

101.29; 1957 c. 172; 1965 c. 399; 1969 c. 276 ss. 379, 584 (1) (a).

101.29, Stats. 1955, is intended to require inspections to prevent fire hazards; it does not apply to flare pots set out in streets or on sidewalks to warn of surface defects. *Smith v. Jefferson*, 8 W (2d) 378, 99 NW (2d) 119.

The duty to make certain building inspections for discovering and protecting against fire hazards may not be delegated to any persons other than officers or members of the fire department. 42 Atty. Gen. 192.

Dwelling units of row houses are excepted by 101.10 (5b) from the inspections required by 101.29 (3), Stats. 1965. 56 Atty. Gen. 36.

**101.30 History:** 1921 c. 262; Stats. 1921 s. 2394—72; 1923 c. 291 s. 3; Stats. 1923 s. 101.30; 1969 c. 276 s. 584 (1) (a).

Under sec. 2394—72, Stats. 1921, the vendor of a machine who sells it f. o. b. factory, but who, at the request and expense of the purchaser, sends a person to install it, is not liable to the forfeiture therein provided for failing to comply with statutes and orders of industrial commission as to safety devices. Under such circumstances the purchaser is the one liable. 11 Atty. Gen. 744.

**101.305 History:** 1963 c. 139; Stats. 1963 s. 101.305; 1969 c. 207; 1969 c. 276 s. 584 (1) (a); 1969 c. 392.

**101.306 History:** 1963 c. 138; 1963 c. 429 s. 8; Stats. 1963 s. 101.306; 1969 c. 276 s. 584 (1) (a).

**101.37 History:** 1933 c. 360; Stats. 1933 s. 101.37; 1937 c. 95 s. 4; 1965 c. 433; 1969 c. 276 s. 584 (1) (b).

**101.40 History:** 1923 c. 76; Stats. 1923 s. 46.23; 1947 c. 268 s. 44; Stats. 1947 s. 101.40; 1969 c. 366 s. 117 (2) (b).

**101.41 History:** 1923 c. 76; Stats. 1923 s. 46.24; 1943 c. 229; 1947 c. 268 s. 44; Stats. 1947 s. 101.41; 1969 c. 276 ss. 583 (1), 584 (1) (b).

**101.42 History:** 1923 c. 76; Stats. 1923 s. 46.25; 1947 c. 268 s. 44; Stats. 1947 s. 101.42; 1969 c. 276 s. 584 (1) (b); 1969 c. 366 s. 117 (2) (c).

**101.43 History:** 1923 c. 76; Stats. 1923 s. 46.26; 1947 c. 268 s. 44; Stats. 1947 s. 101.43; 1969 c. 276 s. 584 (1) (b); 1969 c. 366 s. 117 (2) (b).

**101.55 History:** 1963 c. 264; Stats. 1963 s. 101.55.

**101.60 History:** 1965 c. 439, 625; Stats. 1965 s. 101.60; 1967 c. 269; 1969 c. 276 ss. 381, 584 (1) (a).

**Editor's Note:** Chapter 439, laws of 1965, contained the following provision:

"Section 9. If any provision of section 101.60 (1) of the statutes is declared invalid, such invalidity shall affect and render invalid all other provisions of this act."

On equality see notes to sec. 1, art. I; and on delegation of power see notes to sec. 1, art. IV.

Cities, villages and towns possess the power, irrespective of 101.60, Stats. 1965, to promul-

gate local regulations to prevent and remove all discrimination in housing, even though regulation of nondiscrimination in housing is a matter of state-wide concern. 55 Atty. Gen. 231.

**101.61 History:** 1947 c. 296; Stats. 1947 s. 15.85; 1953 c. 50; 1965 c. 66 s. 8; 1965 c. 439; 1967 c. 327; Stats. 1967 s. 101.61; 1969 c. 276 ss. 382, 383, 384.

**101.62 History:** 1951 c. 205; Stats. 1951 s. 15.855; 1965 c. 439 s. 2; Stats. 1965 ss. 15.85 (2) (b), (c), 15.855; 1967 c. 327 ss. 4, 5; Stats. 1967 ss. 101.61 (2) (b), (c), 101.62; 1969 c. 276 ss. 383, 385; Stats. 1969 s. 101.62.

**101.80 History:** 1969 c. 445; Stats. 1969 s. 101.80.

## CHAPTER 102.

### Workmen's Compensation.

**Revisor's Note, 1931:** \* \* \* This revision of chapter 102 of the statutes is for the purpose of clarifying and simplifying the language, improving the arrangement, omitting unnecessary words, repealing expressly provisions which have been impliedly repealed by later enactments, and facilitating the finding and citing its various provisions. The meaning of the chapter remains the same as before. It is the intention to change the verbiage without changing the law. \* \* \* (Bill 380-S, s. 2)

On equality, inherent rights, and exercises of police power see notes to sec. 1, art. I; on trial by jury see notes to sec. 5, art. I; on legislative power generally and on delegation of power see notes to sec. 1, art. IV; on judicial power generally see notes to sec. 2, art. VII; on the safe-place statute see notes to various sections of ch. 101; on employment regulations see notes to various sections of ch. 103; on workmen's compensation insurance see notes to various sections of ch. 205; and on administrative procedure and review see notes to various sections of ch. 227.

**102.01 History:** 1931 c. 403 s. 2; Stats. 1931 s. 102.01; 1933 c. 314 s. 2; 1933 c. 402 s. 2; 1943 c. 270; 1945 c. 537; 1951 c. 382; 1955 c. 281; 1957 c. 204; 1963 c. 281; 1969 c. 276.

**Revisor's Note, 1931:** The definition of "injury" is from 102.35, Stats. 1929, which is repealed by this bill. \* \* \* (Bill 380-S, s. 2.)

**Editor's Note:** The term "injury" has been construed in various cases cited in notes under 102.03.

**102.03 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—4; 1913 c. 599; Stats. 1913 s. 2394—3; 1917 c. 624; 1923 c. 291 s. 3; Stats. 1923 s. 102.03; 1927 c. 482; 1931 c. 403 s. 5; 1933 c. 314 s. 1; 1933 c. 402 s. 2; 1943 c. 270; 1945 c. 537; 1947 c. 475; 1949 c. 107; 1953 c. 328 s. 2; 1961 c. 269, 323, 641; 1965 c. 346.

1. General.
2. Injury sustained by an employe.
3. Time of injury.
4. Covered employer and employe.
5. Service incidental to employment.
6. Premises of employer.
7. Injury arising out of the employment.

8. Self-inflicted injury.
9. Employment requiring travel.
10. Exclusive remedy.
11. Intermittent disability.

#### 1. General.

On definition of "employer" see notes to 102.04; on "loaned" employes see notes to 102.06; on definition of "employee" see notes to 102.07; on procedure see notes to 102.17; on findings, orders and award see notes to 102.18; and on judicial review see notes to 102.23.

"The right to claim compensation under this act is confined to those cases where the relationship of employer and employe exists. That relationship is created only in those cases where the one claiming to be an employe is in the service of another under a contract, either express or implied. Unless there is such relationship, the injured person is left to the remedies given him by the common law before the enactment of the workman's compensation act." *Culbertson v. Kieckhofer C. Co.* 197 W 349, 351, 222 NW 249, 250.

"Liability under the workmen's compensation act is, strictly speaking, neither tortious nor contractual in its nature. It is an obligation imposed by law which arises out of the status created by the employment. The liability arises out of the law itself, rather than out of the contract of the parties. The law operates upon the status and attaches certain rights and obligations to that status. The relationship of employer and employe has its origin in the contract of employment; but when that relationship is created by the contract, the respective rights and liabilities with reference to compensation depend upon the provisions of the law, not upon the contract of the parties. The fundamental idea upon which liability is imposed is that an injury to an employe, like damage to a machine, is a burden that should be borne by the product of the industry and ultimately paid by those who consume this product." *Val Blatz Brew. Co. v. Industrial Comm.* 201 W 474, 478, 230 NW 623, 624.

"Liability" exists only where the listed conditions concur. The rule, that "liability" contemplates one person on the "right" side and a different person on the "duty" side of the relationship, is so well established that it ought to require the clearest sort of language in the act to conclude that liability of an insurance carrier to a dependent of a deceased employe was contemplated where the dependent claiming the death benefit against the insurance carrier is also the insured employer and where, therefore, the same person occupies both the "right" and the "duty" position and the duty is owed by the person who claims the right. *Thomas v. Industrial Comm.* 243 W 231, 10 NW (2d) 206.

One who has applied for and received and accepted benefits under the workmen's compensation act, and has thereby admitted that all the conditions exist which bring the act into play, cannot attack the constitutionality of the act. *Beck v. Hamann*, 263 W 131, 56 NW (2d) 837.

"The two essential tests which must be satisfied to show liability on the part of the employer under our Workmen's Compensation

Act have been prescribed by statute: (1) That the employe at the time of the accident be performing service growing out of and incidental to his employment; (2) that the injury arise out of the employment. These tests are independent tests and must be satisfied by separate showings of proof, but both tests must be proved to show liability." *Nash-Kelvinator Corp. v. Industrial Comm.* 266 W 81, 84, 62 NW (2d) 567, 569. See also *Wisconsin P. & L. Co. v. Industrial Comm.* 268 W 513, 514, 68 NW (2d) 44, 45.

It is well established that the sole liability of an employer because of the injury of an employe in the course of his employment, either to the employe or to anyone else, is under the workmen's compensation law. Such rule does not, however, apply to cases involving express agreements for indemnification. *Grede Foundries, Inc. v. Price Erecting Co.* 38 W (2d) 502, 157 NW (2d) 559.

Judicial construction of certain provisions of the workmen's compensation act. *Barry*, 17 MLR 174.

Survey of workmen's compensation law, 1942-1955. *Hammond and Levitan*, 1957 WLR 248.

The adequacy of workmen's compensation as social insurance. *Brodie*, 1963 WLR 57.

#### 2. Injury Sustained by an Employe.

A finding by the industrial commission that the miliary tuberculosis from which an employe died was proximately caused by an explosion of gas by which he was injured 4 months prior thereto was warranted by the evidence. *Heileman Brew. Co. v. Industrial Comm.* 161 W 46, 152 NW 446.

Where an employe fell from a ladder and 9 days later died of pneumonia, which caused his death, the evidence supported a finding by the industrial commission that the death proximately resulted from the fall. *A. Breslauer Co. v. Industrial Comm.* 167 W 202, 167 NW 256.

The fact that hernia may result from various industrial pursuits does not prevent it from being an "occupational disease" within the workmen's compensation act. *Marathon P. M. Co. v. Huntington*, 203 W 17, 233 NW 558.

The effect of a disease or infirmity existing before an accident occurs is to be separated from the effect of the later injury, insofar as possible, in administering the workmen's compensation law. Where the preexisting condition is so thoroughly established and so serious that what happens thereafter cannot reasonably be held to be the result of the subsequent accident and the preexisting condition is the cause of the disability, compensation cannot be awarded. *Employers' M. L. Ins. Co. v. Industrial Comm.* 212 W 669, 250 NW 758.

The fact that an employe has previously received compensation based on permanent partial disability for an injury to his foot does not exclude his recovering compensation based on permanent partial disability for a subsequent injury to the same foot, if as a matter of fact the subsequent injury lessened the efficiency of the employe. *Kiesow v. Industrial Comm.* 214 W 285, 252 NW 604.

The word "accident" as used in workmen's

compensation cases includes ruptures resulting from lifting heavy objects. *Malleable I. R. Co. v. Industrial Comm.* 215 W 560, 255 NW 123.

"The mere fact that a disease follows as a result of an accident does not constitute suffering therefrom an occupational disease within the contemplation of the act. An occupational disease, as that term is used in the act, is a disease like silicosis, which is acquired as the result and an incident of working in an industry over an extended period of time." *State v. Industrial Comm.* 233 W 452, 460, 289 NW 618, 622.

In order to recover workmen's compensation for an occupational disease, there must be an actual physical inability to work, and not a mere medical disability. Where a workman, although physically able to work, entered a tuberculosis sanatorium on the advice of physicians for observation and examination as to a silicotic condition which he had contracted as a result of his work, he could not be considered as physically disabled from working and as therefore suffering a wage loss so as to be entitled to workmen's compensation during his stay in the sanatorium. *Odanah Iron Co. v. Industrial Comm.* 235 W 166, 292 NW 439.

Traumatic neurosis or hysteria caused by an industrial accident is a compensable injury. *Johnson v. Industrial Comm.* 5 W (2d) 584, 93 NW (2d) 439.

Where the facts disclose that one is injured while in the service of another, it will be presumed for the purposes of the workmen's compensation act that the person injured was an employe; but such presumption is rebuttable and ceases to have force or effect when evidence to the contrary is adduced; and it does not shift the burden of proof to the alleged employer. *Enderby v. Industrial Comm.* 12 W (2d) 91, 106 NW (2d) 315.

In compensation cases involving mental injuries caused by accident or disease, either directly or as a part of the "process which the injury started," the commission should find the nature of the injury, what caused it, and its healing period; and it is not sufficient in such cases to find merely an injury and leave it to the reviewing court to determine whether the injury is mental or physical, or both. *Johnson v. Industrial Comm.* 14 W (2d) 211, 109 NW (2d) 666.

Legal history of the occupational disease law in Wisconsin. *Otjen*, 22 MLR 113.

Meaning of "accident" under workmen's compensation. 23 MLR 152; 25 MLR 52.

Compensation of occupational disease. *Rabinovitz*, 12 WLR 198.

Compensable injuries and accompanying neurosis: the problem of continuing incapacity despite medical recovery. *Miller and Fellner*, 1968 WLR 184.

### 3. Time of Injury.

Recovery from occupational disease which caused disability before entering upon the last employment and a new onset of that disease after entering upon that employment must occur to render the last employer liable for compensation. (*Falk Corp. v. Industrial Comm.* 202 W 284, 232 NW 542, qualified, and *Zurich G. A. & L. Ins. Co. v. Industrial Comm.* 203

W 135, 233 NW 772, adhered to.) *Outboard M. Co. v. Industrial Comm.* 206 W 131, 239 NW 141.

A molder, whose services were discontinued because he could not work rapidly enough, and who thereafter was found suffering from silicosis, but whose inability to earn a full wage was because of his being inherently a "slow" worker, and not because of his silicosis, did not sustain a disability resulting in wage loss, and was not entitled to compensation from his last employer. *Milwaukee M. & G. I. Works v. Industrial Comm.* 220 W 244, 263 NW 662, 265 NW 394.

Where the supreme court had defined "disability," as an injury, caused by accident or by occupational disease, which results in a wage loss, and the legislature, in a 1933 amendment to the act (ch. 314, Laws 1933), adopted the court's definition by using such word without change, the court was bound to interpret the statute, dealing with the word, in accordance with the meaning theretofore ascribed to such word. The 1933 amendment refers the time of injury back to a point when the employe-employer relationship existed. Even if a plant shuts down and an employe is discharged and is not thereafter employed, if he is thereafter disabled, the time when his disability occurs is referred to the last day of employment which caused his disability, but, in order to sustain an award, there must be disability which is such a physical incapacity to work as results in a wage loss. An employe who became 50 per cent disabled from silicosis as a result of working in the plant of a monument company sustained a "wage loss" so as to entitle him to compensation from the company, his last employer, although he had worked regularly prior to his discharge which followed discovery of his condition. *Schaefer & Co. v. Industrial Comm.* 220 W 289, 265 NW 390.

As respects fixing the liability of compensation insurance carriers, the date on which an employe, during a temporary shutdown of the plant, suffered a hemorrhage of the lungs caused by disease contracted in the course of his employment, constituted the date when compensable disability first occurred. *Jackson Monument Co. v. Industrial Comm.* 220 W 390, 265 NW 63.

If the employe sustained a disability from silicosis resulting in wage loss while working for an employer, the date of injury and liability was then fixed, and ch. 314, Laws 1933, amending 102.01 (2) relating to the date of injury in cases of occupational disease, was inapplicable, since the 1933 amendment applies only when a wage loss occurs after the relation of employer and employe is terminated. *General A. F. & L. Assur. Corp. v. Industrial Comm.* 221 W 540, 266 NW 224.

A finding of the industrial commission fixing the date of an employe's injury from silicosis as a date when the employe first lost time because of his silicosis, which was a date when an insurance carrier was on the risk, was supportable although the employe had suffered no actual wage loss for such loss of time in that there had been no deduction of wages. *General A. F. & L. Assur. Corp. v. Industrial Comm.* 221 W 544, 266 NW 226.

While the "time of injury" is referred back

to "the last day of work for the last employer whose employment caused the disability," and such employer is made liable for compensation, the payment of compensation does not necessarily run from the date of the last day of work, but only from the date of disability, i.e., actual physical incapacity to work. *Monello Granite Co. v. Industrial Comm.* 227 W 170, 278 NW 391.

The date of an industrial accident, including the results incidental thereto, is the time of the occurrence of the injury, and the limitation on the time for filing a claim for compensation therefore begins to run from that moment. *Zabkowitz v. Industrial Comm.* 264 W 317, 58 NW (2d) 677.

The interpretation by the commission of the statutory definition of "time of injury" in the situation where the employe sustains a disability due to occupational disease while still in the employ of the employer as "the last day of work before the filing of the application for compensation" is in keeping with the legislative history of such statutory definition, and one which is required in order to avoid an absurd result. *Green Bay D. F. Co. v. Industrial Comm.* 265 W 38, 60 NW (2d) 409, 61 NW (2d) 847.

In 102.01 (2), Stats. 1953, defining "time of injury" and "date of injury" in the case of disease in workmen's compensation cases as the last day of work for the last employer whose "employment caused disability", the latter term means that employment which caused the disability or to some appreciable extent furthered its progress. *Maynard Elec. Steel Co. v. Industrial Comm.* 273 W 38, 76 NW (2d) 604.

Where there is wage loss from the occupational disease before the termination of employment, the date of the commencement of such wage loss establishes the date of injury. *Wagner v. Industrial Comm.* 273 W 553, 79 NW (2d) 264, 80 NW (2d) 456.

Liability of successive insurers under Wisconsin's workmen's compensation act. *Bezold*, 37 MLR 164.

#### 4. Covered Employer and Employe.

The apportionment of compensation for tuberculosis contracted by one employed concurrently by 3 employers, among such employers, on the basis of the time the employe worked for each during the incubation of the disease is authorized. It seems that one of the employers would be liable for the full amount of the award and, therefore, no one of his employers has been damaged by this apportionment among them. The power to apportion the award is not a delegation of judicial power. An employer for whom he had worked part time, but for whom he was not working at the time of his incapacity, was not liable. *Schaefer & Co. v. Industrial Comm.* 185 W 317, 201 NW 396.

A president of a domestic construction company who was injured while at work on a project of the corporation in a foreign state, pursuant to his contract of employment made in Wisconsin, is subject to the provisions of the Wisconsin workmen's compensation act. *Zurich A. & L. Ins. Co. v. Industrial Comm.* 193 W 32, 213 NW 630.

Where a contract of employment is made within the state of Wisconsin by residents thereof, and both parties have subjected themselves to the terms of the workmen's compensation act, the liability of the employer for an injury to the employe is that prescribed by the act; and the rights and liabilities of the parties must be determined in the courts of this state in accordance with the provisions of said act, whether the injury occurred within or without the state. *Anderson v. Miller S. I. Co.* 169 W 106, 171 NW 935; *Wandersee v. Industrial Comm.* 198 W 345, 223 NW 837.

That the week's work contemplated by a Wisconsin contract was performed in Minnesota did not, under the circumstances, remove the parties from the operation of the Wisconsin workmen's compensation act. *Threshermen's Nat. Ins. Co. v. Industrial Comm.* 201 W 303, 230 NW 67.

When residents of the state contract for services to be performed outside the state, a constructive status under the workmen's compensation act is created, and this continues until the employe acquires an actual status as an employe in some other state. *Val Blatz Brew. Co. v. Industrial Comm.* 201 W 474, 230 NW 623.

Where an employer under the workmen's compensation act engages a person to perform services in this state under a contract of hire, express or implied, no matter where or when such contract may have been engendered, such employe is under the Wisconsin workmen's compensation act and is entitled to its benefits; and this is so even though he is injured while outside of this state rendering services incidental to his employment within this state, and it is not material whether the employe was a resident of this state. *McKesson-Fuller-Morrison Co. v. Industrial Comm.* 212 W 507, 250 NW 396.

To render the federal employers' liability act rather than the Wisconsin workmen's compensation act applicable to employe's injury, it is only necessary that work was so closely related to interstate transportation as to be practically part of it. *Chicago, M., St. P. & P. R. Co. v. Industrial Comm.* 217 W 272, 258 NW 608.

Where the status of employe and employer existed between a Wisconsin resident and a Wisconsin corporation under a contract of employment entered into between them in Wisconsin, the Wisconsin workmen's compensation act was applicable to an injury sustained in Michigan, even though no work had been performed by the employe within Wisconsin. *Jutton-Kelly Co. v. Industrial Comm.* 220 W 127, 264 NW 630.

Where an employe rendered no services in Wisconsin and died outside the state his death is not compensable under the Wisconsin compensation law, notwithstanding the contract was made in Wisconsin. *Dunville v. Industrial Comm.* 228 W 86, 279 NW 695.

