims were filed with the Montana Industrial Accident Board. Seven of these claims ended in appeals to the district courts, and the balance of the controversial claims were either settled by compromise agreement, abandoned, or settled by decisions of the Industrial Accident Board.
dence in the record to support it. The latter may be regarded as a question of law. It differs from review of both law and fact in that where the statute provides generally for review of both the law and the facts, the court may weigh the evidence as the basis for an independent decision. Such a system makes for more frequent appeals and more litigation before the courts in compensation cases.

Judicial review of fact generally involves application of technical rules of evidence and procedure, and the more technical methods will lead to more expense and delay. Also where the power exists, it has an unwholesome effect on the administrative body; subjected to the threat of review, such body will naturally seek to apply technical rules of evidence and procedure in every case. Wider representation by counsel thus becomes necessary, and a prime object of administration of the Compensation Act is thus defeated.

The objection to trial de novo is that it is cumbersome and expensive to introduce evidence on an administrative hearing, and then again introduce it on judicial review. It also affords opportunity to withhold testimony in the administrative hearing and then introduce it in the judicial proceeding, if either party thinks it to his interest to do so. Sometimes the purpose is to discredit the administrative board. The administrative proceeding thus becomes merely an inquiry preliminary to a contest in the courts.

In order of desirability, and, as a study in comparative legislation, the following would appear to be indicated:

(1) Initial hearing by board with opportunity for administrative review, followed by judicial review, if desired, on the record made before the board; appeal to the court allowed on matters of law only; recognition of finality of fact determination by the board. This is the system obtaining under nearly half the Acts. Included are the compulsory compensation jurisdictions of New York, Wisconsin, California, Idaho, Oklahoma, Utah, Indiana, and perhaps by court decision Illinois, as well as the elective compensation states of Colorado, Georgia,
Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, North Carolina, Pennsylvania, South Carolina, and Virginia."

The best organization of judicial review also would dictate that, instead of allowing appeal to a local county or district court, the appeal should be taken directly to the Supreme Court, or to a single intermediate court and then to the Supreme Court. This method insures uniformity in the determinations under the Compensation Act by judges who can acquire considerable familiarity with the law they are called on to administer. Thus, in Wisconsin, all appeals are to the Circuit Court of Dane County at Madison, and from there as of right to the Supreme Court; in New York, all appeals go directly to the Appellate Division, Third Department, at Albany, and from there with limitations to the Court of Appeals."

(2) Judicial review on questions both of law and fact but based on the record made before the board. The 1921 Illinois statute in terms permits a review both on the law and the facts; however, the court has held that it is not within its sphere to weigh conflicting evidence, unless the court can say that the finding is manifestly against the weight of the testimony or is based on incompetent evidence."

(3) Judicial review on the record in part; trial de novo in part. The laws of Montana, North Dakota, Vermont, Washington, Delaware, and to a limited extent the Federal Laws, illustrate this category."

(4) The court wholly or substantially disregards the previous administrative findings and tries the case de novo. Texas, Oregon, Nebraska, Rhode Island and Nevada decisions are in point."

(5) Trial by court of compensation cases, no use whatever being made of an administrative body. This

"Dodd, loc. cit. supra note 5.
"Appeal directly to the Supreme Court, and on questions of law only, is advocated by the American Association for Labor Legislation. See annual bulletin of the Association for 1939, STANDARDS FOR WORKMEN'S COMPENSATION LAWS, p.12.
"Dodd, op. cit. supra note 1, at p. 406.
"Dodd, op. cit. supra note 1, at p. 359 ff.

(6) Jury trial of compensation cases; this is possible in Texas, Hawaii, Vermont, Washington, Iowa, Maryland, Ohio and Oregon."