Where an employer, engaged exclusively in the business of carrying on logging operations in Michigan for a Michigan timber company, hired an employe to work exclusively in Michigan, the Wisconsin workmen's compensation act did not apply so as to allow recovery thereunder for the employe's death from in-

juries sustained in the course of his employment in Michigan, although both he and his employer were residents of Wisconsin and the contract of employment had been made in Wisconsin. (*Wandersee v. Industrial Comm.* 198 W 345, applied; other cases distinguished.) *Schooley v. Industrial Comm.* 233 W 631, 290 NW 127.

An employe of a railroad company, owning and operating ore docks used exclusively for handling iron ore in interstate commerce, was engaged in interstate commerce when injured while making repairs to the docks during the wintertime when the docks were not in operation, so that the federal employers' liability act and not the Wisconsin workmen's compensation act was applicable. (*Minneapolis, St. P. & S. S. M. R. Co. v. Industrial Comm.* 227 W 563, distinguished.) *Great Northern R. Co. v. Industrial Comm.* 245 W 375, 14 NW (2d) 152.

For award when an employer is subject to workmen's compensation laws in 2 states, see *Industrial Comm. v. McCartin*, 330 US 622, reversing 248 W 570, 22 NW (2d) 522.

An employe who acquires a temporary status in this state while on a mission incidental to his main employment in a sister state loses such status on leaving the jurisdiction of Wisconsin, and his remedy for injuries thereafter sustained at the place of his main employment is beyond the jurisdiction of the Wisconsin industrial commission. *Perfect S. R.W. Mfg. Co. v. Industrial Comm.* 257 W 133, 42 NW (2d) 449.

A traveling freight agent of a railroad company engaged almost entirely in interstate transportation, who was employed in calling on companies in Wisconsin and the upper peninsula of Michigan to induce them to ship or direct the shipment of freight over his employer's railroad in interstate commerce, and who was injured while traveling in the course of his employment, was engaged in work in furtherance of and directly affecting interstate commerce within the meaning of the federal employers' liability act, as amended, 45 USC, sec. 51, so that he was subject to that act and was not subject to the Wisconsin workmen's compensation act. *Kettner v. Industrial Comm.* 258 W 615, 46 NW (2d) 833.

The evidence sustained a finding of the industrial commission that an employe, who had only recently been transferred from Wisconsin to Oregon, when he was fatally injured in Portland, was still a resident of Wisconsin at the time of injury, so that the case was subject to the provisions of the Wisconsin workmen's compensation act and the Wisconsin commission had jurisdiction. *Western Condensing Co. v. Industrial Comm.* 262 W 458, 55 NW (2d) 363.

##### 5. Service Incidental to Employment.

An employe who, after eating his lunch on the employer's premises as usual, walked along a passageway near a river bank towards a toilet provided for the use of employes and fell into the river and was drowned, was "performing service growing out of and incidental to his employment" within the meaning of sec. 2394-3, Stats. 1913, if he expected to resume his work when his lunching time expired.

*Milwaukee W. F. Co. v. Industrial Comm.* 159 W 635, 150 NW 998.

The principal of a public school whose duty it was to select a basketball team and who, while supervising for that purpose some test exercises on the school grounds during school hours, was struck and injured by a basketball, was "performing service growing out of and incidental to his employment," even if the rules of the school board required such exercises to be held at recess. *Milwaukee v. Industrial Comm.* 160 W 238, 151 NW 247.

An employe's duties were to dump tram cars containing heated iron ore as they came from kilns, pick up fallen lumps, transfer the cars to the return track, and in the intervals between car arrivals to pass his leisure time as best he could. On a cold night, during one of these intervals, he sat or lay down on the track to warm himself from the ore, and thus was injured by the next car. Under the circumstances, he was "performing service growing out of and incidental to his employment," and that his negligence did not deprive him of the right to compensation. *Northwestern I. Co. v. Industrial Comm.* 160 W 633, 152 NW 416.

The facts upon which the industrial commission found that a night watchman came to his death by accidental injury while he was "performing services growing out of and incidental to his employment," stated and finding sustained. *Heileman B. Co. v. Shaw*, 161 W 443, 154 NW 631.

A city fireman who was injured while using a city street as a means of going to and from an employment carried on at a definite place other than a street was not "performing service growing out of and incidental to his employment" except while "on the premises of his employer". (*Milwaukee v. Althoff*, 156 W 68, limited.) *Hornburg v. Morris*, 163 W 31, 157 NW 556.

An employe of a logging company who was accidentally injured while riding upon a logging train with his pay check to get his pay at the company's office some miles distant, as he was directed and in accordance with custom, received his injury while "performing service growing out of and incidental to his employment." *Hackley-Phelps-Bonnell Co. v. Industrial Comm.* 165 W 586, 162 NW 921.

An employe who, while eating his lunch in the factory of his employer according to a custom tacitly consented to by the latter, was injured by a pile of crude rubber falling upon him, was at the time "performing service growing out of and incidental to his employment." *Racine R. Co. v. Industrial Comm.* 165 W 600, 162 NW 664.

The act of an employe relating solely to his own private affairs, done while off duty and while he is neither going to nor coming from his work nor making any preparation therefor, is not service growing out of and incidental to his employment, though at the time it is performed he is subject to a call to duty and though performed upon the employer's premises under the sanction of a custom. *Brienen v. Wisconsin P. S. Co.* 166 W 24, 163 NW 182.

The evidence did not sustain a finding by the industrial commission that an injury occurred while an employe was "going from his

employment in the ordinary and usual way." *Foster-Latimer L. Co. v. Industrial Comm.* 167 W 337, 167 NW 453.

Upon the facts stated, the carrier of mail from an incoming train on one railroad to an outgoing train on another railroad was "performing service growing out of and incidental to his employment" although he had climbed upon the outside of the mail car at a nearby crossing as the train was slowing down and was injured while so riding. *White v. Industrial Comm.* 167 W 483, 167 NW 816.

Under the facts stated, the foreman of a crew engaged in the construction of a logging road, was "performing service growing out of and incidental to his employment." *Bekkedal L. Co. v. Industrial Comm.* 168 W 230, 169 NW 561.

A mechanic in charge of his employer's pit at an automobile race, with instructions not to leave the pit, left the pit and stood upon the fence at the side of a race track. While there he saw one of his employer's cars stop on the track. Thereupon he ran towards it and was struck by another car and killed. Under the facts stated, he was at the time performing service growing out of and incidental to his employment and the fact that he had disobeyed orders did not preclude an award of compensation for his death. *Frint M. C. Co. v. Industrial Comm.* 168 W 436, 170 NW 285.

Where a millwright of an iron company, whose duties required his presence at the plant during business hours and occasionally at other times, remained after business hours at his work and as he was leaving observed a fire in a building, part of the plant, into which he entered and lost his life. The deceased, at the time of his death, was performing service growing out of and incidental to his employment. *Belle City M. I. Co. v. Rowland*, 170 W 293, 174 NW 899.

An employe of a garbage contractor was injured in consequence of the fright of his horses as he was taking his equipment, part of which was owned by the city, back to the barn of his immediate employer after having taken his last load for the day to the garbage incinerator. Under the facts stated, he was at the time of his injury performing service growing out of and incidental to his employment, and he was entitled to compensation. *Milwaukee v. Fera*, 170 W 348, 174 NW 926.

The crucial question under the workmen's compensation act is whether the injury has been inflicted in the course of service growing out of and incidental to employment, and the act must be given a broad, liberal construction to the end that its beneficent purpose may be fully carried out. An employe 14 years of age, forbidden to operate a paper cutter in the employer's print shop, was not entitled to compensation for an injury received while operating the cutter to make a table for himself, the employer having no knowledge of such forbidden use. The fact that the employer paid the boy money during his disability did not make the employer legally liable for compensation. *Radtke Brothers and Korsch Co. v. Rutzinski*, 174 W 212, 183 NW 168.

Going for a drink or returning in the usual way from the accustomed place of drinking is performing a service growing out of and in-

cidental to employment. So also is any unforbidden act necessary to or promotive of health and comfort. *Widell Co. v. Industrial Comm.* 180 W 179, 192 NW 449.

An employe in a lumber camp injured by a bunk mate who had become insane sustained an accidental injury growing out of and incidental to his employment where the accident was unforeseen and unexpected. *John H. Kaiser L. Co. v. Industrial Comm.* 181 W 513, 195 NW 329.

A county employe, injured by tripping over a wire while returning to his work after his noonday meal along a shortcut over a vacant village block, was entitled to compensation as for an injury arising out of and incidental to his employment. The short cut, though a departure from the usual route, did not necessarily take him out of the usual course of his employment. *Monroe County v. Industrial Comm.* 184 W 32, 198 NW 597.

An employe who contracted typhoid fever by drinking polluted water furnished by his employer while at his work, was, at the time, "performing service growing out of and incidental to his employment." The injury was "accidentally sustained" and "proximately caused by accident." Such injuries may spring from carelessness or negligence. *Vennen v. New Dells L. Co.* 161 W 370, 154 NW 640; *Scott & H. L. Co. v. Industrial Comm.* 184 W 276, 199 NW 159.

Under a contract of employment which included the transportation of the employe to and from his work, the relation of master and servant existed while the employe was being transported home at the end of his day's work for the county, although when injured he was riding on a truck hired by the county to transport the county employes. *Rock County v. Industrial Comm.* 185 W 134, 200 NW 657.

Where a city required its laborers to report at a tool house in the morning and then proceed to where they were to work, an employe who was injured while so proceeding along one of 2 customary routes was at the time of the accident "performing service growing out of and incidental to his employment." *Milwaukee v. Industrial Comm.* 185 W 311, 201 NW 240.

A woman employed to perform work generally in a factory, who swept the floor at the direction of the foreman when a machine on which she was working ran out of material, then started putting the waste material she had gathered through a cut-off saw, as was customarily done, was furthering the interests of her employer and within the scope of her employment, the evidence disclosing that she had worked at various saws and had never been forbidden to do so. *Morgan Co. v. Industrial Comm.* 185 W 428, 201 NW 738.

Where a section foreman of a gang moving steel rails threw a stone at a snake he saw on or near a rail they were about to move, his purpose being to get rid of the snake so that the rail could be moved, and a piece of the stone destroyed an eye of one of the crew, the throwing of the stone was within the scope of the foreman's employment. *Kleeman v. Chicago & Northwestern R. Co.* 186 W 482, 202 NW 295.

An employe, during working hours, making a needed tool box in which to keep the tools

he used in his regular work, was acting within the scope of his employment. *Kimberly-Clark Co. v. Industrial Comm.* 187 W 53, 203 NW 737.

A finding of the industrial commission may be based upon evidence which shows only a preponderance of probabilities where an employe came to his death because of smallpox contracted while eating ice cream furnished in a hospital where he was at work, he was within the scope of his employment. *Vilter M. Co. v. Industrial Comm.* 192 W 362, 212 NW 641.

An injury to the eye of a spinning-machine operator, caused by a nail thrown in play by a fellow employe while the operator was sitting on a window sill 5 feet from the machine about 7 minutes before time to begin work, was received while the employe was within the course of his employment. The injured employe is not precluded from recovering by reason of the fact that the nail was thrown in play, where he himself was not engaged in play and was in no manner to blame for the injury. (*Federal R. M. Co. v. Havolic*, 162 W 341, 156 NW 143, overruled.) *Badger F. Co. v. Industrial Comm.* 195 W 134, 217 NW 734.

A constable, knowing that a man was wanted for desertion, while in the woods picking berries saw him and advanced to where he was standing beside a still, possession of which was unlawful. The man shot the constable, killing him. The constable's death was the result of injuries sustained in the course of employment since circumstances justified the inference that the constable was attempting arrest of the individual for violation of the liquor law. *Presque Isle v. Rutherford*, 200 W 446, 228 NW 589.

The testing and repairing of machinery used in the business of an employer is a service within the scope of the employment, regardless of the ownership of the machine, and the accidental killing of a member of a road-working crew when testing the foreman's automobile used in promoting the work, after making repairs thereon by direction of the foreman, occurred while "performing services growing out of and incidental to his employment." *Columbia County Highway Comm. v. Industrial Comm.* 201 W 301, 230 NW 40.

A servant was employed by the day, and received wood and house rent free. He sustained an injury when cutting wood after hours. The injury was in the course of employment since free wood means wood ready for use. *Kraft v. Industrial Comm.* 201 W 339, 230 NW 36.

A volunteer fireman injured on his way to the fire house with his employer's truck in answer to an alarm was acting within his duties as fireman, and death from injury was compensable by the city. *West Bend v. Industrial Comm.* 202 W 319, 232 NW 524.

A village marshal killed during an attempt to make an arrest under a criminal warrant was, as respects the workmen's compensation act, performing service incidental to his employment, although the attempted arrest was outside of the village limits. *Schofield v. Industrial Comm.* 204 W 84, 235 NW 396.

The death of the president of an employer in an automobile accident while taking 2 employes home after work, as through courtesy he frequently did, was not compensable. *West-*

*ern F. Co. v. Industrial Comm.* 206 W 125, 238 NW 854.

A garage employe killed in a crash of an airplane while riding therein at his employer's suggestion to distribute circulars advertising a "booster day" for the benefit and containing advertisements of businessmen of the locality—the employer having no interest in the plane, which was owned and operated at the time by a third person, or in its earnings or in the receipt from advertising—was not performing service growing out of and incidental to his employment. *Indrebo v. Industrial Comm.* 209 W 272, 243 NW 464.

A slight deviation from the direct line of employment would not remove an employe from "performance of service growing out of and incidental to employment." *Simmons Co. v. Industrial Comm.* 211 W 445, 248 NW 443.

Where, by the express terms of the contract of employment, the employer engages to transport his employes to and from the place of employment, they are rendering services growing out of and incidental to their employment while being thus transported, and are entitled to compensation, where they sustain injuries during the course of such transportation. *Goldsworthy v. Industrial Comm.* 212 W 544, 250 NW 427.

An ash carrier employed by a city, who was required to report each morning to the foreman at a ward yard, before time for starting work, for the purpose of reporting on the previous day's work and receiving instructions, entered into the course of his employment immediately on entering the yard to report, so as to be entitled to compensation for injuries sustained during the interval between his arrival at the yard and the time for starting work, it being immaterial that the foreman had not arrived at the yard prior to the time of the accident. *Milwaukee v. Industrial Comm.* 218 W 499, 261 NW 206.

Where a truck driver, after making a late delivery, had proceeded home in his employer's truck with the employer's permission, the truck driver, whose contract of employment did not require transportation to or from work was a bailee of the truck for his own purpose, and he was not performing services growing out of and incidental to his employment, when burned in attempting to put out a fire in the truck while it was parked on his premises for the night; and hence his injuries were not compensable. (*Belle City M. I. Co. v. Rowland*, 170 W 293, distinguished.) *Wisconsin C. Gas Co. v. Industrial Comm.* 219 W 234, 262 NW 704.

The workmen's compensation act must be liberally construed in favor of including all service as within the scope of the employment that can in any sense be said to reasonably come within it. *Severson v. Industrial Comm.* 221 W 169, 266 NW 235.

A city librarian who journeyed to the capital city to consult the director of the library school relative to certain projects concerning the library in which the librarian worked, and who fell when her crutch slipped on encountering a wet spot on the floor of the Y.W.C.A. building where she stayed overnight, was performing services growing out of and incidental to her employment at the time of her fall, and hence her resulting injuries were compensable.



able. *Voswinkel v. Industrial Comm.* 229 W 539, 282 NW 62.

A medical counselor employed at a summer camp, who was struck in the eye by a ball while playing tennis with other employees at the camp during a period when he was not on duty, was not performing service growing out of and incidental to his employment at the time of injury; hence the injury was not compensable. *YMCA v. Industrial Comm.* 235 W 161, 292 NW 324.

Going to work early from the nurses' dormitory on the hospital premises to the hospital, with the intention of attending religious services in the hospital before reporting there for active duty, did not result in taking the student nurse out of the course of her employment, especially where she was doing just as was expected of her by the hospital-employer and her injury occurred on the employer's premises, not while she was taking part in the religious services, but before that and while she was on her way to work in the ordinary and usual way and before any deviation occurred, and hence at the time of injury she was in the line of her employment so as to be deemed to be performing services growing out of and incidental thereto. *Employers Mut. L. Ins. Co. v. Industrial Comm.* 235 W 270, 292 NW 878.

Where a used-car salesman was merely permitted to make use of any available car of his employer in going between the employee's home and the employer's place of business, and there was no obligation on the employer to transport the employee to and from work, there was no contract to furnish transportation, and the employee was not performing service growing out of and incidental to his employment when injured while attempting to start the car at his home preparatory to leaving for work; hence his injuries were not compensable. *Brown v. Industrial Comm.* 236 W 569, 295 NW 695.

The evidence in a workmen's compensation proceeding sustained findings and conclusions of the industrial commission that—under a union contract providing that when electricians were sent outside the city "all transportation, board and lodging must be paid by the employer," and under arrangements made with the instant employer—the employer had no obligation to transport employees to and from their homes or work except at the beginning and the end of a job outside the city and the employees while on such job merely had the right to receive board and lodging or to receive in lieu thereof an additional \$1.50 per day if they elected to commute to and from work in their own cars, and hence an employee who had elected to commute was not performing services growing out of and incidental to his employment when killed in an accident while returning home in his own car after the end of a day's work. *Kerin v. Industrial Comm.* 239 W 617, 2 NW (2d) 223.

A saleslady at a store, instructed to call on a customer and make a collection before coming to work at the store, and injured by slipping on the sidewalk while on the trip to the customer's home, was performing services at the time of injury, so that the injury was compensable, although the accident occurred before the employee arrived at a point in such

trip where the route to the customer's home deviated from that to the store. *Bitker Cloak & Suit Co. v. Industrial Comm.* 241 W 653, 6 NW (2d) 664.

A co-driver of a truck, who fell from the moving truck, while standing on the running board intending to answer a call of nature, was nevertheless entitled to compensation for his injuries as "performing service growing out of and incidental to his employment" at the time of injury. Negligence of an employe, violation of a statutory rule, or command of the employer, do not bar recovery. *Karlslyst v. Industrial Comm.* 243 W 612, 11 NW (2d) 179.

Where an employe engaged in road-repair work slept in a tent furnished and equipped by his employer at a camp located 4½ miles from the nearest place at which lodging could be obtained, and the employe, without any means of transportation, as a practical matter had no other choice than to sleep at the camp although not actually required to sleep there, he was performing service growing out of and incidental to his employment when during the night a windstorm blew a tool shed over onto him. *Musson v. Industrial Comm.* 248 W 192, 21 NW (2d) 265.

A ship carpenter, living in his home city and traveling daily to and from his employer's plant in another city because of the scarcity of housing facilities in that city during the war emergency, and so traveling in an automobile with fellow employes under a transportation pool approved by the employer as required by gasoline-rationing rules, was not performing services growing out of and incidental to his employment when injured on the public highway while so traveling to the employer's plant, where the employer paid no part of the transportation costs and was under no obligation to provide transportation. *Charney v. Industrial Comm.* 249 W 144, 23 NW (2d) 508.

Where an employe was proceeding on his way to report a fellow employe's interference with his work, and he deviated only for the purpose of inquiring as to the fellow employe's name, and was assaulted by bystander employes while he was making the inquiry, the commission could find that at the time of injury he was performing service growing out of and incidental to his employment and that his injury arose out of his employment. *North End Foundry Co. v. Industrial Comm.* 251 W 332, 29 NW (2d) 40.

Under the statutes relating to circuit court reporters, a circuit court reporter was not performing services growing out of and incidental to his employment when killed in an automobile collision while riding with the circuit judge in the judge's car from Green Bay to Madison, where the judge was to attend a meeting of the supreme court advisory committee on rules, of which the judge was a member, although the judge had asked the reporter to drive with him to Madison. *State v. Industrial Comm.* 252 W 204, 31 NW (2d) 196.

An instructor-driver of a truck, who had been instructed by his employer to stop when someone was injured and give aid, and who was accompanied by a student driver, stopped the truck on seeing 2 cars off the road. The



student-driver, in leaving the truck to go to the scene of the accident, was acting within the course of his employment, and his death, which occurred when a passing car struck him, was incidental to his employment, so that the death was compensable. *Schulz v. Industrial Comm.* 254 W 578, 36 NW (2d) 683.

Where an employe had entered on the performance of his duties, and the nature of his duties was such that a presumption of continuity of service attaches, such presumption remains with him until severed by some occurrence inconsistent with the terms and conditions of his employment. The presumption must control when no more can be brought to overpower it than speculation based on behavior that is as consistent with continuance of duty as with departure from it. *Andreski v. Industrial Comm.* 261 W 234, 52 NW (2d) 135.

Where an employe is injured in the performance of an act in furtherance of his own purposes and without the scope of his employment, the employer is not liable; and the employe may not recover for an injury received while doing work entirely different from that assigned to him, against orders and for his own benefit. *Kosteczko v. Industrial Comm.* 265 W 29, 60 NW (2d) 355.

The evidence supported the industrial commission's finding that a village marshal, who responded to a call concerning an automobile collision by driving the village squad car to the scene of an accident, which was one-half mile outside of the village limits, then went to a nearby tavern and telephoned the county sheriff's department, then returned to the scene of the accident and, while setting out a flare to warn other motorists, was fatally injured when struck by an approaching automobile, was performing service growing out of and incidental to his employment at the time of his injury, in responding to what appeared to be an emergency, although the instructions given to him at the time of his hiring confined his official duties to the village limits and forbade him to go outside of the village except in cases of hot pursuit of offenders. (*Frint Motor Car Co. v. Industrial Comm.* 168 W 436, applied; *Kosteczko v. Industrial Comm.* 265 W 29, distinguished.) *Butler v. Industrial Comm.* 265 W 380, 61 NW (2d) 490.

A service-station employe, on duty until midnight, and later delivering a car to a woman customer employed at a night club in the city until about 2:30 a.m., and riding with her in the car when it left the road some 10 to 12 miles from the city about 3:30 a.m. with resulting injury to him, was not performing service for his employer at the time of the accident. *Hemans v. Industrial Comm.* 266 W 100, 62 NW (2d) 406.

Undisputed facts that an employe was to use his own truck in hauling gravel for his employer, that the truck became damaged while he was hauling on a certain afternoon, that after unloading he went directly from the employer's premises to a service station where the employer's trucks were serviced, and that it was his intention, as per custom, to leave the truck at the gravel pit so that it would be ready for loading the next morning, but that he was injured while engaged in the repair of

the truck at the service station, required the conclusion that he was injured while performing service growing out of and incidental to his employment, keeping the truck in repair being a necessary incident to his employment. *Fels v. Industrial Comm.* 269 W 294, 69 NW (2d) 225.

Where an injury was sustained by a full-time janitor while salvaging some of a building's old refrigeration piping for use in installing a gas line to his basement workshop, which he used both as janitor and his private contracting business, the evidence sustained a finding of the industrial commission that he was "performing service growing out of and incidental to his employment." *Strehlow v. Industrial Comm.* 271 W 408, 73 NW (2d) 416.

The supreme court is committed to the "personal comfort" doctrine, which is that employes who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment. An employe injured on the employer's premises during his lunch hour but after a period of resting by lying down was covered by the act. *American Motors Corp. v. Industrial Comm.* 1 W (2d) 261, 83 NW (2d) 714.

The evidence in a workmen's compensation proceeding supported the industrial commission's findings that an employe of an automobile agency, who was not hired as a salesman but who had been encouraged by his employer to provide the company with leads or prospects for sales, and paid \$10 for each sale, and who had been permitted to use company cars for such purpose, was on an evening trip for the purpose of attempting to sell a car for his employer, not on a personal mission, when he was killed in an accident while returning to the employer's place of business in a company car driven by him, and that he was performing service growing out of and incidental to his employment at the time of his fatal injury. *Nelson Motors v. Industrial Comm.* 2 W (2d) 614, 87 NW (2d) 241.

Where an employer invites an employe to go with him to a restaurant for coffee, with no loss of pay, and the employe is hurt in a collision on the way, the employe is entitled to compensation. The test of the employer's right of control over the employe's actions is incompatible with the "personal comfort" doctrine; once an employe has entered into the course of his employment, the test to be applied in determining whether he has removed himself therefrom is that of deviation; an act which ministers to the employe's comfort while on the job is not such deviation, since it is incidental to, and not wholly apart from, the employment. *Krause v. Western Casualty & Surety Co.* 3 W (2d) 61, 87 NW (2d) 875.

If the employer had a contractual duty to transport the employe to and from work, and if the employer or his agent directed the employe to ride in the fellow employe's car in lieu of the employer's truck, the injury sustained by the employe while so riding would

be compensable. *Matayo v. Industrial Comm.* 5 W (2d) 401, 92 NW (2d) 743.

A village deputy marshal, subject to call to duty at all times, although off duty when drinking coffee in a restaurant after his regular patrol hours, was back within his employment when he went outside to receive official information and was then struck by a runaway automobile, so that his injury was compensable. *Chamberlain v. Industrial Comm.* 5 W (2d) 411, 92 NW (2d) 829.

An employe who ministers to his personal comfort during the hours of employment is nonetheless "performing service growing out of and incidental to his employment," so that his accidental injury while so doing may be compensable; it not being necessary that the employe actually be performing some act of work connected with the employment at the time of the accident. *Van Roy v. Industrial Comm.* 5 W (2d) 416, 92 NW (2d) 818.

102.03 (1) (c) does not require that an injury to an employe be "within the scope of employment," but only that at the time thereof the employe be performing service "growing out of and incidental to his employment." Although a workmen's compensation claimant cannot recover where he performs forbidden acts outside the range of his service, such rule is not applicable when an employe, in furtherance of his employer's interest and not merely to further his own personal ends, commits some acts of disobedience. *M. W. Martin, Inc. v. Industrial Comm.* 13 W (2d) 574, 109 NW (2d) 92.

The supreme court no longer adheres to the strict rule precluding award of workmen's compensation for an injury suffered by an employe who is satisfying his curiosity even though his departure from the scope of employment is minor, and adopts the new rule that deviations which are impulsive, momentary, and insubstantial should not be regarded as departures from the scope of employment. (Contrary doctrine in *Peterman v. Industrial Comm.* 228 W 352, and *Guenther v. Industrial Comm.* 231 W 604, rejected.) *Maahs v. Industrial Comm.* 25 W (2d) 240, 130 NW (2d) 845.

If an employe engages in an activity in disobedience of an order of his employer but his actions were undertaken in furtherance of the employer's interests rather than the employe's, compensation is to be granted. *Grant County Service Bur. v. Industrial Comm.* 25 W (2d) 579, 131 NW (2d) 293.

A teacher who was responsible for supervising a group of students who were preparing a dinner for parents as part of their group activity, who drove 18 miles home to bathe and change clothes in preparation for the dinner was performing service incidental to her employment in so doing. *Horvath v. Industrial Comm.* 26 W (2d) 253, 131 NW (2d) 876.

A hunting trip by a part-time officer of a company with a customer, partly to discuss the sale of stock or assets of the company, which trip was approved by the president of the company constituted a business trip under 102.03 (1) (c). *Continental Cas. Co. v. Industrial Comm.* 26 W (2d) 470, 132 NW (2d) 584.

An employe is covered when accidentally killed during working hours when helping a superior, at his request, handle a personal matter which was not related to the employer's

business. *Continental Cas. Co. v. Industrial Comm.* 26 W (2d) 470, 132 NW (2d) 584.

An employe who, departing from her employer's plant and entering the company's parking lot, opened the trunk of her car to remove a package therefrom (belonging to a coemploye), and fell to the ground when a gust of wind caught the package as she held it in midair, was not going from her employment "in the ordinary and usual way", and thus deemed to be performing services incidental to her employment so as to be entitled to compensation benefits. *Dardenell v. Dept. of I., L. & H. R.* 37 W (2d) 249, 155 NW (2d) 43.

Because an employer derives some benefit from a social function in the form of increased morale and greater employe efficiency does not, as a matter of law, bring social and recreational pursuits within the course of one's employment. *Schwab v. Dept. of I., L. & H. R.* 40 W (2d) 686, 162 NW (2d) 548.

A member of the national guard injured in a football game played for the purpose of encouraging enlistments is not entitled to benefits under the workmen's compensation act. 12 Atty. Gen. 622.

A county is not liable under the workmen's compensation act or otherwise for injuries suffered by a person as the result of an automobile accident while coming to the courthouse to serve on a jury. 14 Atty. Gen. 291.

Extent of liability for off-premises injuries to employes other than salesman. *Donovan,* 36 MLR 290.

Workmen's compensation: The "personal comfort" doctrine. *Clemons,* 1960 WLR 91.

#### 6. Premises of Employer.

Where the death of a city street cleaner resulting from injuries sustained when he was struck by an automobile while on his way to report for the day's work, the fact that at the time of the accident he happened to be traversing a street on which he might later be required to work did not make such street, at the moment of injury, the "premises of the employer" within 102.03 (2), Stats. 1925. *Caravella v. Milwaukee,* 194 W 190, 215 NW 911.

An employe who was injured while riding a bicycle on his way home after work over a road maintained by his employer for its own purposes is entitled to compensation, as for an injury received while on the premises of the employer. *Northwestern F. Co. v. Industrial Comm.* 197 W 48, 221 NW 396.

Under undisputed facts, whether an employe was injured on the premises of the employer is a law question on which the commission's finding is not conclusive. An employe injured on a sidewalk 20 feet from the entrance to the employer's plant was not on the "employer's premises." Amendment to the compensation law, to include injuries to employe on employer's premises while going to or from work, should not be construed to include a situation not clearly within its intentment. *Krebs v. Industrial Comm.* 200 W 134, 227 NW 287.

An employe's duty was to unload cement from a railroad car for paving of a highway 2 miles away. He had completed work and started home and was injured when he stopped at the scene of paving operations. The

injuries did not occur on the "premises" of the employer, while the employe was going from employment in the ordinary or usual way, though the employer was under contract to improve the highway, since that fact did not make the highway the premises of the employer. *E. W. Hallett C. Co. v. Industrial Comm.* 201 W 182, 229 NW 547.

Death of an employe of a paving contractor injured when proceeding home on completed paving from which the barrier had been removed by the highway commission which opened the street to public traffic was not compensable as occurring on "premises of the employer," under 102.03 (1) (c). *Gunderson v. Industrial Comm.* 218 W 248, 260 NW 636.

Where an employe was injured while standing on a strip between the sidewalk and the fence of the city's yard after reporting at the yard in the performance of his duty, he was already at work, not going to work, when injured, and, therefore, his right to compensation for the injuries sustained was not dependent on whether such strip constituted city "premises" within the meaning of 102.03 (1) (b), Stats. 1931. *Milwaukee v. Industrial Comm.* 218 W 499, 261 NW 206.

An employe, who while walking to work along a short-cut path traversing open land owned by his employer and by third persons fell and was injured when on the open land of the employer in close proximity to the premises where the employe worked but separated therefrom by a public street, was not entitled to compensation, especially since the employer had effectively marked the limits of the premises constituting its place of employment by inclosing the same by brick walls and iron fence through which entrance could be gained only at guarded gates or doors on presentation of an identification card. *International Harvester Co. v. Industrial Comm.* 220 W 376, 265 NW 193.

An employer's plant was enclosed by a fence with gates, adjacent on one side to a street along which there was a right of way, one half of which was owned by the employer and one half by the city. An employe, going from work by walking through an exit gate and then along a paved pathway across such right of way, and struck by a streetcar operating on that portion of the right of way owned by the city, was not "on the premises of his employer" when injured, hence was not entitled to the benefits of the act, although the employer had constructed the pathway for the use of its employes and had agreed to hold the streetcar company harmless against any claim for injury resulting from the construction and maintenance of the pathway across the streetcar tracks. (*International Harvester Co. v. Industrial Comm.* 220 W 376, applied.) *Dickson v. Industrial Comm.* 261 W 65, 51 NW (2d) 553.

Where one employed as a clerk by the College of Agriculture of the University of Wisconsin was injured in slipping on ice on a sidewalk along a road or drive on the campus while on his way to lunch off the campus, and was then on that portion of the campus devoted to the activities of the college with which he was associated, he was injured while "on the premises of his employer." *State v.*

*Industrial Comm.* 4 W (2d) 472, 90 NW (2d) 397.

For the purposes of 102.03 (1) (c) a parking lot which an employer provided near its plant proper for the use of its employes, and on which an employe fell while on her way to get her car after the close of her working day in the plant proper, was part of the "premises" of her employer, although the plant proper was entirely inclosed either by building walls or by fences. *American Motors Corp. v. Industrial Comm.* 18 W (2d) 246, 118 NW (2d) 181.

The sentence in 102.03 (1) (c) providing that the premises of the employer include the premises of any other person on whose premises service is being performed does not restrict coverage to instances where services are being performed for the other person. A stevedore employed by one company on a dock owned by a railroad, who was injured away from the dock while walking to lunch across tracks not connected to the dock, could claim benefits. *J. F. McNamara Corp. v. Industrial Comm.* 24 W (2d) 300, 128 NW (2d) 635.

An employe who was injured while in the process of parking her car in the company's parking lot provided for employes when she attempted to disengage the bumper of her vehicle from that of another—sustained such injury in the course of her employment and established the requisite condition for imposition of liability in that this was the "ordinary and usual way" of going to her place of employment within the intendment of the statute. *Cmelak v. Industrial Comm.* 27 W (2d) 552, 135 NW (2d) 304.

To meet the conditions of liability as prescribed in 102.03 (1) (c), Stats. 1965, with respect to the place of injury sustained by an employe in a workmen's compensation case, the applicant must establish either that (1) he was on the premises of the employer when injured, or (2) he was in the immediate vicinity thereof and the injury resulted from an occurrence on the premises. *Frisbie v. Dept. of L. & H. R.* 45 W (2d) 80, 172 NW (2d) 346.

#### 7. *Injury Arising Out of the Employment.*

A finding by the industrial commission that adenitis of the lymphatic glands of the groin, by which an employe was disabled, was the proximate result of an accidental injury sustained while he was engaged in loading a barrel of soap upon a wagon, was supported by the evidence. *Eagle Chem. Co. v. Nowak*, 161 W 446, 154 NW 636.

An injury is not the proximate cause of disability suffered by the injured person after he unreasonably refuses to submit to a surgical operation which is fairly certain to remove the disability previously suffered in consequence of the injury. *Lesh v. Illinois S. Co.* 163 W 124, 157 NW 539.

An employe may recover compensation for an injury growing out of and incidental to his employment, even though physically unsound at the time, and the result would not have been caused by the mishap if he had been sound. Hernia resulting from accidental straining of a muscle is "proximately caused by accident," even though the employe was

predisposed to that infirmity. *Casper C. Co. v. Industrial Comm.* 165 W 255, 161 NW 784.

Injury resulting from a hazard neither peculiar to a given industry nor substantially increased by the nature of the service required by it is not the subject of compensation. The danger need not have been foreseen or expected, but after its event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence. But the freezing of a woodsman's feet was proximately caused by accident, where his misunderstanding of orders had caused him to work unusually hard and, by reason of resulting perspiration, to increase thereby the hazard of freezing. *Ellingson L. Co. v. Industrial Comm.* 168 W 227, 169 NW 568.

The right of an employe to compensation for an injury caused by falling with a falling elevator is not affected by the fact that he would not have been badly hurt if he had not been ruptured before the accident or if he had not been wearing an improperly fitting truss. *F. Eggers V. S. Co. v. Industrial Comm.* 168 W 377, 170 NW 280.

A teamster, kicked by a horse, who applied a salve used by him for slight injuries and continued to work until infection resulted, without consulting a doctor, although advised to do so, did not as a matter of law refuse to adopt such means for recovery as an ordinary prudent person would use under like circumstances, so as to defeat his widow's right to compensation. *Banner C. Co. v. Billig*, 170 W 157, 174 NW 544.

Predisposition to disease does not prevent an award by the industrial commission to an employe when the injury is proximately caused by the accident. *Hackley-Phelps-Bonnell Co. v. Cooley*, 173 W 128, 179 NW 590.

Compensation for death by sunstroke can be awarded only where the injury is one resulting from a hazard inseparably connected with the industry in which the deceased was employed, or substantially increased by such industry. Where exposure to the sun is not substantially different from that of ordinary outdoor work, no compensation can be awarded. *Lewis v. Industrial Comm.* 178 W 449, 190 NW 101.

Whether or not hernia is an occupational disease or an injury not accidental growing out of an incidental to an employment, the mere fact that during the employment the employe discovered a protrusion through the inguinal tract is not sufficient to show any relation between the employment and such protrusion; and a finding by the industrial commission that the protrusion was an injury growing out of and incidental to the employment was not unfounded. *Belle City M. I. Co. v. Industrial Comm.* 180 W 344, 102 NW 1010.

The injuries contemplated by the workmen's compensation act are such as are incidental to and grow out of some employment. They do not include an injury caused by lightning unless the employment involved an exceptional exposure to that hazard. *Hoenig v. Industrial Comm.* 159 W 646, 150 NW 996; *Carey v. Industrial Comm.* 181 W 253, 194 NW 339.

A finding, by the industrial commission,

that the employe's pulmonary tuberculosis was caused by the nature of the employment and during the term of employment was sustained by the evidence notwithstanding the employe at the time of entering the employment may have had a latent form of tuberculosis. *A. D. Thomson & Co. v. Industrial Comm.* 194 W 600, 217 NW 327.

In order to sustain an award under the workmen's compensation act for a subsequent injury on the ground of a prior injury suffered by an employe in the course of his employment, the subsequent injury must be traced to and have some causal connection with the first injury occurring while in the immediate service of the employer. *Western L. & C. Co. v. Industrial Comm.* 194 W 606, 217 NW 303.

An employe working outdoors during cold weather and receiving an injury by accidental freezing is entitled to compensation. *Eagle River B. & S. Co. v. Peck*, 199 W 192, 225 NW 690.

The industrial commission's finding that the employe's death by lightning resulted from a hazard incidental to his employment was one of fact which could not be disturbed by the court. *Newman v. Industrial Comm.* 203 W 358, 234 NW 495.

It is not necessary, in order to entitle the employe to compensation for occupational disease, that his incapacity arise when he was performing service growing out of and incidental to his employment; he is entitled to be compensated if at the time of disability the relation of employer and employe existed. When the employer-employe status is once established by contract, express or implied, oral or written, it will be presumed to continue until terminated by the affirmative act of one of the parties; hence, compensation for pneumoconiosis, where disability occurred during a shutdown for repairs of a granite plant, may be had if such relation was not thus terminated before the disability occurred. Where the question as to the existence of such relation at the time of such disability was not litigated before the commission, judgment vacating an award will be reversed with instructions to remand the case to the commission for further proceedings. *Wisconsin G. Co. v. Industrial Comm.* 208 W 270, 242 NW 191.

Pneumonia contracted by a taxicab company's employe, due to exposure while changing a tire and attending to the loading and unloading of taxicabs, was injury incidental to employment. *Yellow Cab Co. v. Industrial Comm.* 210 W 460, 246 NW 689.

Dermatitis may be considered as an "occupational disease" compensable under the workmen's compensation act when an employe uses a cleaning compound in his work and his use of it in his work causes dermatitis. *Kroger G. & B. Co. v. Industrial Comm.* 239 W 455, 1 NW (2d) 802.

An individual workman's susceptibility to a particular disease does not make that disease noncompensable under the workmen's compensation act. *Milwaukee E. R. & T. Co. v. Industrial Comm.* 258 W 466, 46 NW (2d) 198.

Agricultural workers who were struck by lightning during a severe storm while being transported in an elevated position on an open

truck from the field to their living quarters were subjected to an increased danger from lightning and their deaths were caused by injuries arising out of their employment. *Stokely Foods, Inc. v. Industrial Comm.* 264 W 102, 58 NW (2d) 285.

Unless an employe's disability is shown to have resulted from an occupational disease, its cause must be found in an accident in order to warrant the award of compensation, and a mere breakdown due to disease is not compensable even if the physical effort involved in the work made some contribution to the final disability. *Buettner v. Industrial Comm.* 264 W 516, 59 NW (2d) 442.

In a proceeding for injuries allegedly sustained by a core assembler, who experienced a sharp pain in the lower part of his back in 1936 when he and a fellow employe were carrying a head core and the fellow employe tripped over something on the floor, the evidence, which included the employe's arthritic history and medical testimony based thereon, supported a finding of the commission that the employe's complaint and disability were due to causes wholly unrelated to his alleged injuries of 1936 or to his employment. *Walter v. Industrial Comm.* 264 W 522, 59 NW (2d) 463.

The evidence sustained a finding that, as to an employe who was peacefully performing his assigned work at his usual place of employment in a plant employing a large number of workers when he was assaulted by fellow employes who objected to working with him because he had used his union designation in connection with signing an allegedly Communist-inspired peace petition, the accident causing his injury arose out of his employment. *Nash-Kelvinator Corp. v. Industrial Comm.* 266 W 81, 62 NW (2d) 567.

In a workmen's compensation proceeding on a claim for benefits for the death of an employe who had suffered injuries to his head and chest in a nonindustrial automobile accident, and who fell to the floor while at work in his employer's plant 17 days later, and was found lying there unconscious, and died in a hospital a few hours later, where there was no evidence that the fall in the plant was the result of the employe's work or his environment, or that the results of the fall were aggravated by some condition of the employment, the claim was properly denied by the commission for failure of proof that the employe had sustained injury arising out of his employment. *Rick v. Industrial Comm.* 266 W 460, 63 NW (2d) 712.

An employer takes an employe as he is, and the fact that the employe may be susceptible to injury by reason of a preexisting physical condition does not relieve the last employer from being held liable for workmen's compensation benefits if the employe becomes injured due to his employment, even though the injury may not have been such as to have caused disability in a normal individual. The fact that a former injury may have produced a weakness in the employe's body making him more susceptible to further injury than a normal individual would be, does not necessarily in itself establish a partial permanent disability of a compensable nature. *M. & M. Realty Co. v. Industrial Comm.* 267 W 52, 64 NW (2d) 413.

The evidence supported findings of the industrial commission that cerebral hemorrhages suffered by an employe of a power company, who had a congenital aneurysm in the cerebral blood vessel, were caused by severe strain to which he was subjected when attempting to guide a pole into a hole and when attempting to pull a conductor wire, and that the employe was thereby injured in an "accident" arising out of his employment. *Wisconsin P. & L. Co. v. Industrial Comm.* 268 W 513, 68 NW (2d) 44.

An accident causing injury did not arise out of employment where the facts showed that the injured woman, 69 years old, having a heart condition, was seen to waver as she mounted 2 steps in front of the building on her way to work, and then backed down the steps to the sidewalk where she collapsed. *Peterson v. Industrial Comm.* 269 W 44, 68 NW (2d) 538.