In *Paulich v. Republic Coal Co.*, claimant was, on July 28, 1932, after hearing by the board, awarded 56 weeks of compensation at $19 per week; after appeal by claimant to the 14th judicial district court, the findings of the board were on February 9, 1933, affirmed. On March 16, 1933, the court overruled a motion to modify its conclusions, but its final order of March 25, 1933, changed the weekly award from $19 to $20 weekly. Subsequently and after receipt of the amount of the judgment, claimant filed an appeal in the Supreme Court. The appeal was dismissed on the ground that acceptance of the fruits of the judgment was inconsistent with the right of appeal therefrom. On July 12, 1934, claimant petitioned the court to review the award under—as interpreted in the majority opinion—R. C. M. 1935, Section 2956, on the ground of aggravation of his disability. On March 4, 1935, the board rendered finding to the effect that claimant's disability was not greater than in 1932 when his case was originally decided by the board. On appeal to the district court, the board's finding was, on September 13, 1935, sustained. On November 19, 1936, claimant filed with the board a petition asking that the periods of payment of weekly compensation be extended to the maximum allowed by the statute, on the ground that his disability continued after the date of the judgment of March 28, 1933; he did not claim a changed condition in this petition. On March 24, 1937, the board without a hearing dismissed the petition on the ground that it had no jurisdiction to grant the relief sought. Claimant applied for a rehearing; on its denial, he appealed to the 14th judicial district court. The court heard the case on December 10, 1937, admitted testimony over defendant's objection, and rendered judgment in claimant's favor for $5341 (a lump sum payment for claimant's disability to and including June 28, 1938).

On appeal to the Supreme Court, the first question to be determined was whether the board had jurisdiction to hear the petition of claimant; the second, whether the district court

*Dodd, op. cit. supra note 1, at p. 84.*

*Dodd, op. cit. supra note 1, at pp. 346-358.*

*(1940) 110 Mont. 174, 102 P. (2d) 4.*

*(1934) 97 Mont. 224, 33 P. (2d) 514.*
had the power to hear the matter on appeal in the absence of a hearing by the board. The court by a three to two decision answered both questions in the affirmative; Mr. Frank P. Leiper, District Judge, sitting by consent of the parties, wrote the dissenting opinion which was concurred in by Justice Morris. The majority of the court reason that the previous decision in the 1933 appearance of the case in the Supreme Court is not decisive since it antedated the decisions in the Meznarich and Lunardello cases, holding that acceptance in full of an award did not preclude later application when it was discovered that disability continued, citing R. C. M. 1935, Section 2952. The dissent proceeds on the ground that it was the duty of the board, on the filing of the petition, to hold a hearing, and in the absence of this, that the court was without power to perform this function of the board.

The majority opinion relies on the language of R. C. M. 1935, Section 2961, the trenchant portion of which reads:

"If the court shall find from such trial, as aforesaid, that the findings and conclusions of the board are not in accordance with either the facts or the law, or that they ought to be other or different from those made by the board, or that any finding and conclusion, or any order, rule, or requirement of the board is unreasonable, the court shall set aside such finding, conclusion, order, judgment,

"Meznarich v. Republic Coal Co. (1935) 101 Mont. 78, 53 P. (2d) 82. "Lunardello v. Republic Coal Co. (1935) 101 Mont. 94, 53 P. (2d) 87. Compare with the Meznarich, Lunardello, and Paulich cases, Willis v. Pilot Butte Mining Co. (1930) 58 Mont. 26, 35, 190 P. 124, 125, where the court said: "...the power given the district court is that of review rather than trial anew." In Rom v. Republic Coal Co. (1933) 94 Mont. 250, 255, 22 P. (2d) 161, 163, the court said: "The Workmen's Compensation Act makes the board the trier of facts and permits a review only by the court except in cases where for good cause shown, evidence is permitted in addition to the record before the board." In Sykes v. Republic Coal Co. (1933) 94 Mont. 239, 244, 22 P. (2d) 157, 158, the court said: "...the statute contemplates merely a review of the record before the board, unless there is some special reason or 'good cause' for the reception of additional evidence, and in no case permits a full 'trial de novo'..." Is not a return to the doctrine of the Rom and Sykes cases desirable? And see the recent cases of Nigretto v. Industrial Accident Fund (1940) ——Mont. ——, 106 P. (2d) 178, where the court used this language: "In the first instance, the board is the trier of the facts and has the power and it is its duty to determine conflicts in the evidence. If no additional testimony is taken on appeal to the district court, the case comes to it with the presumption that the board has decided correctly. Where additional testimony is taken, the court determines the conflicts based on the record before the board, and that additional testimony." Accordingly, it was held in the case that the evidence did not establish the plaintiff's claim that the accident resulted in a broken rib which caused bronchopneumonia from which the employee died.
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decree, rule, or requirement of said board, or shall modify or change the same as law and justice shall require, and the court shall also make and enter any finding, conclusion, order or judgment that shall be required, or shall be legal and proper in the premises."

Says the court at page 188 of 110 Mont., page 10 of 102 P. (2d):

"The provisions of this section indicate that the legislature had in mind the granting of very broad powers to the district court on appeal. Were it not for this section, the limitations of the statute would prevent determination of the matter finally, as was done by the lower court here, in the absence of a hearing before the board. But this section seems to express rather plainly the will of the legislature that even where the board fails to hold a hearing, on appeal, the district court may proceed and determine the matter at once."

In addition, the court observed that it was defendant's duty to make the record show by some testimony that it had been prejudiced by the lower court's action in proceeding to hear the whole matter, instead of sending it back to the board, and this the defendant had failed to do.

The dissenting opinion, after citing R. C. M. 1935, Sections 2961 and 2964 (requiring liberal interpretation of the Act), correctly indicates that these two sections are merely parts of the Act, and that all parts of the Act must be read and considered together in construing it. Section 2947 provides that all proceedings to determine disputes shall be instituted before the board and not elsewhere, and heard and determined by the board, subject only to review in the manner and within the time in this Act provided. Section 2960 provides that on appeal to the district court, that court may for good cause shown permit additional evidence to be introduced, but in the absence of such permission from the court, the cause shall be heard on the record of the board, as certified to the court by it.

Reading Sections 2947, 2960 and 2961 together, it would seem that the legislative intent was that the function of the district court is to review the record before the board on matters both of law and fact unless there is some special reason or good cause shown for the reception of additional evidence, in which case, partial trial de novo follows, but that in no case is full trial de novo by the district court contemplated.

It was the duty of the board upon the filing of the petition to afford a hearing to all concerned in order to learn the facts. The remedy of mandamus is generally an appropriate remedy.
to require an administrative board to perform its duty. Under R. C. M. 1935, Section 2961, however, it appears that the district court has the power to reverse the order of the board and send the case back with directions to set the cause down for a hearing.

As a study in the relationship *inter se* of board and court it is believed that this decision is significant of an undesirable trend in Montana interpretations of the Workmen’s Compensation Law. Administrative determination is calculated to be superior to trial and decision by courts in this class of cases. The many procedural steps in this highly litigious case are symptomatic of what to expect as we transfer functions from board to court; in fact, all the advantages alleged for administrative tribunals—prompt action involving payments to a wage-earner’s family in lieu of the regular pay-check, a flexible, non-technical procedure, a layman’s court making unnecessary counsel fees for representation, administration by experts—all these fade, and the defects of court administration inevitably appear as we minimize the functions of the board and enhance the competence of the court. Unfortunately, the legislature has placed us as low as the third class in the scale previously noted; it is not deemed necessary that the court interpret the Act so as to place us in the fourth class.

A final word involves the doctrine of res adjudicata. It will be noted that judgment was rendered on September 13, 1935 affirming an order of the board denying compensation in addition to that awarded under the first petition. No appeal was taken from that judgment, and counsel for defendant urged that the matter was res adjudicata as of that date, and that the lower court’s judgment in the instant case that compensation was due plaintiff extending back to the year 1933 is, therefore, erroneous.

The majority opinion finds no error on the ground that the petition leading to the 1935 judgment was based on R. C. M. 1935, Section 2956, or the theory that the employee’s disability had increased, whereas the petition leading to judgment in the instant case was based on Section 2952 or the theory of continuation of the same disability beyond the period of termination of the original award. In the dissenting opinion at page 18 of 102 P. (2d), it is said: “After diligent search of the record, I am unable to find any justification” for the statement that the previous petition was filed under R. C. M. 1935, Section 2956. “The petition was filed under the Workmen’s Compensation Act and not under any particular section of that Act.”
The difference in viewpoint appears to involve consideration of the Code cause of action. To understand what has been adjudicated, it is necessary to know how much is embraced in the "cause of action." On the one hand, the cause of action may be viewed as a group of facts entitling to judicial relief but limited or subtended by the resulting legal right to be enforced. On the other, and, it is believed, by the better view, it is such an aggregate of operative facts as will give rise to at least one right of action, but not limited to a single right; it may give rise to one or more rights of action. Thus, it is believed, it would be an inconvenient rule to say that there are separate causes of action for each claim, legal or equitable. Formerly a litigant in the wrong court was not thereby prevented from going into the other court; under the code, there is no longer a reason for that rule. At common-law, a litigant who brought trespass when he should have brought case was not thereby precluded from starting an action on the case; under the code there is no occasion for such a rule.