A finding of the industrial commission that an employe's injury was caused by his work, was sufficient as being the equivalent of a finding that the accident or disease causing injury arose out of the employment. A physical strain which produces an injurious physical result constitutes an "accident" in the sense that such term is used in the workmen's compensation act, and it is not essential that the exertion producing the disability be out of line with the ordinary duties of the job in order that the disability be compensable. *Wisconsin Appleton Co. v. Industrial Comm.* 269 W 312, 69 NW (2d) 433.

The concrete stairway which an employe was required to use in the course of his employment to punch the clock at the end of the workday created a special zone of hazard, and his fall down these steps was an accident which arose out of his employment. *Cutler-Hammer, Inc. v. Industrial Comm.* 5 W (2d) 247, 92 NW (2d) 824.

The fact, that the employe had a preexisting diseased intervertebral disc which was liable to herniate from even normal work effort as a bricklayer, does not relieve the employer from liability, since an employer takes an employe "as is," and if the employe is suffering from a disease predisposing to "breakage" and an exertion required by the employment causes "breakage" at the moment of exertion, the employer is liable under the act. There is no burden on the employe to show that the exertion being put forth at the time of the herniation was in any way unusual to his employment. (*Buettner v. Industrial Comm.* 264 W 516, so far as to the contrary, overruled.) *Brown v. Industrial Comm.* 9 W (2d) 555, 101 N W (2d) 788.

The causal relationship between an injury and the disability presents a fact question for the industrial commission. *Fitz v. Industrial Comm.* 10 W (2d) 202, 102 NW (2d) 93.

The "positional risk" doctrine does not embrace within its ambit all falls on the employer's premises, and consequently no valid presumption can arise that an unexplained fall on the employer's premises arose out of the employment. Where a hotel chambermaid testified that she did not know how or why she happened to fall while going to the hotel from the hotel laundry where she had her lunch, and there was no evidence indicating that her

fall was caused by any hazard or danger of her employment or by any other cause entitling her to compensation, the commission properly denied her application on the ground that she had not met her burden of proof of the essential fact that the accident arose out of her employment. *Nielsen v. Industrial Comm.* 14 W (2d) 112, 109 NW (2d) 483.

An unexplained fall on a hard, level floor is not compensable. *Kraynick v. Industrial Comm.* 34 W (2d) 107, 148 NW (2d) 668.

Where, in resolving conflicting medical testimony as to whether the employe sustained a herniated disc as a result of the incident described in the opinion or suffered from a pre-existing degenerative disc condition, credible medical evidence and other evidence supported the latter conclusion, the commission was warranted in finding that the employe had not met her burden of proof in establishing that the herniated disc arose out of her employment. *Lewellyn v. Dept. of I., L. & H. R.* 38 W (2d) 43, 155 NW (2d) 678. Compare *Detter v. Dept. of I., L. & H. R.* 40 W (2d) 284, 161 NW (2d) 873. See also: *Schroeder v. Dept. of I., L. & H. R.* 43 W (2d) 12, 168 NW (2d) 144; and *Burks v. Dept. of I., L. & H. R.* 45 W (2d) 1, 172 NW (2d) 27.

Where the record disclosed that decedent, who had been suffering from advanced arteriosclerosis, died of a heart attack while driving his employer's delivery truck to its destination after having loaded the same with heavy cargo, the commission correctly determined that the claim was compensable based on medical testimony which clearly disclosed that the immediate cause of the heart attack was the physical exertion of the decedent in his employment. *Tews L. & C. Co. v. Dept. of I., L. & H. R.* 38 W (2d) 665, 158 NW (2d) 377.

There is no presumption that an unexplained fall, although occurring on the employer's premises and resulting in injuries, arises out of the employment. *Vasquez v. Dept. of I., L. & H. R.* 39 W (2d) 10, 158 NW (2d) 331.

There are 2 elements necessary for compensation when a preexisting degenerative condition becomes manifest during normal exertive activity: (1) There must be a breakage, and (2) this breakage must have occurred on the job while the employe was exerting either usual or unusual effort. Moreover, if a pre-existing condition is aggravated and accelerated beyond normal progression by the employment-related activity, the employe should recover even if there is no definite breakage. *Reich v. Dept. of I., L. & H. R.* 40 W (2d) 244, 161 NW (2d) 878.

There is no presumption that an injury is caused by, results from, or arises out of employment merely because an injury occurs while the employe is at work; and there is no presumption that an unexplained fall occurring in the course of employment arises out of his employment. *Brickson v. Dept. of I., L. & H. R.* 40 W (2d) 694, 162 NW (2d) 600.

Evidence on the issue of causation amply supported the department's finding that the occupational disease of silicosis and emphysema sustained by an employe arose out of his employment. *Kohler Co. v. Dept. of I., L. & H. R.* 42 W (2d) 396, 167 NW (2d) 431.

While it is well settled that a truly unexplained fall is not compensable, giving rise to no presumption that the injury arose out of the employment, that principle does not obtain where the employe is performing services when he or she sustains an injury in a nonidiopathic fall, and the fall is explained by evidence of a cause related to the employment. *Briggs & Stratton Corp. v. Dept. of I., L. & H. R.* 43 W (2d) 398, 168 NW (2d) 817.

Analysis of compensability for occupational diseases. *Otjen*, 22 MLR 113.

The doubtful basis of liability for disability or death resulting from heart conditions. *Levitani*, 41 MLR 347.

Cardiac cases under the Wisconsin workmen's compensation act. *Bartl*, 48 MLR 397.

"Arising out of and in the course of the employment" in workmen's compensation acts. *Brown*, 7 WLR 15 and 67; 8 WLR 134 and 217.

Unexplained and idiopathic falls as arising out of the employment. 1962 WLR 532.

#### 8. *Self-Inflicted Injury.*

Intoxication which proximately causes the death of an employe is not necessarily "wilful misconduct" and a finding by the commission that the death of an employe "was proximately caused by accident and was not caused by wilful misconduct; that at the time of such accident he was in an intoxicated condition which proximately caused the accident," means that he did not wilfully bring upon himself such degree of intoxication; and being within the jurisdiction of the commission such findings should not be disturbed. *Nekoosa-Edwards P. Co. v. Industrial Comm.* 154 W 105, 141 NW 1013.

An injury resulting to an employe from his intoxication is not an "intentionally self-inflicted" injury, within 102.03 (1) (d), so as to preclude his recovery of workmen's compensation therefor, intoxication cases being provided for by the penalty clause in 102.58 reducing the compensation which an employe would otherwise be entitled to by 15 per cent where the injury results from his intoxication. *Nutrine Candy Co. v. Industrial Comm.* 243 W 52, 9 NW (2d) 94.

Evidence disclosing that an employe, whose body was found in an acid tank on the premises of his employer, was 5 feet 9 inches tall and weighed about 180 pounds, that the opening through which his body had to pass to enter the tank was only 23 inches by 20 inches and was covered by a grate and wooden cover, and that the only way in which he could enter through so small an opening would be to hold his arms close to his body, together with evidence disclosing his background as a patient in mental institutions, would support no inference other than that the act leading to the employe's death was intentional and did not grow out of his employment, thereby overcoming the presumption against suicide, and relieving the employer of liability for his death in view of 102.03 (1) (d). *A. O. Smith Corp. v. Industrial Comm.* 264 W 510, 59 NW (2d) 471.

In a workmen's compensation proceeding involving a claim for death benefits of an employe who during the course of his employment received a severe electrical shock which



injured him physically and thereafter manifesting mental deterioration committed suicide, it was error for the commission in determining whether the suicide was impelled because of the injuries to utilize the "voluntary, wilful act" standard rather than the "chain-of-causation" test, and denial of benefits based on the application of the erroneous theory necessitated redetermination of the issue in light of the record and evidence. (*Barber v. Industrial Comm.* 241 W 462, not adhered to.) *Brenne v. Dept. of I., L. & H. R.* 38 W (2d) 84, 156 NW (2d) 497.

When death by suicide is compensable under workmen's compensation. 28 MLR 53.

#### 9. *Employment Requiring Travel.*

A salesman whose duty required him to go from place to place in a city slipped and injured his leg on a public street while so engaged. He was "performing service growing out of and incidental to his employment." *Schroeder & Daly Co. v. Industrial Comm.* 169 W 567, 173 NW 328.

A city salesman who was injured on a city street by an automobile truck, while on his way to make his first business call in the morning, his duty not requiring him to first go to his employer's place of business, was "performing service growing out of and incidental to his employment." *United States C. Co. v. Superior H. Co.* 175 W 162, 184 NW 694.

A salesman traveling by automobile may receive compensation for injuries received by him in such travel, and he is within the scope of his employment while, in response to his employer's request, he is returning to the employer's office. *Schmiedeke v. Four Wheel D. A. Asso.* 192 W 574, 213 NW 292.

The death of a salesman from injuries received while bringing his family back in an automobile from a vacation was not compensable, the evidence warranting the conclusion of the commission that the injury did not occur within the scope of employment although the trip included stops to interview the employer's debtors, and that such business errands were incidental to the employee's pleasure trip. *Barragar v. Industrial Comm.* 205 W 550, 238 NW 368.

A supervising teacher being on a highway incidentally to performance of duties when meeting death, it was immaterial by what route she was returning home. *Racine County v. Industrial Comm.* 210 W 315, 246 NW 303.

The death of a salesman in an automobile collision while returning from a holiday trip before reaching a point where he would turn off to make his scheduled route for the day, or to go to his employer's office, did not occur within the scope of his employment and hence was not compensable. *Automotive P. & G. Co. v. Industrial Comm.* 220 W 122, 264 NW 492.

An employe who did outside inspection work and in connection therewith used his automobile, the expense of operating which for such purpose was paid by his employer, but who had completed such outside work for the day and had gone to his home for supper, was not "performing service growing out of and incidental to his employment" while driving his car after supper to his employer's of-

fice, where the injury was not sustained on the employer's premises. *Githens v. Industrial Comm.* 220 W 658, 265 NW 662.

A moving picture theater manager, injured while transporting films in his automobile from a theater to a film service agency in his home city for his employer after a day's work, pursuant to an agreement with his employer, was "performing service growing out of and incidental to his employment" within the workmen's compensation act. *Car & General Ins. Corp. v. Industrial Comm.* 224 W 543, 272 NW 351.

The death of a relief work secretary, employed by a county, from the collision of a train and the secretary's automobile in which the secretary was returning from a district meeting to which he had been called by the district engineer for state emergency relief to discuss uncompleted projects in the county, was compensable as incurred while "performing service growing out of and incidental to his employment," as against the contention that the trip was not at the direction of the county employing the secretary. *Sauk County v. Industrial Comm.* 225 W 179, 273 NW 515.

In a workmen's compensation proceeding involving the death of a pump repairer for a railroad company who, while on his way to a repair job and waiting in his car because of a severe storm, was killed when the roof of the building in front of which he was parked fell on the car, the undisputed facts sustained the findings and conclusions of the industrial commission that the danger of being injured by falling parts of buildings in cities and towns during storms was a street risk to which the employe was subject by reason of his employment and that hence his death from the falling of the roof made his accident one arising out of his employment. *Scandrett v. Industrial Comm.* 235 W 1, 291 NW 845.

An employe, injured when the automobile in which he was riding left the road while actually enroute to the place of a meeting of salesmen called by his employer, was not out of the course of his employment at the time of his injury because of the fact that during the trip and prior to the accident he had gone on a drunken spree and was intoxicated. *Nutrine Candy Co. v. Industrial Comm.* 243 W 52, 9 NW (2d) 94. See also *Hilbert v. Dept. of I., L. & H. R.* 40 W (2d) 598, 162 NW (2d) 596.

A traveling salesman, whose work required him to travel, and whose traveling expenses were paid by his employer, but who was given a free choice in the selection of his sleeping accommodations in a territory where usual and ordinary accommodations of the sort that he would enjoy at home were available, was not in the course of his employment while taking a bath in a room rented by him at a tourist camp for the night, and an injury sustained by him by slipping on a bath mat, there being no claim that the accommodations were in any way unsafe, did not arise out of any hazard created by, and did not arise out of, his employment, hence was not compensable. *Gibbs Steel Co. v. Industrial Comm.* 243 W 375, 10 NW (2d) 130.

A salesman, who lived in a rented room in Detroit at his employer's expense while on business there, began making business calls there on a certain day after telling his land-



lord that he might go to Windsor, Canada, for the night to visit relatives; his last business call that day was at a brewery, located on the Detroit river, where he inquired as to the best route to reach Windsor; his whereabouts were unknown from the time he left the brewery until his body was found later on the Canadian side of the river south of Windsor. From this evidence the industrial commission could find that the decedent could not have gone to the bank of the river in the course of any operation remotely concerning services for his employer, and that the execution of no business purpose could have exposed him to the hazards of the river, and that his death did not occur in the course of nor arise out of his employment. Where there is evidence to support the finding of the commission that the decedent at the time of his accidental drowning was not performing services growing out of and incidental to his employment, contentions as to the burden of the employer to prove the fact of deviation from the course of employment, and as to the existence of a presumption that the employe continued in his employment and was so engaged at the time of his death because of evidence that he was in the service of his employer when last seen, need not be further considered. *Armstrong v. Industrial Comm.* 254 W 174, 35 NW (2d) 212.

Where the company had found a place for deceased to live outside of Milwaukee because of the housing shortage, and furnished him with a company truck for transportation to and from his home because there was no other transportation available, and he used a company truck for transportation and for making emergency calls from his home, and his repair tools were in the truck at the time of his death, the company furnished such employe with transportation as part of his contract of employment, and he was "performing service growing out of and incidental to his employment" at the time of his death. *West Shore Trans. Co. v. Industrial Comm.* 258 W 477, 46 NW (2d) 203.

Evidence disclosing only that a salesman, whose territory included a part of Arizona, on taking leave of his last customer of the day in a city in Arizona, went to dine with friends at a restaurant in an adjoining city in Mexico, and later in the evening was found dead of unexplained injuries a short distance from such restaurant, did not show a deviation from his employment and did not overcome the inference that he was within the scope of his employment at the time. *Hansen v. Industrial Comm.* 258 W 623, 46 NW (2d) 754, explained in *Rick v. Industrial Comm.* 266 W 460, 461-462, 63 NW (2d) 712, 714.

Evidence that a sheriff, concededly engaged in his employment in his office at the county seat until about 10:45 a.m., then left his office, without disclosing his purpose, stopped and had some beer at 2 taverns in the county and asked for highway directions at one of them, and traveled to an adjoining county and back, all during the course of the day and evening, and was killed sometime after midnight when his automobile went off the road while near and headed in the direction of the county seat, without any further evidence as to his movements or the nature of his activities during

such period, was not sufficient to overcome the presumption of continuity of service which attached to him. *Andreski v. Industrial Comm.* 261 W 234, 52 NW (2d) 135.

A sales manager, who intended to attend a convention in Milwaukee accompanied by his wife, who started from Mineral Point accompanied by his wife and children, and who was killed in an accident while on the way to Fond du Lac to leave the children, had deviated from the course of his employment to accomplish a purely personal objective and not "acts reasonably necessary for living or incidental thereto," within the meaning of 102.03 (1) (f), declaring that such acts shall not be regarded as a deviation for a private or personal purpose by employes whose employment requires them to travel. *Simons v. Industrial Comm.* 262 W 454, 55 NW (2d) 358.

An employe, recently transferred from Wisconsin to Oregon, and fatally injured there while on his way to the railroad station in Portland to make necessary arrangements for the transportation of his wife and children to Portland, sustained his injury while "performing service growing out of and incidental to his employment," rather than performing a personal errand, and the accident causing the injury arose out of his employment. *Western Condensing Co. v. Industrial Comm.* 262 W 458, 55 NW (2d) 363.

In a proceeding for death benefits arising out of the death of contractor's employe, who was working at the employer's premises when sent by his foreman to do some repair work at a farm, and who was killed in an automobile accident about 3:45 p.m. while returning in his own car on the route that he would use in returning either to his employer's premises or to his own home, evidence that the foreman directed the employe to go in the employe's car and that the employe was to go home if he finished the work during the day and it was close to quitting time, and that the employe would be credited for an hour of work time for his transportation cost, established an obligation on the part of the employer to transport the employe to his place of work and home, and warranted a finding of the commission that the employe was "performing service growing out of and incidental to his employment" at the time of his death. (*Kerin v. Industrial Comm.* 239 W 617, distinguished.) *Selmer Co. v. Industrial Comm.* 264 W 295, 58 NW (2d) 628.

An employe, whose duty it is to travel on behalf of an employer and to do work away from the premises of the employer and who is not required to report to the premises before starting to do this outside work, is performing service as soon as he leaves his home and starts for the first place at which he is to perform such work. *Fruit Boat Market v. Industrial Comm.* 264 W 304, 58 NW (2d) 689.

Evidence that an employe "who was required to travel" finished work at 5 p.m., had some drinks, inquired for a place to eat, and was next seen in his ditched car 10 miles from the city at one a.m., and who did not remember whether he had eaten dinner before the accident, supported a finding that his injuries did not occur in the course of, and did not arise out of his employment. The presump-

tion under 102.03 (1) (f) disappears when rebutting testimony is introduced. (*Hansen v. Industrial Comm.* 258 W 623, distinguished.) *Turner v. Industrial Comm.* 268 W 320, 67 NW (2d) 392. See also *Dibble v. Dept. of I., L. & H. R.* 40 W (2d) 341, 161 NW (2d) 913.

A truck driver, engaged in hauling a load of corn to his employer's place of business, but stopping at a liquor store and arrested in front thereof for fighting, and then fleeing the custody of the momentarily absent officer and entering the truck, had resumed his employment, and was in the course thereof while driving the truck on the direct and usual route to the employer's place of business when the truck overturned. *Olson v. Industrial Comm.* 273 W 272, 77 NW (2d) 410.

A salesman, whose place of employment includes all of a certain area, and who travels wherever his sales leads require within such area and works whatever hours he deems necessary, is entitled to the protection of the act until he returns to his home. *Richardson v. Industrial Comm.* 1 W (2d) 393, 84 NW (2d) 98.

Under 102.03 (1) (f), providing that an employe who is required to travel is deemed to be performing services growing out of and incidental to his employment at all times while on the trip, except when engaged in a deviation for a private or personal purpose, the effect is to cast on the one claiming such a deviation the burden of proving either that such portion of the trip was for personal purposes solely, or that any business purpose was merely incidental. When the work of the employe has a part in creating the necessity for the trip, service to the employer need be only a concurrent cause of the trip, and need not be the sole, the primary, or the dominant cause. *James v. Industrial Comm.* 18 W (2d) 239, 118 NW (2d) 185.

Under 102.03 (1) (f) a deviation of 30 miles from the ordinary route to go to a particular restaurant was not reasonably necessary even though claimant was allowed considerable latitude by his employer, where the evidence was that there were a number of good restaurants on or close to his route. *Neese v. State Medical Society*, 36 W (2d) 497, 153 NW (2d) 552.

An employe, required to travel between cities and given no specific instructions as to which route he must travel, may choose any reasonable route among the available alternatives, and if the route selected by him meets the test of reasonableness, it meets the requirements of 102.03 (1), Stats. 1963. *Bergner v. Industrial Comm.* 37 W (2d) 578, 155 NW (2d) 602.

Because of the presumption created by 102.03 (1) (f), Stats. 1963, there must be a finding of 2 essential facts by the department before benefits can be denied: (1) there must be a deviation by the employe from his business trip; and (2) such deviation must be for a personal purpose not reasonably necessary for living or incidental thereto. *Dibble v. Dept. of I., L. & H. R.* 40 W (2d) 341, 161 NW (2d) 913.

Liability where salesman mixes private business with sales occupation. 20 MLR 159.

#### 10. Exclusive Remedy.

Compensation provided by sec. 2394-4, Stats. 1911, is in lieu of that provided by sec. 1339 in the case of a city employe injured by a defective sidewalk while in the line of his service. *Milwaukee v. Althoff*, 156 W 68, 145 NW 238.

Although the death of an employe may be caused by the violation of the statutory duty imposed by sec. 2394-48, Stats. 1921, upon the employer to furnish the employe with a reasonably safe place to work, the remedies afforded by the workmen's compensation act are exclusive of all other remedies. *Knoll v. Shaler*, 180 W 66, 192 NW 399.

Under the statute making the liability prescribed by the workmen's compensation act exclusive where employer and employe were both under the act, the industrial commission had jurisdiction to entertain an application for compensation for death resulting from injuries received on a vessel lying in navigable waters. *Northern C. & D. Co. v. Industrial Comm.* 193 W 515, 213 NW 658.

Where both employer and employe are subject to the workmen's compensation act, the right of the employe to the recovery of compensation for injuries pursuant to the act is, as declared by 102.03 (2), the exclusive remedy against, and constitutes the sole liability of, the employer. *Deluhery v. Sisters of St. Mary*, 244 W 254, 12 NW (2d) 49.

The safe-place statute, 101.06, imposes an absolute duty on the owner of a building of furnishing a place as safe as the nature of the employment will reasonably permit; but the liability of the employer for injuries sustained by his employe is, as expressly provided by 102.03 (2), exclusively for compensation under the workmen's compensation act, and it is not a tort liability. The employer's failure to meet safety standards could only increase the amount of workmen's compensation to be paid. *Saxhaug v. Forsyth Leather Co.* 252 W 376, 31 NW (2d) 589.

When a husband or wife is injured in the course of his or her employment, and is entitled as an employe to compensation under the workmen's compensation act, the other spouse cannot maintain an action against the employer for loss of consortium as the result of the injury, since the liability of the employer is solely under the act, and he has no other or different liability to anyone for injury sustained by an employe in the course of his employment. *Guse v. A. O. Smith Corp.* 260 W 403, 51 NW (2d) 24.

Where an employe sustains injury in his employment and the conditions for liability under the workmen's compensation act exist against the employer, the exclusive remedy of the employe against the employer is under the act even though the employe's injury resulted from the employer's gross negligence. The legislature intended to give employes the benefit of compensation for injuries, whether caused by another's negligence or their own, and in return to withhold their right of common-law action against their employers for such injuries, so that the act constitutes a complete substitute for the previous remedies in tort on the part of employes against their em-

ployers. *Beck v. Hamann*, 263 W 131, 56 NW (2d) 837.

Where a trucking company's employe was burned when a boom on its truck came into contact with electric wires on premises of a third party, the employe's exclusive remedy against the employer was under 102.03; hence the employer was not a proper party as interpleaded defendant in the employe's action against a third party. *Albert v. Regal Ware*, 6 W (2d) 519, 95 NW (2d) 240.

Where a caddy, injured at a golf club when the caddy house collapsed, made application for workmen's compensation benefits which were awarded and paid, the unappealed awards were not subject to collateral attack in and by a subsequent action, based on the safe-place statute (101.06) brought by the caddy against the club for the injuries sustained in the same accident. *Mathews v. Big Foot Country Club*, 7 W (2d) 244, 96 NW (2d) 327.

102.03 (2), which provides in pertinent part that where conditions exist affording the employe the right to recover compensation that right is the exclusive remedy against the employer and the insurance carrier, was not intended to preclude suit against a coemploye as a third-party tort-feasor, for the workmen's compensation act does not affect the right to maintain any common-law action for tort except those in which the parties sustained toward each other the relationship of employer and employe and those against the compensation carrier. *Zimmerman v. Wisconsin Elec. P. Co.* 38 W (2d) 626, 157 NW (2d) 648.

The exclusive remedy against a city (Milwaukee) with respect to injuries sustained by its employe while working on a ship was under the workmen's compensation act; and where it had paid compensation to the employe it could not, absent an express indemnity clause, be held liable for indemnity to a shipowner which had been sued by the employe for injuries. *Bagrowski v. American Export Isbrandson Lines, Inc.* 305 F Supp. 433.

Effect of exclusive remedy provision on spouse's action for loss of consortium. 35 MLR 405.

#### 11. Intermittent Disability.

102.03 (3) does not mean that each period of temporary disability has a separate date of injury. Where the intermittent periods of temporary disability are all due to one continuous occupational disease, the date of injury is established by the first period. *Wagner v. Industrial Comm.* 273 W 553, 79 NW (2d) 264, 80 NW (2d) 456.

**102.04 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—4, 2394—5; 1913 c. 599; 1917 c. 624; 1923 c. 291 s. 3; 1923 c. 437 s. 2; 1923 c. 449 s. 56; Stats. 1923 s. 102.04; 1931 c. 87 s. 2; 1931 c. 403 s. 6; 1931 c. 469 s. 1; 1943 c. 270; 1947 c. 456; 1961 c. 387; 1967 c. 350.

1. Public employer.
2. Private employer.

#### 1. Public Employer.

Cities have power, under 62.04 and 62.11 (5), Stats. 1925, to contract and to furnish fire service to people and communities adjacent to the cities, and at least within their trading

areas; and a volunteer fireman who was injured on his return from a fire outside the city limits and who acted under the direction of the city fire chief pursuant to a plan adopted by the council for furnishing fire protection outside of the city limits, is entitled to workmen's compensation. *Burlington v. Industrial Comm.* 195 W 536, 218 NW 816.

A county was not liable for workmen's compensation for the death of a workman fatally injured while working on a county trunk road under the direction of the county highway commissioner in payment for federal drought relief unless the county board had adopted the drought relief program and assumed liability under the workmen's compensation act for workmen working out the drought relief contracts. *Marathon County v. Industrial Comm.* 225 W 514, 272 NW 374.

An award of the industrial commission made because of injury to a workman employed at the university should be against the state. 3 Atty. Gen. 930.

On the applicability of 102.04, Stats. 1941, and related sections of ch. 102 to counties, see 31 Atty. Gen. 76.

#### 2. Private Employer.

A person may be an employer and liable as such for injuries to an employe under the workmen's compensation act even though he does not direct the work of an employe, as long as he possesses the power to direct it. *C. R. Meyer & Sons Co. v. Grady*, 194 W 615, 217 NW 408.

"The right to claim compensation under this act is confined to those cases where the relationship of employer and employe exists. That relationship is created only in those cases where the one claiming to be an employe is in the service of another under a contract, either express or implied. Unless there is such relationship, the injured person is left to the remedies given him by the common law before the enactment of the workmen's compensation act." *Culbertson v. Kieckhefer*, 197 W 349, 351, 222 NW 249, 250.

Joint employers of a compensation claimant compelled to cease work because of an occupational disease are jointly liable upon whatever basis they may have fixed as between themselves. *Michigan Quartz Silica Co. v. Industrial Comm.* 214 W 492, 253 NW 167.

The relation of employer and employe, within the workmen's compensation act, does not arise merely as a result of benefits conferred—there must be either expressly or by implication a contract of hire. *Koski v. Industrial Comm.* 233 W 1, 288 NW 240.

One operating a bulk station as the employe of an oil company, if hiring 3 or more employes in his own behalf, or carrying workmen's compensation insurance, would himself be an "employer" within 102.04 (2) and 102.05 (3) so that he or his insurer would be liable for compensation for injuries sustained by his employe; and in such situation the oil company, although it was an "employer" in relation to its station operator, was not an "employer" in relation to the injured employe, nor liable for compensation for his injuries. *Standard Oil Co. v. Industrial Comm.* 234 W 498, 291 NW 826.

One who engages in raising ginseng and en-

gages in no other agricultural pursuits is not engaged in "farming" as that term is understood in the workmen's compensation act. *Eberlein v. Industrial Comm.* 237 W 555, 297 NW 429.

The employes of a partnership, where they have no contract of employment with a partner in his individual capacity as the operator of a separate business, are not his employes in determining whether he is an "employer" subject to the workmen's compensation act in respect to such separate business under the definition of "employer" in 102.04 (2). *Kalson v. Industrial Comm.* 248 W 393, 21 NW (2d) 644.

The workmen's compensation act does not contemplate that an employer who had elected to accept the act by taking out workmen's compensation insurance, but who later absolutely abandoned his business (as distinguished from a temporary suspension with intention of resumption), canceled his insurance, and ceased to be an employer for 9 years, should be considered as still subject to the act, merely because of not filing a statutory notice of withdrawal, where he reentered business after the lapse of 9 years and then became an employer of only the one employe who was injured. *Hansen v. Industrial Comm.* 242 W 293, 7 NW (2d) 881.

By 102.04 (3), every person, firm or private corporation to whom 102.04 (2) is not applicable, who shall in the manner provided in 102.05 elect to become subject to the provisions of the act is an employer. Thus, if he shall at any time have 3 or more employes, or shall file an election to become subject to the act, or shall enter into a contract for insurance of compensation, or against liability therefor, he is an employer under the act. Immediately upon the employment of 3 or more persons he becomes subject to the act, but at any time that he has less than 3 employes he can withdraw as provided in 102.05 (1). *Stapleton v. Industrial Comm.* 249 W 133, 26 NW (2d) 677.

The nature of the partnership before the law. *Peck*, 37 MLR 66.

**102.05 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—6; 1913 c. 599; Stats. 1913 s. 2394—5; 1915 c. 316; 1917 c. 624; 1923 c. 291 s. 3; 1923 c. 437 s. 2, 3; 1923 c. 449 s. 56; Stats. 1923 s. 102.05; 1925 c. 171 s. 2; 1929 c. 453 s. 3; 1931 c. 403 s. 7; 1933 c. 36; 1943 c. 270; 1947 c. 456; 1963 c. 281; 1967 c. 350; 1969 c. 276 s. 584 (1) (a), (c).

By making a contract of insurance which covered employes working about a corn shredder, both employer and the insurance carrier clearly evidenced a desire to include such laborers, whether or not they be farm laborers, and a workman who received an injury while engaged in shredding corn on the employer's farm can recover compensation. *Hillman v. Industrial Comm.* 190 W 196, 208 NW 928.

A workmen's compensation insurance policy covering "Farm labor—All employes of whatever nature, excluding clerical office force 'engaged upon' or 'in connection with' such farm," covered a household domestic who was employed to do everything in connection with the farmhouse and who was in-

jured while preparing to wash clothes. *Wall-rabenstein v. Industrial Comm.* 195 W 15, 216 NW 495.

An employer who was engaged in road construction in the summer and logging operations in the winter, and who had taken out a compensation insurance policy, was thereby brought within the compensation act; and his employe, receiving an injury while driving a tractor under his employer's orders to plow land belonging to a third person, was entitled to compensation. (*Hillman v. Industrial Comm.* 190 W 196, applied.) *Heal v. Industrial Comm.* 197 W 95, 221 NW 389. Compare *Nace v. Industrial Comm.* 217 W 267, 258 NW 781.

Where the employer, after abandoning his business, had received from the industrial commission an inquiry as to why he had canceled his compensation insurance, and he had filled out and returned a form, the nature of which he did not recall, and the commission's records, although no longer containing the correspondence, contained a notation "No employes since November, 1930," the written information furnished to the commission by such employer is considered to have informed it that he had abandoned his business and to have been the equivalent of a formal filing with it of a written withdrawal of his acceptance of the act previously effectuated by his taking out of insurance. *Hansen v. Industrial Comm.* 242 W 293, 7 NW (2d) 881.

See note to 102.04, on private employer, citing *Stapleton v. Industrial Comm.* 249 W 133, 23 NW (2d) 514, 26 NW (2d) 677.

The fact that the owner of a golf club had taken out insurance, to protect himself against liability under the workmen's compensation act, was not sufficient to make him liable for something not legally chargeable to him and, without anything more, did not constitute an election to waive his right to object to the constitutionality of a provision of the act (102.07 (5), Stats. 1947) under which a person, injured while caddying for a patron of the club, claimed to be an employe of the owner as a matter of law without the owner's having hired or induced him to enter the services in which he was engaged when injured. *Wendlandt v. Industrial Comm.* 256 W 62, 39 NW (2d) 854.

Under 102.05 (3), Stats. 1959, the terms of a workmen's compensation policy may govern whether an employer is subject to the act with respect to certain classes of employes, but in all other respects the provisions in such a policy cannot determine which relationships are or are not those of employment under the workmen's compensation act. *Enderby v. Industrial Comm.* 12 W (2d) 91, 106 NW (2d) 315.

**102.06 History:** 1913 c. 599; Stats. 1913 s. 2394—6; 1917 c. 624; 1923 c. 291 s. 3; Stats. 1923 s. 102.06; 1929 c. 453 s. 3; 1931 c. 403 s. 8; 1943 c. 270; 1947 c. 143.

1. Contractor's employe.
2. Loaned employe.

1. *Contractor's Employe.*

An employe of one who, pursuant to a contract with a city, was collecting garbage and

removing it to an incinerator, was entitled to compensation from the city for injuries sustained while performing service required by such contract, even though the contractor was not subject to the compensation act. *Milwaukee v. Fera*, 170 W 348, 174 NW 926.

A contractor who is subject to the compensation act is liable for injuries to an employe of his subcontractor who is not subject to it. *Miller v. Industrial Comm.* 179 W 192, 190 NW 81.

A dock company is not liable to an employe of a stevedore contractor who employed, paid and discharged his own men at will, and who received from the dock company his compensation in a lump sum. *Machae v. Fellenz C. & D. Co.* 183 W 44, 197 NW 198.

If a boarding-house keeper was an independent contractor of a canning company, his relation terminated when he severed his connection and had most of his belongings removed from the premises; and in that case the company was not liable for compensation to one of the employes of the boarding-house keeper for an injury by a runaway horse while he was seated in a buggy preparatory to leaving. *Lange C. Co. v. Industrial Comm.* 183 W 583, 197 NW 722.

The term "contractor" as used in the workmen's compensation act does not include the relations existing between 2 companies. *Deep Rock O. Co. v. Derouin*, 194 W 369, 216 NW 505.

"The fact that sec. 102.06 of the Statutes might, under certain contingencies, place defendant in the position of insurer of any compensation that might be due from plaintiff's employer, does not make plaintiff an employe of the defendant for the reason that this provision of the statute does not create the relationship of employer and employe, but does create a relationship that is analogous to that of an insurer. Where the relationship of insurer exists, liability is based upon an independent contract between the employer and his contractor, and not upon any contract of service, either express or implied." *Culbertson v. Kieckhefer C. Co.* 197 W 349, 351, 222 NW 249, 250.

The plaintiff was subject to the workmen's compensation act. A truck owner employed by the plaintiff was not subject to the act. The plaintiff was therefore liable under the act for the death of the employe of the truck owner. *Great A. & P. Tea Co. v. Industrial Comm.* 205 W 7, 236 NW 575.

An employe of one who stood in the relation of independent contractor to a school district with respect to reroofing its school building, injured while working in the contractor's shingle mill in which the shingles for the school were cut, was not an employe of the contractor under the reroofing contract with the district, cutting the shingles being no part of the contract. *School Dist. v. Industrial Comm.* 216 W 244, 257 NW 18.

A lumber company which did none of its own logging was not liable for compensation to an employe of a farmer, to whom the lumber company lent money to purchase a tract and equipment and from whom the lumber company bought logs, on the theory that the farmer was a "contractor" within the statute

making an employer liable for compensation to an employe of a "contractor," though the statute was intended to prevent employers from relieving themselves of liability by doing through so-called independent contractors what they would otherwise do through direct employes, since the farmer and the lumber company were in the relation of seller and buyer. *Employers Mut. L. Ins. Co. v. Industrial Comm.* 224 W 527, 272 NW 481.

The determinations of the industrial commission as to whether the ultimate facts found fulfill a proper legal definition of such terms as "employe", "independent contractor", and "contractor under" are not conclusive. A finding that R. was a "contractor under" the lumber company, so as to make the company liable for compensation to an employe of R., was partly a conclusion of law, where it involved a determination, not only as to the facts, but also as to what facts were required to produce the legal relationship of "contractor under". A finding that the manner in which the work was carried out and the details thereof were to a large extent within the discretion of the company was a finding of fact. *Heineman L. Co. v. Industrial Comm.* 226 W 373, 276 NW 343.

Where a town employed an uninsured firm to haul materials for road repair in the town, and the chairman of a neighboring town agreed that the neighboring town would pay half the expenses of repairing the road between the towns, there was no contract between the neighboring town and the firm and, therefore, the neighboring town was not liable as "employer" for the death of an employe of the firm working in the gravel pit from which the materials were taken. *Employers Mut. L. Ins. Co. v. Industrial Comm.* 229 W 121, 281 NW 678.

The purpose of 102.06 is to prevent employers from relieving themselves of liability by doing through independent contractors what they would otherwise do through direct employes. Where a county fair association made a contract with a booking agency to produce a rodeo show at the association's annual fair for a specified portion of the receipts for entry to the grandstand to view the show, and the agency made a contract accordingly with a rodeo owner to give the show, the rodeo owner was not a "contractor or subcontractor" so as to render the fair association liable for compensation to an injured performer-employe of the rodeo owner. *Marinette County Fair Asso. v. Industrial Comm.* 242 W 552, 8 NW (2d) 268.

Where a canning company arranged, on behalf of farmers who were under contract to raise peas to sell to the company, to have an airport operator dust the crops, the expense to be charged to the farmers by the company, the airport operator was not a "contractor under" the canning company, and hence the company was not liable in workmen's compensation for the death of the airport operator's employe, killed while dusting pea fields from an airplane of his uninsured employer. (*Madison Entertainment Corp. v. Industrial Comm.* 211 W 459, and other cases applied.) *Britton v. Industrial Comm.* 248 W 549, 22 NW (2d) 525.

When M., who was engaged in the business of operating carnival companies, arranged with K., who was a lessee of one of M.'s carnival units, to operate such leased carnival unit to fulfill M.'s contract to operate a carnival at a certain place, K. was an independent contractor doing work ordinarily and customarily done by M., so that K. was a "contractor or subcontractor under" M., and M. and his insurance carrier were liable for workmen's compensation to an employe of K. who was injured while working at such carnival and while K.'s liability was not covered by workmen's compensation insurance. *Miller v. Industrial Comm.* 258 W 321, 46 NW (2d) 323.

Although a contractor may be liable to employes of a subcontractor who has no insurance, he is not liable for the insurance premiums if the subcontractor does not pay them. *Boeck Construction Equip. Corp. v. Voigt*, 17 W (2d) 62, 115 NW (2d) 627, 117 NW (2d) 372.

Where an insurer of a general contractor, required to pay benefits under 102.06 to an employe of an uninsured subcontractor (to whom a part of the work had been delegated) brought action against the main subcontractor who carried no workmen's compensation insurance, claiming to be subrogated by virtue of an alleged indemnity agreement between the general contractor and main subcontractor, its right to relief was not founded on or limited by the workmen's compensation act, but arose from the alleged indemnity agreement. *New Amsterdam Cas. Co. v. Acorn Products Co.* 42 W (2d) 127, 166 NW (2d) 198.

## 2. Loaned Employe.

Both the employer who loaned an employe, and the employer to whom the employe was loaned and in whose service he was injured, were made liable for compensation to the injured employe, but as between the 2 employers the lender was given a right of action over against the other, and hence payments made by the lender to the injured employe were made to discharge an actual liability, and could be recovered by the lender in an action, although such payments were made in advance of workmen's compensation proceedings in which the borrower alone was held liable for compensation, as against the contention that such payments were "voluntary payments" made under mistake of law with full knowledge of the facts and hence not recoverable. *American Surety Co. v. Northern Trust Co.* 240 W 78, 2 NW (2d) 850.

An employer who is not subject to the workmen's compensation act does not elect to become subject to the act merely by becoming a subcontractor and borrowing an employe from a contractor who is subject to the act, where the number of employes which the borrowing employer has, including the borrowed employe, is less than 3. *Ocean A. & G. Corp. v. Poulsen*, 244 W 286, 12 NW (2d) 129.

Factors to be considered in determining which of 2 contractors was the employer at the time of an accident, and whether the relation of employer and employe existed between a special employer and a "loaned" employe, are: Whether the employe actually or

impliedly consented to work for a special employer; whose work the employe was performing at the time of injury; who had the right to control the details of the work being performed; and for whose benefit primarily the work was being done. A general contractor entered into a hiring arrangement whereby he carried insurance and social security for and paid the wages of an employe but was reimbursed by a second contractor; the second contractor had a separate contract for the installation of certain machinery and the general contractor had nothing to do therewith; the employe agreed to work for the second contractor on the installation job; the installation work was under the sole direction of the second contractor's superintendent; the employe was doing installation work for second contractor when injured. On above evidence, a determination of the industrial commission that the employe was employed by the general contractor but had been loaned to the second contractor so as to make latter his employer liable in workmen's compensation for his injuries is warranted. *Combustion Eng. Co. v. Industrial Comm.* 254 W 167, 35 NW (2d) 317.

Where the plaintiff, employed by a tube company to help unload incoming trucks of freight at a loading dock on the premises of his employer, and suing the owner of a truck for injuries sustained while assisting the driver to start the truck stalled on ice at the dock, went to the aid of the driver at the direction of the company foreman, and had been previously directed by the foreman to aid truck drivers to move stalled trucks and had done so, and it was to the interest of the company to get the stalled truck away from the dock to make room for other trucks, the plaintiff was not an employe of the defendant so as to render his remedy against the defendant one exclusively under the workmen's compensation act. *Siblik v. Motor Transport Co.* 262 W 242, 55 NW (2d) 8.

The remedy of a compensation insurer under 102.29 is not an alternative to the remedy under 102.06 and an unsuccessful pursuit of one remedy does not preclude pursuing the other. The theory of election of remedies is not applicable since only one remedy can apply, depending on whether the defendant is a third-party tort-feasor or a special employer. An employe of a printing company, doing what was primarily the trucking firm's work at the request of the trucking firm's crew at the time he was injured, but acting on the orders of the printing company that he go along with the truckers and help them, was doing it to serve the printing company's interests by expediting the trip and hastening his return to his regular duties at the printing plant, and therefore he was an employe of the printing company at the time of his injury rather than the special employe of the trucking firm. *Braun v. Jewett*, 1 W (2d) 531, 85 NW (2d) 364.

To transfer liability from a general employer to one to whom an employe is loaned, there must be some consensual relationship between the loaned employe and the employer whose service he enters, sufficient to create a new employer-employe relationship.



Hanz v. Industrial Comm. 7 W (2d) 314, 96 NW (2d) 533.

Of the four essential tests to be applied in determining whether a loaned employe retains his employment with his original employer, or becomes the employe of the special employer, the most important one is whether the employe actually or impliedly consented to work for the special employer. Springfield L., F. & F. Co. v. Industrial Comm. 10 W (2d) 405, 102 NW (2d) 754. See also: Schaub v. Calder Van & Storage Co. 308 F (2d) 835, 837; and Huckstorf v. Vince L. Schneider Enterprises, 41 W (2d) 45, 49-54, 163 NW (2d) 190, 193-195.