Now that we have the fusion of law and equity, and the principle of the one form of action, the scope of the cause of action has been extended, and with it also the doctrine of res adjudicata. The legal theory should not be regarded as any part of the cause of action. Is it not how misleading from the standpoint of important legal consequences to attempt to delimit a cause of action at law as against a cause of action in equity, a cause of action in contract as against a cause of action in tort, a cause of action under the employer's liability act as against a cause of action at common-law? Rather, should not the pleader within the limits of the one form of action state clearly and in concise language the facts entitling him to one or more aspects of legal relief? And, does not res adjudicata then mean that within the limits of the application of the rule the plaintiff cannot litigate in a subsequent suit a right or rights which he either did bring up or could have brought up in a suit commenced earlier? The law abhors a multiplicity of suits, and will not permit a defendant to be harassed by two or more actions for the same thing where a com-

"CLARK, CODE PLEADING (1928) p. 77.


"On the questions of the separate statement, splitting a cause of action, rules for joinder of causes of action, res adjudicata, and when amendment will be followed, see CLARK, op. cit. supra note 43, pp. 77, 84, 320, 367, 603.
plete remedy might be obtained by one of them." It might be added that the rule is a salutary one of policy to prevent interminable litigation and so the wasting of the time of courts.

If this analysis of the Code cause of action is correct, it would seem to follow that there is not a cause of action for compensation under R. C. M. 1935, Section 2956, and a cause of action under Section 2952 thereof, but that, when plaintiff filed his petition leading to the 1935 judgment, he should have stated therein the facts of his then existing condition entitling him to compensation under any and all theories of the compensation law. The judgment of September 13, 1935 would, therefore, seem to be res adjudicata of the right or rights which plaintiff either did bring up or could have brought up in connection with that suit.

The majority opinion refers to a general understanding, prior to the Mezzarich and Lunardello cases, that under the Montana statutes the award, when made in a final sum, precluded the recovery of any additional compensation in excess of the total contemplated by the judgment unless there was a showing that the disability had increased; that it was on this theory alone that the second petition was filed. But, it is submitted that, when courts reverse their decisions, there is to be found little or no authority for reopening the cases of the unfortunate litigants whose property or personal rights were decided prior to the changed interpretation of the law.

III.

IS CITY FIREMAN WHO SLIPS ON ICY SIDEWALK WHILE ENROUTE HOME ENTITLED TO COMPENSATION? STREET ACCIDENTS AS INJURY ARISING IN COURSE OF AND OUT OF THE EMPLOYMENT.

In Griffin v. Industrial Accident Fund," a fireman employed by the city of Great Falls, had worked the regular eight hour night shift ending at 7:30 A. M. He started to walk home. When about five blocks therefrom, he accidentally slipped and fell on the ice-covered sidewalk, and suffered injury from which he died. The fire department operated in three shifts of eight hours each, but each member of the department was subject to further call in case of conflagration or other emergency. It is conceded that there was no emergency at the time of the accident. The Supreme Court held


*(1940) —Mont. ——, 106 P. (2d) 346.
the case to be non-compensable in that it was not due to an accident arising out of and in course of the employment; the board had likewise decided, while the district court had found an injury in course of but not arising out of the employment. Says the court at page 348 of 106 P. (2d):

"The rule has been settled in this state that a workman is not entitled to compensation for injury received while traveling to and from his place of work by any instrumentality not under the control of the employer, and when he is subjected to only the ordinary street hazards common to all pedestrians (citing Murray Hospital v. Angrove). Here it is true that the instrumentality causing the injury—the sidewalk—was an instrumentality under the control of the employer—the city; in other words, the injury occurred on premises under the control of the employer. But unless the instrumentality causing the injury, or the premises on which the injury occurred were used in connection with the actual place of work where the employer carried on the business in which the employee was engaged, there can be no recovery."