There is an important distinction between the mere consent of an employe to perform certain acts on behalf of or for the benefit of the special employer and the consent to leave his employment and enter into a new employer-employe relationship, of even a temporary nature. Escher v. Dept. of I., L. & H. R. 39 W (2d) 527, 159 NW (2d) 715.

In determining the status of an employe under the "loaned-servant" doctrine, great weight is given to the right of an individual worker to choose his employer and not to be transferred to some special employer without his consent. Ryan, Inc. v. Dept. of I., L. & H. R. 39 W (2d) 646, 159 NW (2d) 594.

**102.07 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394-7; 1913 c. 599, 707; 1917 c. 624; 1919 c. 577; 1921 c. 451 s. 1; 1923 c. 291 s. 3; 1923 c. 437 s. 2; 1923 c. 449 s. 56; Stats. 1923 s. 102.07; 1929 c. 241; 1929 c. 453 s. 3; 1931 c. 87 s. 1, 3; 1931 c. 403 s. 9; 1933 c. 402 s. 1, 2; 1935 c. 465; 1937 c. 162; Spl. S. 1937 c. 6; 1939 c. 261; 1943 c. 270; 1945 c. 537; 1951 c. 247; 1953 c. 328; 1955 c. 283; 1957 c. 14; 1961 c. 323, 387; 1963 c. 287; 1969 c. 341.

**Committee Note, 1969:** Sub. (11) is intended to provide workmen's compensation benefits for volunteer workers in charitable, educational and similar institutions such as churches, hospitals and schools, where the volunteers perform services, such as maintaining, repairing or improving premises, providing care and comfort for patients, instructing students, etc. It is not intended to provide benefits for solicitors, scout counselors, groups whose main purpose is social, etc. [Bill 334-S]

1. General.
2. Public employes.
3. Private employes.
4. Newsboys.
5. Independent contractors.

#### 1. General.

The principal or primary test for determining if an employer-employe relationship exists is whether the alleged employer has a right to control the details of the work. Among the subsidiary or secondary tests which should be considered are: (1) The direct evidence of the exercise of the right to control; (2) the method of payment of compensation; (3) the furnishing of equipment or tools for the performance of the work; and (4) the right to fire, or terminate the relationship. Scholz v. Industrial Commission, 267 W 31, 64 NW (2d) 204, 65 NW (2d) 1. See also: Ace R. & H. Co. v. Industrial Comm. 32 W (2d)

311, 145 NW (2d) 777, and Prentice v. Dept. of I., L. & H. R. 38 W (2d) 219, 156 NW (2d) 482.

#### 2. Public Employes.

A resident of a village who responded to the call of the village marshal for assistance in making an arrest and who was shot and killed by a person who was technically under arrest was an employe of the village within the meaning of the workmen's compensation act. West Salem v. Industrial Comm. 162 W 57, 155 NW 929.

The night marshal of a village, having the powers and duties of a village peace officer, is an "employe" of the village; and the village is liable to him for an injury accidentally sustained in the performance of his official duty. Kiel v. Industrial Comm. 163 W 441, 158 NW 68.

Within the meaning of sec. 2394-7 (1), Stats. 1921, a person working out his road tax, instead of paying in cash, was an employe of the town. Germantown v. Industrial Comm. 178 W 642, 190 NW 448.

Cities have power to furnish fire service to people and communities adjacent to the cities; and a volunteer fireman who was injured on his return from a fire outside the city and who acted under the direction of the city fire chief is entitled to compensation. Burlington v. Industrial Comm. 195 W 536, 218 NW 816.

A person on county poor relief, who was injured while voluntarily doing "made-work" for a village, and who while doing such work received from the county in cash, instead of in supplies, part of his budgeted necessities as a public charge, which necessities the county was obligated by law to furnish without his doing such work, was merely a recipient of public charity so far as the county was concerned, and was not in the service of the county under a contract of hire nor of the village so as to be an "employe" within the workmen's compensation act. West Milwaukee v. Industrial Comm. 216 W 29, 255 NW 728.

A workman injured while working under the direction of the county highway commissioner on a county road, under "work agreement" in payment for drought relief furnished his father by the U. S. government under a system which required that the county, to obtain workmen under a "work agreement," accept responsibility for compensation to injured workmen, was not an "employe" of the county, because the county highway commissioner had no power to set him to work. Marathon County v. Industrial Comm. 218 W 275, 260 NW 641.

A county dance hall inspector, who as such inspector possessed powers of a deputy sheriff, had the right to call on a patron of a dance hall for assistance in quelling a disturbance at a dance, and such patron was an employe of the county, within the workmen's compensation act, when injured while rendering such assistance. (West Salem v. Industrial Comm. 162 W 57, and Vilas County v. Industrial Comm. 200 W 451, applied.) Shawano County v. Industrial Comm. 219 W 513, 263 NW 590.

A man who was engaged to cut wood for the county and who was paid a wage which he could spend where and as he saw fit, so



long as he paid for his necessities, was not a relief recipient, but was an employe of the county. *Lincoln County v. Industrial Comm.* 228 W 126, 279 NW 632.

A student nurse, taking required clinical training at the Wisconsin General Hospital as a part of her course at the University of Wisconsin, was not an employe of the state under an implied contract of hire so as to render the state liable under the workmen's compensation act, since one cannot become an employe of the state under an implied contract of hire but can become such only in accordance with the provisions of 16.01 to 16.30, relating to civil service. (*Employers Mut. L. Ins. Co. v. Industrial Comm.* 235 W 270, distinguished.) *State v. Industrial Comm.* 250 W 140, 26 NW (2d) 268.

In a workmen's compensation proceeding against a town because of the death of a member of a partnership, evidence disclosing that the partnership members were to work as skilled operators of their bulldozer, that the town officers were to participate only by designating the portion of the highway to be worked, the compensation to be at a specified rate per hour, the work to be done at the convenience of and in the manner chosen by members of partnership, and that the town was interested only in that the roadway be cleared of trees which had interfered with the removal of snow, sustained a finding of the industrial commission that the decedent was not an employe of the town at the time of the accident. *Phaneuf v. Industrial Comm.* 263 W 376, 57 NW (2d) 406.

Evidence that a representative of a village charged with maintenance of its streets engaged the applicants on an hourly-pay basis, supervised essential details of their work, and caused them to be carried on the village payroll, rendered it reasonable for the commission to conclude that the applicants were employes and not independent contractors. *Prentice v. Dept. of I. L. & H. R.* 38 W (2d) 219, 156 NW (2d) 482.

Where an employe serving a governmental unit seeks workmen's compensation benefits, 102.07 (10), Stats. 1965, requires that the department apply the same standards in determining his status as it would if applicant were in private employment. *Hilbert v. Dept. of I., L. & H. R.* 40 W (2d) 598, 162 NW (2d) 596.

A supervisor of dance halls while performing the duties of his office comes under the provisions of the workmen's compensation act. 14 Atty. Gen. 374.

A county is liable for compensation insurance premiums for employes employed by the register of deeds or the sheriff on a fee basis. 26 Atty. Gen. 34.

See notes to 49.046 and 49.05, citing 41 Atty. Gen. 289.

### 3. Private Employes.

The amendment to sec. 1728a, by ch. 466, Laws 1913 (providing that "no employer shall employ, require, permit or suffer" any minor to work at any employment dangerous to the life, health, safety or welfare of such minor, etc.), does not narrow the definition of the word "employe" as contained in sec. 2394-7 (2), Stats. 1913. *Lutz v. Wilmanns Brothers Co.* 166 W 210, 164 NW 1002.

Where a mechanic regularly employed in a warehouse to keep automobiles in repair was temporarily transferred to similar work at automobile races participated in for advertising purposes, the latter employment was not "casual." *Print M. C. Co. v. Industrial Comm.* 168 W 436, 170 NW 285.

Where an employe of an excavating contractor consented to be transferred to the service of a gas company laying pipe in ditches dug by the contractor and was injured while working for the gas company and under its sole control, the gas company, and not the contractor, was liable, he being an employe of the gas company, within the common-law rule, though he continued to work for the contractor one hour a day and was continued on his pay roll. A finding of the industrial commission on the question of the relationship sustained by the workman to the gas company was not conclusive because, the evidence being undisputed, the question was one of law. *Cayll v. Waukesha G. & E. Co.* 172 W 554, 179 NW 771.

The operator of a pleasure resort furnished fireworks, superintended setting them off, employed D. H. to set them, authorized the employment of an assistant, and compensated the assistant. An award under the workmen's compensation act for an injury causing the death of the assistant was proper. *Hasenfus v. Industrial Comm.* 184 W 281, 199 NW 158.

The president of a construction corporation who acted as a superintendent, and who did not own any stock or have any independent control of the corporation, is an employe within the meaning of the workmen's compensation act. *Zurich A. & L. Ins. Co. v. Industrial Comm.* 193 W 32, 213 NW 630.

One employed to cut down a tree standing on property on which the employer proposed to erect a building was not employed in the "usual course of the employer's business." *Charles Ploetz & Co. v. Industrial Comm.* 194 W 603, 217 NW 325.

The operator of a stone crusher, furnished to a contractor pursuant to a rental contract, who was under the control of the contractor, and who was paid and subject to discharge by the contractor, is an employe of the contractor. *C. R. Meyer & Sons Co. v. Industrial Comm.* 194 W 615, 217 NW 408.

That an injured person was secretary and treasurer of a corporation did not exclude him from the classification as an "employe." A compensation insurer was estopped to claim an officer of a corporation owning 70% of its stock was not entitled to compensation for injuries, where his salary was included in the aggregate on which the premium was based. *Columbia C. Co. v. Industrial Comm.* 200 W 8, 227 NW 292.

One who was staying with the owner of a bowling alley until he could find a job, who earned no money, who had no assigned duties, who came and went as he pleased, who was not part of the establishment, and whose relation to the owner was that of a guest, was not an "employe" of the owner of the bowling alley. *Schanen v. Industrial Comm.* 200 W 440, 228 NW 520.

A corporation was liable as an employer for compensation for the death of an employe re-

sulting when assisting in the rescue of an employe of another corporation. *Conveyors' Corp. v. Industrial Comm.* 200 W 512, 228 NW 118.

A finding that one employed to cut timber on a piece-work basis, receiving directions as to where to work and what trees to cut for veneer, was an "employe" and not an "independent contractor," was justified. One injured while in another's service will be presumed to be an employe in a workmen's compensation case. *Allaby v. Industrial Comm.* 200 W 611, 229 NW 193.

Under the provisions of 102.03 and 102.07 (4), Stats. 1927, a discharged employe sustaining an injury on returning to the premises of the former employer, after being paid, for the purpose of removing his personal belongings, is not entitled to compensation, his presence on the premises not being referable to the contract of employment or in any measure in obedience to his contractual obligation. *Pederson and Voechting (Trustees) v. Industrial Comm.* 201 W 599, 231 NW 267.

A boy injured while working at the direction of the superintendent of the city poor farm, under an arrangement whereby he performed services for his board, was an employe and an injury which he sustained was sustained while "performing service growing out of and incidental to, employment," which was compensable even though he was acting as a substitute. Actual knowledge of the poor master was attributed to the city. *Sheboygan v. Traute*, 202 W 420, 232 NW 871.

A traveler injured while assisting a motor-truck driver in releasing his truck mired on the highway was an employe of the driver's employer, and hence his injuries were compensable. *Johnson v. Wisconsin L. & S. Co.* 203 W 304, 234 NW 506.

An employe of a corporation, even though he is its principal officer, is entitled to the protection of the workmen's compensation act. *Milwaukee T. Co. v. Industrial Comm.* 203 W 493, 234 NW 748.

The statutory definition of employe does not exclude an employe because the service which he is temporarily performing is not usually requested of employes in his employment. Death of a painter which occurred in an accident while the painter was returning on employer's truck after hauling furniture for the employer was compensable. *Metzger v. Industrial Comm.* 205 W 339, 235 NW 802.

A claimant who assisted a truck driver with knowledge and acquiescence of the employer's manager, and who, although not paid regular wages, occasionally had been compensated by such manager for similar services, was an "employe" under an implied contract of hire. *National F. Service v. Industrial Comm.* 206 W 12, 238 NW 904.

A night watchman for 2 companies, hired by one in pursuance of an agreement of both but paid by both, was in the employ of both. In view of the purpose of the workmen's compensation act to burden the particular industry in which the injury to the employe occurs with the damages resulting therefrom, the employer in whose place of business the night watchman was injured was alone liable

for compensation for such injuries. *Murphy S. Co. v. Industrial Comm.* 206 W 210, 239 NW 420.

A carpenter-contractor, constructing a scaffold for the erection of a smokestack by a boiler company, was an employe of such company while helping under its control and direction, pursuant to an exchange of work arrangement, in work on the smokestack entirely disconnected from the scaffold work, and was entitled to compensation from such company for injuries sustained while so employed. *Neitzke v. Industrial Comm.* 208 W 301, 242 NW 163.

For purposes of compensation for occupational disease the employer-employe relationship continues until terminated by an affirmative act of one or the other of the parties. *Wisconsin Granite Co. v. Industrial Comm.* 214 W 328, 252 NW 155.

Injuries received by a farm laborer while operating his employer's corn shredder on the employer's farm are not compensable, where the employer has not taken insurance under or elected to include his employes under the workmen's compensation act, since the act exempts farmers and farm laborers from its provisions. *Nace v. Industrial Comm.* 217 W 267, 258 NW 781.

To be an "employe," within the workmen's compensation act, one must have a superior under whose direction work involved in employment is to be done. An assignee for the benefit of creditors was not an "employe" within the act, where the assignment vested legal title to corporate assignor's assets in the assignee, subject to a trust in favor of creditors and assignor, and a rider was attached to the assignor's liability policy in which the assignee was added as an insured employer, notwithstanding the assignee was to be paid compensation or a commission. *Fritz v. Industrial Comm.* 218 W 176, 260 NW 459.

A physician employed by a medical association who was hired to perform other duties than those of a physician and surgeon, such as those of hospital superintendent and manager of the hospital pharmacy and who was required to testify at workmen's compensation hearings, was an "employe" and his estate was entitled to compensation for his death from injury received while on the way to attend a hearing before the industrial commission. *Gomber v. Industrial Comm.* 219 W 91, 261 NW 409.

The evidence established that an applicant for compensation from a news company, who was injured while riding in the truck of an employe of the news company during the delivery of newspapers and magazines, was a helper of such employe in the latter's employment with the news company, paid by such employe, and, under evidence that on numerous occasions the helper had assisted such employe with the latter's work in the presence of an officer of the news company, the helper was properly found by the commission to be an employe of the news company within 102.07 (4), Stats. 1931. *Milwaukee News Co. v. Industrial Comm.* 224 W 130, 271 NW 78.

A minor, injured while working for his father under a contract for wages, is entitled to the benefits of the workmen's compensation act. *Curt v. Industrial Comm.* 226 W 16,

275 NW 447. See also *Eckharat v. Judevine*, 233 W 168, 288 NW 756.

Where former employes of a granite company, which had closed down its quarry because of the prohibitive cost of compensation insurance, entered into an agreement for the formation of a partnership to lease the quarry, to quarry and finish granite, and divide the profits, and did lease the quarry from the granite company, but, under the agreement as drawn, and under the practice pursued, the employes were paid according to the same wage scale as before and could never receive anything more than wages, and the entire output of the quarry was disposed of to the granite company at cost, and the relationship with the granite company as to control, supervision, etc., was the same as before, the agreement did not create a "partnership" nor the relationship of "independent contractor," and the "partners" were nevertheless "employes" of the granite company, subject to the workmen's compensation act. (*York v. Industrial Comm.* 223 W 140, distinguished.) *Montello Granite Co. v. Industrial Comm.* 227 W 170, 278 NW 391.

The provision defining "employee" as including "all helpers and assistants of employes, whether paid by the employer or employe, if employed with the knowledge actual or constructive, of the employer," in effect making the employe's employer liable to such helpers for workmen's compensation in case of injury, was merely to bring within the protection of the act certain classes of persons not theretofore included, such as helpers engaged under circumstances such that the employe soliciting their services could not be said to be an employer liable for compensation under the act, but such amendment was not intended to apply where the employe soliciting the services of helpers was himself an employer liable for compensation under the act and where he, not his employer, was the actual employer of such helpers. *Standard Oil Co. v. Industrial Comm.* 234 W 498, 291 NW 826.

An undertaking by a group of heirs to remodel, for purposes of making it salable or rentable, a building which they had purchased adjacent to their inherited holdings in order to end a boundary dispute affecting such holdings, was only a casual, isolated and desultory activity, which did not constitute a "trade, business, profession or occupation" of theirs, within the workmen's compensation act, and hence a workman employed by them in the remodeling was not entitled to compensation from them for injuries sustained while so engaged. *Cornelius v. Industrial Comm.* 242 W 183, 7 NW (2d) 596.

Where an employe at the command and pursuant to the direction of his employer enters the service of another, no new employer-employe relationship is created, in the absence of consent on the part of the employe to the creation thereof. *Boehck Equip. Co. v. Industrial Comm.* 246 W 178, 16 NW (2d) 298.

Where a miner, employed by the G. B. mine, was requested by one of the owners of the C. mine to assist in rescuing employes of the C. mine buried in a cave-in at the C. mine, and was killed while assisting in the attempted rescue, he was at the time of his accident

an employe of the owners of the C. mine, so that they were liable for death benefits awarded under the workmen's compensation act to the deceased's surviving mother. (*Conveyors Corp. v. Industrial Comm.* 200 W 512, applied; *Rhineland Paper Co. v. Industrial Comm.* 206 W 215, distinguished.) *Cherry v. Industrial Comm.* 246 W 279, 16 NW (2d) 800.

Where the defendant's truck driver, delivering coal to the plaintiff's home, asked plaintiff to help him, and she was injured when the truck suddenly started while she was setting a block under the wheel, she was at the time of injury engaged in furthering her own interests, and her activities were for the purpose of getting delivery of the coal and not to accommodate the defendant coal company, and she was not its temporary "employee" so as to be limited to a recovery under the workmen's compensation act. *Nemeth v. Farmers Co-op. El. Co.* 252 W 290, 31 NW (2d) 569.

Where an employer sold his business to another person under a bona fide conditional sales contract and the employes in the business became the employes of the new owner, a workmen's compensation policy which had been issued to the former owner did not automatically cover the liability of the new owner, and the insurance company, in the absence of a formal assignment of the policy or of any basis for an estoppel, was not liable for injuries to an employe hired by the new owner and never an employe of the former owner, nor was the former owner liable, but the sole liability was that of the new owner, who had not obtained insurance. *Zemel v. Industrial Comm.* 255 W 126, 37 NW (2d) 850.

The evidence supported a finding of the industrial commission that the decedent, who had formerly worked for the defendant on the defendant's fishing boat and at the defendant's fish warehouse for fixed wages and was drowned as the result of an explosion on the defendant's fishing boat, was at the time of death an employe of the defendant, rather than a partner or an independent contractor, although at that time he was operating the defendant's fishing boat under an arrangement whereby he was to receive a share of the receipts. *Fisher v. Industrial Comm.* 255 W 131, 37 NW (2d) 877.

Where the industrial commission's permissible finding of ultimate fact was that the services which H. was rendering at the time of his injury while operating a corn picker on G.'s farm were being performed pursuant to an implied contract whereby G. was being repaid for work which G. had previously furnished to a partnership of which H. was a member, and it appeared that G. had exercised control over the details of the work by telling H. what to do and where to do it, the required conclusion of law therefrom is that H. at the time of his injury was the employe of G. *Gant v. Industrial Comm.* 263 W 64, 56 NW (2d) 525.

The fact that one is the president and general manager of a family corporation in which he is the principal stockholder does not prevent an employe-employer relationship from existing between the corporation and himself. *Fruit Boat Market v. Industrial Comm.* 264 W 304, 58 NW (2d) 689.

The presumption that one injured while per-

forming services for another was an employe of such other, is rebuttable, and ceases to have force or effect when evidence to the contrary is adduced. The election authorized by 102.07 (4) (c) is applicable only to the situation of employer-employe and not to an independent contractor. *Scholz v. Industrial Comm.* 267 W 31, 64 NW (2d) 204, 65 NW (2d) 1.

In a proceeding on the claim of a member of a church who was injured while helping to clean the kitchen of the church when a step-ladder collapsed under her while she was wiping a light in the ceiling, the evidence supported findings of the industrial commission that the services which the claimant rendered were not undertaken pursuant to contract of hire, express or implied, and that the claimant was a volunteer and not an employe. *Enderby v. Industrial Comm.* 12 W (2d) 91, 106 NW (2d) 315.

Compensation is payable to the parents of a 14-year-old boy killed while at work even though the boy was unemancipated, had no work permit, received no regular wage and was the son of an officer of the corporate employer. *Harry Crow & Son, Inc. v. Industrial Comm.* 18 W (2d) 436, 118 NW (2d) 841.

A man who owns practically all of the stock of a corporation operating a tavern and who is responsible only to himself in running it is not an employe. *Duvick v. Industrial Comm.* 22 W (2d) 155, 125 NW (2d) 356.

A man is an employe although he owned 80% of the corporate stock where he performed duties normal to an employe and was so working at the time of his injury. An insurance company is not estopped to deny the relationship because it treated him as an employe in computing premiums. *Marlin Electric Co. v. Industrial Comm.* 33 W (2d) 651, 148 NW (2d) 74.

To establish entitlement to workmen's compensation benefits under 102.07 (4) to (8), Stats. 1963, as an employe, or in the alternative as a statutory employe, it must be found as a prerequisite that the applicant was "in the service of" the claimed employer (as required by subsec. (4) of the statute) or that the claimed employer was one for whom the applicant was "performing service" (as prescribed in subsec. (8) of the statute). *Lange v. Dept. of I., L. & H. R.* 40 W (2d) 618, 162 NW (2d) 645.

#### 4. Newsboys.

The decedent, engaged at the time of his death merely in the work of soliciting subscriptions for a newspaper, was not engaged in "selling or distributing" newspapers so as to be deemed an "employe" for purposes of workmen's compensation. The presumption, in proceedings for workmen's compensation, that one injured while performing services for another was an employe of such other is rebuttable, and ceases to have force or effect when evidence to the contrary is adduced. *Huebner v. Industrial Comm.* 234 W 239, 290 NW 145.

#### 5. Independent Contractors.

A painter, who did jobs for others, but hired no help, agreed with a village to paint and clean a bridge for a specified price, the

agreement providing that he might do the work in his own way and at his own convenience and reserved to the village no control over the details of the work, was an independent contractor. *Weyauwega v. Industrial Comm.* 180 W 168, 192 NW 452.

The principal test to be applied in determining whether one rendering services for another is a servant or an independent contractor is whether the employer has the right to control the details of the work. Other things are to be considered, however, such as the place of work, time of employment, method of payment, and the right of summary discharge of employes. *Kolman v. Industrial Comm.* 219 W 139, 262 NW 622. See also: *Montello Granite Co. v. Industrial Comm.* 227 W 170, 278 NW 391; *Huebner v. Industrial Comm.* 234 W 239, 290 NW 145.

Findings of the industrial commission that the claimant school janitor did not maintain a separate business, did not hold himself out to and render service to the public, was not himself an employer subject to the workmen's compensation act, and had not taken out workmen's compensation insurance, would make him an employe of the school district even though he might for all other purposes be considered an independent contractor. *Woodside School Dist. v. Industrial Comm.* 241 W 469, 6 NW (2d) 182.

To warrant a finding that a person (not himself an employer), injured while performing service in the course of the business of an employer, was not an "employe," there must be proof, not only that he was an independent contractor and maintained a separate business, but also that he held himself out to and rendered service to the public. *Dryden v. Industrial Comm.* 246 W 283, 16 NW (2d) 799.

The evidence warranted the industrial commission's findings that the deceased husband of the claimant had entered into a contract with a hotel company for the painting of its hotel lobby for a lump sum, that at such time he was an independent contractor and maintained a separate business and held himself out to and rendered service to the public, and that he was not an "employe" of the hotel company at the time of his injury and that his widow was not entitled to death benefits from the hotel company. *Conrad v. Industrial Comm.* 254 W 574, 37 NW (2d) 60.

The claimant, a home builder and known as a skilled carpenter and cabinetmaker, as a matter of law was maintaining a separate business in which he held himself out to render service to the public in any or all of such capacities, so that 102.07 (8) had no application in determining whether the instant claimant was an employe when injured while doing repair work for a church congregation. Such skilled craftsmen are usually considered to be independent contractors. *St. Mary's Congregation v. Industrial Comm.* 265 W 525, 62 NW (2d) 19.

The members of the orchestra, including the leader, who lined up engagements, were jointly and severally independent contractors who held themselves out to render service to the public in a separate business maintained by them, and the claimant member was not an employe of the orchestra leader, or of the

dance-hall operator, although the written contract between the orchestra leader and dance-hall operator denominated the latter as "employer" and members of the orchestra as "employees," and stated that the "employer" should at all times have complete control of the services which the "employees" would render. *Schmidlkofer v. Industrial Comm.* 265 W 535, 61 NW (2d) 862.

The evidence in a workmen's compensation proceeding sustained a finding of the industrial commission that claimant, engaged in hauling logs by truck for the alleged employer when injured, was an independent contractor, and not an employe, at the time of his injury. *Scholz v. Industrial Comm.* 267 W 31, 64 NW (2d) 204, 65 NW (2d) 1.

The independent contractor provision in 102.07 (8) applies to cases where the state is the employer. A trapper on Horicon marsh who by agreement with the conservation commission was allowed to trap muskrats to reduce the number of the animals, but who was subject to numerous restrictions, and who could keep only half his catch, was an independent contractor, not a mere licensee. *Rehse v. Industrial Comm.* 1 W (2d) 621, 85 NW (2d) 378.

Servant distinguished from an independent contractor. 25 MLR 109.

Independent contractor or employe. *Terwilliger*, 12 WLR 219.

**102.08 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—8; 1913 c. 599; 1917 c. 624; 1923 c. 291 s. 3; Stats. 1923 s. 102.08; 1925 c. 171 s. 3; 1931 c. 87 s. 2; 1931 c. 403 s. 10; 1931 c. 469 s. 2; Stats. 1931 s. 102.08; 1933 c. 402 s. 2; 1935 c. 465; 1943 c. 270; 1969 c. 276 s. 584 (1) (a).

Where an employe knowingly makes a false representation concerning his epilepsy at the time he is hired, no claim can be made for accident or death resulting from an epileptic seizure. *Volunteers of America v. Industrial Comm.* 30 W (2d) 607, 141 NW (2d) 890.

**102.11 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—10; 1913 c. 599; 1915 c. 462; 1917 c. 624; 1919 c. 680 s. 3; 1921 c. 462; 1923 c. 291 s. 3; 1923 c. 328 s. 4; 1923 c. 449 s. 44; Stats. 1923 s. 102.11; 1927 c. 42; 1929 c. 453 s. 1, 2; 1931 c. 42; 1931 c. 403 s. 12; 1935 c. 465; 1937 c. 180; 1943 c. 270; 1945 c. 532, 537; 1947 c. 475; 1949 c. 107; 1951 c. 382; 1953 c. 328; 1955 c. 281; 1957 c. 204; 1959 c. 280; 1961 c. 269; 1963 c. 281; 1965 c. 166; 1967 c. 350; 1969 c. 341.

A plumber having been called upon by the marshal of a village to aid in the arrest of a disturber of the peace was shot and killed by the disturber. The amount recoverable by his widow should be based upon the earnings of one doing police duty in the same or a neighboring locality, not upon his earnings as a plumber. *West Salem v. Industrial Comm.* 162 W 57, 155 NW 929.

Since the amendment of sec. 2394-10, Stats. 1911, by ch. 599, Laws 1913, the nature and extent of an injury to an employe, and his compensation therefor, are to be ascertained by reference to the impairment of his earning capacity at the time of his injury. This wage-earning capacity is to be distinguished from

capacity to make money by the conduct of business operations or by the use or investment of capital other than his own labor. *McDonald v. Industrial Comm.* 165 W 372, 162 NW 345.

A deputy sheriff engaged for a single night to attend a place of amusement and to admit only those who produced tickets or whose names were furnished him was acting as the doorkeeper of the proprietor and not as a peace officer. Such employment as doorkeeper being seasonal and irregular, compensation for his injury was to be computed on the basis of previous earnings of the injured employe and others of the same class in the same employment in the same locality. An award of compensation cannot be sustained unless it be shown what a person continuously employed in the same occupation would earn in any year. The industrial commission is not warranted in proceeding partially on one basis and partially on another in computing the award. *Rainbow Gardens v. Industrial Comm.* 186 W 223, 202 NW 329.

In fixing an award of indemnity for the permanent disability of a minor employe, the industrial commission is entitled to consider the qualifications of the employe, his education and experience, as well as his actual earnings prior to the injury. *Badger C. Co. v. Industrial Comm.* 195 W 327, 218 NW 190.

The "average daily wage" of a compensation claimant who knew when he commenced work that he was to work 6 hours a day, and who until he was injured worked 6 hours every day, on a construction job which was being performed under a contract requiring the employer to employ workmen only 6 hours a day except in emergencies and to pay time and a half for overtime, should be computed on the basis of a 6-hour day. *Builders' M. C. Co. v. Industrial Comm.* 213 W 246, 251 NW 446.

In compensation proceedings, the industrial commission did not err in making an award to a 15-year-old minor on the basis of its finding that on attaining the age of 27, had he not been injured, he would have earned a wage entitling him to compensation for the maximum rate, since by the presumption prescribed by the statute, the commission was required to find, in the absence of any proof as to what the minor would probably earn after attaining the age of 27 years, that on attaining that age he would have earned a wage equivalent to the amount on which the maximum weekly indemnity is payable. *Milwaukee News Co. v. Industrial Comm.* 224 W 130, 271 NW 78.

Compensation must be based on the earning capacity of the injured workman in the employment and as he was employed at the time of his injury. *Highway Trailer Co. v. Industrial Comm.* 225 W 325, 274 NW 441.

Where a grocery clerk at the time of injury was one of a group of 40 similar clerks regularly employed only 2 days per week on the same days in each week, and there was also a group of full-time grocery clerks regularly employed 5 days per week, there were 2 distinct classes of employes, and "the particular employment" in which the clerk in question was engaged was that of a clerk working 2

days per week, and her average weekly earnings under 102.11 (1) (a) should have been computed on that basis. *Carr's, Inc. v. Industrial Comm.* 234 W 466, 290 NW 174, 292 NW 1.

The purpose of the provision in 102.11 (1) (a), for the calculation of average weekly earnings, is to base compensation on the normal income one derives from his employment. A higher rate for hours over 40 was properly used where 48 hours were regularly worked each week. *National Pressure Cooker Co. v. Industrial Comm.* 249 W 381, 24 NW (2d) 697.

102.11 (3) requiring that a wage loss be determined by considering the proportionate extent of impairment of the employe's earning capacity applies only to temporary disabilities. *Northern States P. Co. v. Industrial Comm.* 252 W 70, 30 NW (2d) 217.

In the case of an executive of one company, injured while doing manual labor for another, who had no established wage rate for manual labor, the commission cannot award compensation at the highest rate or on any average weekly rate. It must base the award on the going rate for manual labor in the community at the time. *Springfield L., F. & F. Co. v. Industrial Comm.* 10 W (2d) 405, 102 NW (2d) 754.

**102.12 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—11; 1913 c. 599; 1917 c. 624; 1921 c. 451 s. 1; 1923 c. 291 s. 3; 1923 c. 437 s. 2; 1923 c. 449 s. 56; Stats. 1923 s. 102.12; 1929 c. 453 s. 3; 1931 c. 403 s. 13; 1943 c. 270; 1947 c. 475; 1949 c. 107, 634; 1951 c. 382; 1969 c. 276 s. 584 (1) (a).

**Revisor's Note, 1931:** Substance of next to the last sentence is carried to 102.17 (4). (Bill 380-S, s. 13)

1. Employe's knowledge.
2. Actual notice to employer.
3. Employer not misled.
4. Payment of compensation.
5. Two-year limitation.

1. *Employe's Knowledge.*

That a filling station operator shot by a robber erroneously considered himself a lessee rather than an employe did not suspend running of the limitation against filing of application for compensation under the statutory limitation as to filing. *Larson v. Industrial Comm.* 224 W 294, 271 NW 835.

A stonecutter's failure to claim compensation for disability due to silicosis within 2 years after becoming aware that his lung trouble was caused by stone dust barred his claim, though he knew nothing about silicosis. *Universal Granite Q. Co. v. Industrial Comm.* 224 W 680, 272 NW 863.

An employe, who in 1930 sustained a hernia during work, immediately experienced severe pain, told the foreman that he was ruptured, was treated by a doctor and fitted with a truss, was disabled from work for the remainder of the day, but did not suffer further disability from the hernia or any wage loss therefrom until 1935, and first filed an application for compensation in 1936, is deemed to have known the nature of his disability and its relation to his employment on the date of sustaining the hernia and hence his right to com-

penensation was barred by the 2-year limitation. *Creamery Package Mfg. Co. v. Industrial Comm.* 226 W 429, 277 NW 117.

An "accidental injury" is an injury that results from a definite mishap, while an "occupational disease" is a disease acquired as a result of work in the employment and the mere fact that a disease follows an accident does not make the disease an "occupational disease." The wrist injury here came from an accident, and so was barred under the 2-year clause. *Andrzeczak v. Industrial Comm.* 248 W 12, 20 NW (2d) 551.

The evidence sustained a finding of the industrial commission that a nurse, who contracted tuberculosis in the course of her employment for the hospital, knew or ought to have known the relation of her disability to her employment with the hospital more than 2 years prior to filing her application for compensation and hence her claim was barred. *Reinhold v. Industrial Comm.* 253 W 606, 34 NW (2d) 814.

The evidence sustained a finding of the industrial commission that the claimant, who had contracted pulmonary tuberculosis in the course of her employment while a student nurse in a hospital, neither knew nor ought to have known of the nature of her disability and its relation to her employment more than 2 years prior to the filing of her application for compensation. What a claimant may have thought as to the nature of her disability and its relation to her employment is not alone sufficient to start the running of the 2-year statute of limitations; it being necessary that such thought be based on something more than suspicion and conjecture, and that it be based on knowledge of, or on reliable information regarding, the nature of the disability and its relation to the employment. *St. Mary's Hospital v. Industrial Comm.* 257 W 411, 43 NW (2d) 465.

Where an employe sustained accidental injury to his knee but no payment of compensation, except medical treatment at the time, was made therefor, and the employer had no reason to know until after 2 years that the employe had sustained or probably would sustain permanent disability therefrom, and the employe filed no claim until after 2 years, his claim was barred. The provision as to the date when the employe "knew or ought to have known the nature of the disability and its relation to his employment," applies only to occupational disease, and not to accidental injury. *Zabkowicz v. Industrial Comm.* 264 W 317, 58 NW (2d) 677.

Notice to the employer, as required by 102.12, Stats. 1965, was timely, where the claimant made application for a hearing within a month after learning of his permanent partial disability, although some years after he became afflicted, for the time requirement has reference to when he knew or should have known of his permanent partial disability, not when he knew or should have known that he had silicosis and emphysema. *Kohler Co. v. Dept. of I., L. & H. R.* 42 W (2d) 396, 167 NW (2d) 431.

Latent injuries and statutes of notice and limitation in Wisconsin's workman compensation law. *Fink, 1954 WLR 277.*



### 2. Actual Notice to Employer.

Mere notice to the employer that an employe became sick while at work cannot be considered "actual notice of injury" within limitation provision of compensation law. *Van Domelon v. Industrial Comm.* 212 W 22, 249 NW 60.

Where the employer received actual and complete notice of an employe's disability from silicosis within 30 days after the employe knew the nature of his disability and its relation to employment, the employe's right to partial compensation for wage loss due to partial disability was not barred. *Glancy M. I. Co. v. Industrial Comm.* 216 W 615, 258 NW 445.

"Actual notice" to an employer of injury to an employe may exist where the employer is given possession of facts which show him to be conscious of having the means of knowledge although he does not use them. *Crucible Steel C. Co. v. Industrial Comm.* 220 W 665, 265 NW 665.

Where the liability of the employer was fixed within 2 years, the insurer was not discharged by the fact that no claim was made against the insurer within 2 years after the injury. *Maryland Cas. Co. v. Industrial Comm.* 230 W 363, 284 NW 36.

Where an employe told his employer on the day of the accident that he had hurt his back and where he was in the hospital 7 days, this was sufficient notice even though no compensation was paid for more than 2 years. *Western Cas. & Surety Co. v. Industrial Comm.* 24 W (2d) 439, 129 NW (2d) 127.

Filing of an application for adjustment of claims stops the running of the statute of limitations. The statute of limitations is suspended as regards persons residing in a country occupied by the enemy. 14 Atty. Gen. 212.

### 3. Employer Not Misled.

Evidence that an employe on the day after he fell told his employers about it and claimed he was hurt and had consulted a doctor; that the employers said they would pay the doctor's bill and that they did afterward pay \$5 thereon and \$2 to the employe for lost time, was sufficient to cast on the employers the burden of showing that they had been misled, and in the absence of evidence to the contrary was sufficient to sustain a finding that they were not misled. *Pellett v. Industrial Comm.* 162 W 596, 156 NW 956.

The burden of proof, in a case of failure to give the notice required by sec. 2394-11, is upon the employer to show that he was misled and prejudiced by the failure to give such notice. *A. Breslauer Co. v. Industrial Comm.* 167 W 202, 167 NW 256.

A finding that the failure of an employe to give his employer notice of an injury within 30 days after it occurred was not intended to mislead and did not mislead or prejudice such employer by depriving him of an opportunity to either investigate the claims or furnish surgical aid that might have saved the employe's life, was sustained by the evidence. *Vasey v. Industrial Comm.* 167 W 479, 167 NW 823.

The fact that failure of notice prevented the employer from having the injured employe

examined as provided by 102.13 was a ground for claiming that it was misled by the want of notice. *Frank Martin-Laskin Co. v. Industrial Comm.* 180 W 334, 193 NW 70.

The employer has the burden of showing, by evidence which the industrial commission is bound to accept as true, that he was misled by the failure of the employe to give the notice of injury specified by 102.12. *Michigan Quartz Silica Co. v. Industrial Comm.* 214 W 289, 252 NW 682.

### 4. Payment of Compensation.

Where an employer paid the funeral expenses of a deceased employe to an administrator believing that the deceased left no dependents, such payment did not estop the employer from pleading a want of notice as a bar to a proceeding to recover compensation commenced more than 2 years after the date of the accident. The payment of funeral expenses was not a payment on account of compensation. *Manteufel v. Jenkins*, 172 W 565, 179 NW 761.

Payments to an injured employe pursuant to the Michigan compensation act were not the payment of "compensation" within the meaning of that word as used in the Wisconsin compensation act, and hence did not prevent the running of the 2-year limitation. *Jutton-Kelly Co. v. Industrial Comm.* 220 W 127, 264 NW 630.

Where no payment of compensation was made to an employe disabled from silicosis, and no application was filed with the industrial commission within 2 years from the date he knew the nature of his disability, his right to compensation therefor was barred, regardless of whether notice of disability had been received by the employer. *Harnischfeger Corp. v. Industrial Comm.* 220 W 386, 265 NW 215.

A payment made by an employer to an injured employe within the 2 years, in order to operate as a payment of "compensation," must have been made by the employer with intent that it was as compensation under the workmen's compensation act for the injury. *Stewart v. Industrial Comm.* 236 W 167, 294 NW 515.

### 5. Two-Year Limitation.

The bar of the 2-year statute attaches unless an application be filed with the commission within 2 years or the person against whom liability is claimed has been made a party within that time pursuant to the provisions of 102.17 (1) (a). *Sentinel News Co. v. Industrial Comm.* 224 W 355, 271 NW 413, 272 NW 463, 273 NW 819.

When an application for workmen's compensation benefits is timely made, such application tolls the running of the statute of limitations as to all compensation to which the applicant may ultimately be entitled. *Delta Oil Co. v. Industrial Comm.* 273 W 285, 77 NW (2d) 749.

**102.13 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—12; 1913 c. 599; 1917 c. 624; 1921 c. 451 s. 1; 1923 c. 291 s. 3; 1923 c. 437 s. 2; 1923 c. 449 s. 56; Stats. 1923 s. 102.13; 1931 c. 403 s. 14; 1939 c. 261; 1949 c. 107; 1951 c. 382; 1969 c. 255 s. 65; 1969 c. 276 ss. 388, 584 (1) (a).



**Revisor's Note, 1931:** There has never been a conjunction between clauses (a) and (b) of (2). It is thought that the meaning indicates that "or" is implied. (Bill 380-S, s. 14)

102.13 (1) does not require submission to an examination which in the opinion of the attending physician would be unreasonable because it would imperil the life or health of the employe. *Penokee Veneer Co. v. Industrial Comm.* 252 W 396, 31 NW (2d) 622.

**102.14 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—13; 1913 c. 599; 1917 c. 624; 1923 c. 291 s. 3; Stats. 1923 s. 102.14; 1931 c. 403 s. 15; 1963 c. 281, 459; 1969 c. 276 ss. 389, 584 (1) (a).

**Revisor's Note, 1931:** See 370.01 (3), 101.02 and 101.03. (Bill 380-S, s. 15)

The industrial commission is a quasi-judicial body and stands as an impartial tribunal in the administration of the law. Partisan activity on the part of the commission is not permitted. Every claimant, employer and insurance carrier stands equal before it and the duty of the commission is to investigate, find the facts according to the weight of evidence, and apply the law fairly and justly without regard to the consequence to particular parties. *Pruno v. Industrial Comm.* 187 W 358, 204 NW 576.

Administrative problems in Wisconsin's workmen's compensation. *Laube*, 3 WLR 65.

**102.15 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—14; 1913 c. 599; 1913 c. 772 s. 70; 1917 c. 624; 1917 c. 677 s. 84; 1919 c. 703 s. 25; 1923 c. 291 s. 3; Stats. 1923 s. 102.15; 1929 c. 465 s. 3; 1931 c. 403 s. 16; 1969 c. 276 s. 584 (1) (a).

**Revisor's Note, 1931:** The matter of employing help is covered by 14.71. The last sentence of (1) is a duplication of 101.05. (Bill 380-S, s. 16)

The statute does not empower the industrial commission to amend the statute relating to the time within which a claim must be filed, to enlarge the time for filing a claim, or to change the manner in which parties are to be brought before the commission. *Sentinel News Co. v. Industrial Comm.* 224 W 355, 272 NW 463.