As to the status of a fireman, as an employee, under the Workmen's Compensation Act, the authorities are in conflict. In the absence of an express provision for firemen and policemen, they are generally held not to be "employees," "laborers," or "workmen," within the meaning of compensation acts. Many of the cases say that they are public officers whose duties relate to the governmental functions of the municipality and for whose torts while exercising such functions the municipality is not liable; typical is the Georgia case of Parker v. Travelers' Insurance Company. In some cases, however, firemen or policemen under the facts have been held "employees" and entitled to recover under the compensations acts; typical of this minority group is the Illinois case of Johnson v. Industrial Commission. In a few jurisdictions, the rights of firemen and policemen are governed by express provision of the compensation acts; the Maine Act is representative, providing expressly that policemen shall be "deemed" employees within the meaning of the Act.

*(1932) 92 Mont. 101, 10 P. (2d) 577.
*(1932) 174 Ga. 525, 163 S. E. 159; see in this group cases cited in 81 A. L. R. 472, including decisions from Ga., Ind., La., Md., Neb., N. Y., Okla., Texas, Va., Wash., and Conn.
*(1927) 326 Ill. 553, 158 N. E. 141; and see cases cited in 81 A. L. R. 472, 480, from Mich., Ill., Minn., and Wis.
*See Moriarity's Cases (1927) 126 Me. 358, 138 A. 555, and cases cited in 81 A. L. R. 472, 481, from Me., Pa., N. D., N. J., and Utah.
The principal case contains no discussion of this question. It had previously been held in *City of Butte v. Industrial Accident Board* that Compensation plan number three is, as to a city, exclusive, compulsory and obligatory upon both employer and employee. R. C. M. 1935, Sections 2842 and 2847, make provision for "employees" and "workmen" engaged in hazardous occupations. And by amendment of 1925, R. C. M. 1921, Section 2863, was amended to include in the definition of "employee" and "workmen," all who are connected with or engaged in hazardous occupations of the elected and appointed paid public officers." It was held in *Moore v. Industrial Accident Fund* that the amendment is limited to those occupations enumerated in the Act and to others of the same general character. The instant case is a tacit recognition that firemen are entitled to the protection of the Act.

The prime question then is: did the fireman here suffer an injury arising in course of and out of the employment? In *Fogg's Case*, a Portland, Maine fireman lived and slept at the station house; his hours of duty were 24 hours per day; he was allowed three hours a day for meals, but because he lived two miles distant from the station, he was allowed to bring his breakfast and eat it in the station house, thus giving him an hour and a half each for midday and evening meals. If an alarm for fire came while he was at meals, it was his duty to answer as soon as possible, if within his district; if the alarm was a second or general alarm, it was his duty to go whether it was within his district or another. He was injured while alighting from an electric car on the way home for the noon meal; his case was held compensable as injury arising in course of and out of the employment. It will be noted, however, that according to the facts he was on duty at the time of the accident; the relationship of employer and employee still existed during the meal hours, and the employee was at a place where he reasonably might be according to the usual routine of his duties.

In the principal case, the Great Falls fire department operated under eight-hour shifts in accordance with the Montana eight-hour law, and though the fireman might be subject to emergency call outside his regular shift, it is believed that the court is correct in regarding the case as one where the general

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28(1916) 52 Mont. 75, 156 P. 130; Lewis and Clark County v. Industrial Accident Board (1916) 52 Mont. 6, 155 P. 263, L. R. A. 1916 D. 268.

29Ch. 121, §3, LAWS OF MONTANA 1925.

30(1927) 80 Mont. 136, 209 P. 826.

31(1926) 125 Me. 168, 132 A. 129.
rule, that injury suffered while going to or from work is non-compensable, applies.

The exception has also been applied in Montana cases, as in *Herberson v. Great Falls Wood and Coal Co.*, where the employee, enroute to work, was hit by an auto in the street. But he was there given a specific extra duty to perform—namely, unlocking one of the gates to the plant; for this purpose he had been given the key and was on his way to perform the duty at the time of the accident. In the instant case, the employee, while always subject to general emergency call, was not undertaking any specific duty for the employer at the time of the accident. It, therefore, seems not improper to hold that his death was not due to an injury arising in course of and out of the employment.

*(1929) 83 Mont. 527, 273 P. 294. The majority of the jurisdictions permit the recovery of compensation where the employee received a street injury while in the course of his employment, although the employment may not have required his presence on the street continually, but only occasionally, or even on the one occasion on which he was injured. See cases in 51 A. L. R. 508, 514; and 80 A. L. R. 110, 127.*