The purpose of a rule of practice of the industrial commission, providing that parties to a controversy in a workmen's compensation case may stipulate the facts in writing and the commission may thereupon make its finding or award, and requiring that such a stipulation be accompanied by a report from the physician stating the extent of the injured employe's disability, is to expedite procedure and to make it unnecessary to hold a formal hearing and to take testimony, the stipulated facts being intended as a substitute for testimony taken at a formal hearing. *Wisconsin Axle Division v. Industrial Comm.* 263 W 529, 57 NW (2d) 696.

The industrial commission may properly adopt a rule of procedure, requiring employers to make accident reports. 10 Atty. Gen. 894.

**102.16 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—15; 1913 c. 599; 1915 c. 241; 1917 c. 624; 1923 c. 291 s. 3; Stats. 1923

s. 102.16; 1925 c. 171 s. 2; 1927 c. 517 s. 2; 1931 c. 403 s. 17; 1935 c. 465; 1943 c. 270; 1953 c. 328; 1969 c. 276 s. 584 (1) (a), (c).

**Revisor's Note, 1931:** Last 2 sentences of (1) are transferred to new 102.64. (Bill 380-S, s. 17)

A minor employe, like an adult, may compromise his claim subject to the power of the industrial commission to review, set aside, modify or confirm the same, upon application within one year. A mere formal award by the commission pursuant to such compromise is not a review and confirmation under sec. 2394-15, Stats. 1913. *Menominee B. S. L. Co. v. Industrial Comm.* 162 W 344, 156 NW 151.

Sec. 2394-15 (2), Stats. 1917, confers jurisdiction on the industrial commission to pass upon the reasonableness of medical bills only as between employer and employe. A physician may resort to the courts to enforce his claim for services rendered at the employer's request. *Noer v. G. W. Jones L. Co.* 170 W 419, 175 NW 784.

The jurisdiction of the industrial commission is limited by sec. 2394-15, Stats. 1917, to the determination of disputes concerning compensation, and, on finding that a claimant was not an employe of the insured employer, the commission has no jurisdiction to adjudicate questions affecting the employer and its insurer only. *Porter v. Industrial Comm.* 173 W 267, 181 NW 317.

A proposed settlement between an employer and the parents of an employe killed in the employment is a "dispute or controversy" that must be submitted to the industrial commission for approval. The appearance of the parents before the commission, orally consenting to the settlement, and a letter to the commission from the attorney of the employer's insurer, also expressing consent, gave the commission jurisdiction to approve the settlement without any formal application for compensation. Such an adjustment became absolute at the expiration of a year and the commission thereafter had no jurisdiction to award treble damages. *Hotel Martin Co. v. Industrial Comm.* 182 W 79, 195 NW 865.

A settlement deliberately made with full knowledge of the facts must stand until it is set aside upon application of a party by the industrial commission, whose action is evidenced by such a record as to leave no doubt that the commission acting as such has taken the action required by this section. *Nowiny P. Co. v. Industrial Comm.* 187 W 30, 203 NW 740.

Failure of counsel of an applicant to present a possible ground of recovery before the industrial commission cannot be deemed a waiver of the matter, as the law contemplates that the commission shall protect the rights of an injured workman and his dependents. *Nystrom v. Industrial Comm.* 196 W 406, 220 NW 188.

The industrial commission, which is given jurisdiction to hear all disputes or controversies affecting compensation, and to make its finding and award, has jurisdiction to construe a compensation insurance policy and determine whether the insurer had in law insured the risk. *Northwestern C. & S. Co. v. Industrial Comm.* 197 W 237, 221 NW 766.

A controversy as to the existence of an insurance contract between an employer and an insurance carrier was a "controversy concerning compensation," of which the industrial commission had jurisdiction. *Maryland Cas. Co. v. Industrial Comm.* 198 W 202, 223 NW 444.

A letter from the industrial commission to an insurer indicating that the commission would not affirm a stipulation for settlement was in effect a review and setting aside of the stipulation. *Wisconsin M. L. Co. v. Industrial Comm.* 202 W 428, 232 NW 885.

Where an original award, made in 1931 pursuant to a compromise agreement, contained no reference as to any allowance for increased compensation, the industrial commission had jurisdiction to enter an award for such increased compensation although application therefor was filed more than a year after date of first award; the provision of 102.16 (1) being inapplicable in the circumstances. *R. J. Wilson Co. v. Industrial Comm.* 219 W 463, 263 NW 204.

The industrial commission is without power to try an equitable issue of the right of the insurer to reimbursement for money paid out under a compensation award. *Employers Mut. L. Ins. Co. v. Industrial Comm.* 230 W 374, 284 NW 40.

The industrial commission has no jurisdiction to enter an order requiring an employer to offer to the applicant medical, surgical, and hospital treatment, but has jurisdiction to determine any dispute or controversy arising under the workmen's compensation act and has jurisdiction to pass on the reasonableness of medical and hospital bills in case of dispute. *Levy v. Industrial Comm.* 234 W 670, 291 NW 807.

Under 102.16 (1), as amended by sec. 11, ch. 270, Laws 1943, if the word "compromise" appears in a stipulation of settlement, the industrial commission's award on the stipulation is an award on a genuine compromise and is subject to the one-year limitation prescribed therein for commission action on compromises, but if the word "compromise" does not appear in the stipulation of settlement, further claim and right of an employe is subject to commission action within the 6-year period prescribed in 102.17 (4). In the 1943 amendment "claim" means the claim and right of an employe for compensation, and does not include a claim of an employer or his insurance carrier. *Wacker v. Industrial Comm.* 248 W 315, 21 NW (2d) 715.

See note to 102.18, on review by department, citing *Boehmke v. Industrial Comm.* 253 W 610, 34 NW (2d) 774.

Where, in response to an injured employe's claim for workmen's compensation filed with the industrial commission, the employer's insurance carrier assumed full liability and paid to the claimant employe the full amount of compensation claimed, such payment, together with the obtaining of the claimant's release and filing the same with the commission, did not constitute a "compromise" within the meaning of that term as used in 102.16 (1), and hence the one-year limitation of such statute did not apply as a bar to a further claim based on the same in-

jury. *Metropolitan Cas. Ins. Co. v. Industrial Comm.* 260 W 298, 50 NW (2d) 399.

See note to 102.17, on 6-year statute of limitation, citing *C. F. Trantow Co. v. Industrial Comm.* 262 W 586, 55 NW (2d) 884.

In view of the practical interpretation thereof by the industrial commission for many years, the words "stipulation of settlement," as used in 102.16 (1), are construed to embrace a stipulation of facts which embodies no element of compromise, as well as a stipulation of settlement which does embody an element of compromise, so that an award based on such a stipulation could be opened up, under 102.16 (1) and 102.17 (4), at any time within 6 years from the date of the last payment of compensation. *Wisconsin Axle Division v. Industrial Comm.* 263 W 529, 57 NW (2d) 696.

Where the employer agreed in writing to eliminate the word "compromise" from an agreement with the employe and to have the agreement considered as a stipulation of fact before the commission, 102.16 (1) did not operate to limit the commission's right to modify an award of October 11, 1948, based on such stipulation, to one year after the award. Such employer is not in a position to question the constitutionality of such provision, since one may not retain the benefits of an act of the legislature while attacking the constitutionality of one of the important conditions thereof. *Zweig v. Industrial Comm.* 269 W 324, 69 NW (2d) 440.

Where a stipulation of settlement, not containing the word "compromise," was entered into pursuant to 102.16 (1), Stats. 1951, and an award of workmen's compensation death benefits to the 2 then-known dependent children of a deceased employe was made by the commission on the basis thereof, the unappealed award became final and binding at the expiration of 20 days so that it could not thereafter be set aside on the application of the employer and its insurance carrier; but a third dependent child, not a party to the stipulation of settlement and hence not bound by the award, could apply for death benefits within the time permitted to a claimant by 102.17 (4), and the commission could award death benefits to her, notwithstanding the prior award. *Speelmon Elevated Tank Serv. v. Industrial Comm.* 2 W (2d) 181, 85 NW (2d) 834.

The industrial commission has the exclusive and absolute discretion to review compromise agreements and compromise releases entered into in workmen's compensation cases. *Meyer v. Industrial Comm.* 13 W (2d) 377, 108 NW (2d) 556.

**102.17 History:** 1911 c. 50; Stats. 1911 s. 2394—16; 1913 c. 599; 1917 c. 624; 1921 c. 451 s. 1; 1921 c. 551 s. 1; 1921 c. 9 s. 2; 1923 c. 291 s. 3; Stats. 1923 s. 102.17; 1927 c. 523 s. 34; 1929 c. 453 s. 3; 1931 c. 403 s. 18, 18a; 1931 c. 413; 1931 c. 469 s. 5; 1935 c. 465; 1943 c. 270; 1949 c. 107; 1951 c. 382 s. 5, 6; 1953 c. 328; 1961 c. 269, 621; 1963 c. 281; 1967 c. 350; 1969 c. 276 ss. 390, 584 (1) (a), (c); 1969 c. 324, 341; 1969 c. 392 s. 45g.

**Revisor's Note, 1931:** Subsection (4) is from next to last sentence of 102.12 (3) is renumbered 101.10 (1a) for better arrangement. (5)

is transferred to new 102.64. New (5) is based on the last sentence of 102.12. [Bill 380-S, s. 18]

1. Procedure.
2. Check on payment.
3. Six-year statute of limitations.

1. Procedure.

Under sec. 2394—16, Stats. 1911, parties are entitled to a fair hearing upon the merits, including the right to know what the testimony taken without notice tended to prove, and the right to meet any new matter. *International H. Co. v. Industrial Comm.* 157 W 167, 147 NW 53.

The notice of hearing given under sec. 2394-16, Stats. 1913, should either have attached thereto a copy of the application or should contain a statement of the time, place and general nature of the injury. And when an award made after a hearing has been opened up, because the employers did not receive the notice of hearing, and in order to allow them to introduce their evidence and cross-examine the claimant, the claimant need not be required to present his evidence anew—a wide discretion being allowed to the industrial commission in matters of procedure. *Pellett v. Industrial Comm.* 162 W 596, 156 NW 956.

A general appearance before the industrial commission by an unlicensed foreign corporation having no post-office address in this state waived any lack of jurisdiction on the part of the commission by reason of its failure to file the notice required by 102.17, Stats. 1931, with the secretary of state. *McKesson-Fuller-Morrisson Co. v. Industrial Comm.* 212 W 507, 250 NW 396.

Under 102.17 (1) (a), 102.23 (4), and 102.64 (2), Stats. 1933, in a proceeding on a claim for compensation against the state, the state is a party, and the attorney general is entitled to appear on behalf of the state so that an order entered by the industrial commission awarding compensation on the application of a state employe, without any notice of the proceeding to, or appearance by, the attorney general, was void ab initio, and therefore could be vacated by the commission on its own motion more than 20 days after entry thereof. *Johnson v. Industrial Comm.* 222 W 19, 267 NW 286.

See note to 69.23, citing *Milwaukee E. R. & L. Co. v. Industrial Comm.* 222 W 111, 267 NW 62.

The industrial commission has authority to consider the report of an independent medical examiner which was broader than the extent of disability especially in view of 102.17 (1) (b), authorizing the commission to direct an employe claiming compensation to be examined by a regular physician and the results reported to the commission. The essential requirement of the statutes, which was not claimed to have been violated in this case, is that such ex parte testimony shall be reduced to writing and that either party shall have the right to rebut the same on final hearing. *General A. F. & L. Assur. Corp. v. Industrial Comm.* 223 W 635, 271 NW 385.

An award was improperly made to an employe who made his claim before the industrial commission against the highway committee of a county where neither the county nor

the state, either of which might or might not have been the employer was a party to the proceeding. The court should have remanded the matter to the commission for further proceedings. *Marinette County Highway Committee v. Industrial Comm.* 227 W 560, 278 NW 863.

The industrial commission is not a court and is not required to conduct its proceedings according to the course of courts. Where the insurer appeared by counsel before the commission at the time set for the hearing in a compensation proceeding, the insurer thereby became a party to the proceeding and was bound by the determination. *Maryland Cas. Co. v. Industrial Comm.* 230 W 363, 284 NW 36.

See note to 885.16, citing *J. Romberger Co. v. Industrial Comm.* 234 W 226, 290 NW 639.

The proceeding instituted pursuant to 102.17 (1) (a) by filing an application with the industrial commission, which is then required to mail a copy to all parties in interest, is the only proceeding authorized by the workmen's compensation act regarding compensation and benefits, and the act contemplates that by this procedure all parties in interest are to be brought before the commission and their rights under the act determined. *Bellrichard v. Industrial Comm.* 248 W 231, 21 NW (2d) 395.

See note to 885.12, citing *State ex rel. St. Mary's Hospital v. Industrial Comm.* 250 W 516, 27 NW (2d) 478.

See note to 102.19, citing *Waunakee Canning Corp. v. Industrial Comm.* 268 W 518, 68 NW (2d) 25.

Where the employer acquiesced in the receipt before the commission of a written report of the employe's physician, admitted in evidence under 102.17 (1) (as), and agreed that such report was a part of the record, the employer thereby waived any right to object later to the commission's consideration of such report. *Zweig v. Industrial Comm.* 269 W 324, 70 NW (2d) 440.

A physician's unverified written report relating to disability, addressed to the employer's compensation insurer and submitted to the industrial commission at the commission's request but objected to as evidence by the employer, did not constitute competent evidence in the case. *California Packing Co. v. Industrial Comm.* 270 W 72, 70 NW (2d) 200.

Where the industrial commission asked a physician for an opinion under 102.17 (1) (c), and the parties proceeded without objection to cross-examine the physician, a party cannot object on appeal that the opinion should not have been asked for because no dispute or doubt existed to justify asking for the opinion. *State v. Industrial Comm.* 272 W 409, 76 NW (2d) 362.

The mere fact that the attorney who appeared for the employer and the employer's insurance carrier at the hearing in a workmen's compensation case was then the acting governor, did not establish that the commission's order, affirming the examiner's findings and order, and dismissing the claimant's application for workmen's compensation, was procured by fraud of the commission so as to require that the order be set aside under 102.23(1)(b). *Boles v. Industrial Comm.* 5 W (2d) 382, 92 NW (2d) 873.

Where the medical report was based on claimant's statement to the doctor and there was a material variance between the statement and his testimony, the commission could disregard the report. *Davis v. Industrial Comm.* 22 W (2d) 674, 126 NW (2d) 611.

See note to sec. 1, art. I, on limitations imposed by the Fourteenth Amendment, citing *Borum v. American Motors Corp.* 301 F Supp. 255.

Practice before the industrial commission. *Levitan*, 1950 WLR 252.

### 2. Check on Payment.

102.17 (2), authorizing the industrial commission to order hearings on its own motion if it has reason to believe that compensation has not been paid, is valid. *Valentine v. Industrial Comm.* 246 W 297, 16 NW (2d) 804.

### 3. Six-Year Statute of Limitations.

An employe was twice injured, the second injury being more than 6 years after the first one. Following the second injury a cataract was discovered which has resulted from the first injury. As regards the statute of limitations the injury in this case arose at the time the employe became entitled to compensation for the disability caused by the cataract. *Acme B. Works v. Industrial Comm.* 204 W 493, 234 NW 756, 236 NW 378.

Where an employe had been awarded compensation by an industrial commission in 1925 on stipulated facts, but made no request for a hearing before the commission on an issue of increased compensation by way of penalty until more than 6 years after injury and more than 6 years after payment of primary compensation and filing with the commission of receipt or release acknowledging payment of increased compensation and the employer, in consideration of filing of such receipt, had carried out its agreement to retain such employe at his former wage as long as its plant continued in operation, the employe was barred from recovering increased compensation. *Putnam v. Industrial Comm.* 219 W 217, 262 NW 594.

The bar of the 2-year statute attaches unless an application be filed with the commission within 2 years or the person against whom liability is claimed has been made a party within that time pursuant to the provisions of 102.17 (1) (a). *Sentinel News Co. v. Industrial Comm.* 224 W 355, 271 NW 413, 273 NW 819.

Under 102.01 (2), Stats. 1933, the "date of injury" of an employe, whose death allegedly resulted from disease contracted in his last employment, was his last day of work, so that, had he survived, his claim would have been barred by the 6-year limitation in 102.17 (4), Stats. 1933, and hence, by operation of 102.46, Stats. 1933, under which his widow acquired no greater rights than he would have had, had he survived, the widow's claim for death benefits was likewise barred, no claim having been filed either by the employe or his legal representative during the 6-year-limitation period. *Weissgerber v. Industrial Comm.* 242 W 181, 7 NW (2d) 415.

An employe's claim for compensation for an impairment of vision involved in an eye injury for which he last received compensation for

temporary disability in May 1937 was barred by 102.01 (2), 102.17 (4), where the claimant did not proceed within the time limited thereby, even though a fraud may have been committed on him by physicians and he did not discover the facts thereof until after the time thus limited had expired, since 330.19 (7) does not apply to proceedings under the workmen's compensation act. *Fossman v. Industrial Comm.* 257 W 540, 44 NW (2d) 266.

Under 330.19, as well as the special 6-year provision in 102.17 (4), the limitation is on the time in which the proceedings can be commenced, and once proceedings are commenced such limitation has no further application. The filing of an injured employe's application for workmen's compensation in 1928 constituted a commencement of proceedings so that such proceedings were commenced within the 6-limitation period, and hence (there having been no final disposition which would operate as a bar) the 6-year limitation did not apply as a bar to a further claim made in 1949 based on the same injury. (Statements in *Putnam v. Industrial Comm.* 219 W 217, inferring that the 6-year limitation was applicable despite the commencement of proceedings within the 6-year period, are deemed obiter dicta.) *Metropolitan Cas. Ins. Co. v. Industrial Comm.* 260 W 298, 50 NW (2d) 399.

Further proceedings in relation to an award of October 7, 1949, of 50% dependency to a minor child of a deceased employe, based on a stipulation in which the word "compromise" did not appear, were not subject to the one-year limitation in 102.16 (1), or to the 20-day limitation in 102.18 (3), but were subject to the 6-year limitation in 102.17 (4); and in such case the industrial commission, acting within such 6-year period, had jurisdiction, on its own motion, to order and hold a hearing and enter an award for additional compensation. *C. F. Trantow Co. v. Industrial Comm.* 262 W 586, 55 NW (2d) 884.

See note to 102.16, citing *Speelmon Elevated Tank Serv. v. Industrial Comm.* 2 W (2d) 181, 85 NW (2d) 834.

The 6-year statute is a bar even though the original order denying compensation was entered because of fraud on the part of the employer. *Borello v. Industrial Comm.* 26 W (2d) 62, 131 NW (2d) 847.

**102.18 History:** 1911 c. 50; Stats. 1911 s. 2394—17; 1913 c. 599; 1917 c. 624; 1923 c. 291 s. 3; Stats. 1923 s. 102.18; 1927 c. 517 s. 2; 1931 c. 403 s. 19; 1931 c. 414; 1931 c. 469 s. 6, 8; 1933 c. 159 s. 22; 1933 c. 402 s. 2; 1935 c. 465; 1937 c. 180; 1939 c. 513 s. 30; 1951 c. 382 s. 7, 8; 1953 c. 631; 1959 c. 660; 1969 c. 276 ss. 391, 584 (1) (a); 1969 c. 341.

**Committee Note, 1969:** [As to (1) (a)] This authorizes dismissal of applications without requiring the expense and inconvenience of a formal hearing. [As to (1) (b)] This is procedural to avoid confusion. The department may but is not required to make findings of evidentiary facts. Findings necessary to support the ultimate facts may be implied from the credible evidence or reasonable inferences therefrom. (Bill 344-S)

1. Findings, orders and awards.
2. Review by department.

3. Modification.
4. New award.

1. *Findings, Orders and Awards.*

Where the facts pleaded before the industrial commission constitute no defense the commission need make no findings with reference thereto. *Miller S. I. Co. v. Boucher*, 173 W 257, 180 NW 826.

The industrial commission is not bound to accept the opinions of experts as to the cause of an employe's disability which are contrary to its own expert knowledge upon the subject. Where the conclusion of the commission relates to a subject of special and expert knowledge, courts should reverse the findings of the commission with great reluctance. *McCarthy v. Sawyer-Goodman Co.* 194 W 198, 215 NW 824.

Where there is a difference of opinion between experts as to the cause of illness of an employe, the finding of the industrial commission is conclusive unless clearly against all the credible testimony, or so inherently unreasonable in itself as not to be entitled to any weight. *A. D. Thomson & Co. v. Industrial Comm.* 194 W 600, 217 NW 327.

The industrial commission is required to make findings of fact only where the testimony is conflicting. If it believes the facts in a case are undisputed, it should indicate that conclusion by its finding. The character of a decision is not affected by being designated as a finding of fact. A finding cannot be supported by taking bits of testimony out of context and considering them alone apart from other undisputed circumstances in the case. A statement of a witness that he was hired or employed, or that he was or was not under the workmen's compensation act, is simply a conclusion, and as such is not evidence in workmen's compensation proceedings. *Tesch v. Industrial Comm.* 200 W 616, 229 NW 194.

The industrial commission has power, pending the final determination of the controversy before it, after any hearing to make interlocutory findings, orders, and awards, and to enforce them in the same manner as a final award. *Knobbe v. Industrial Comm.* 208 W 185, 242 NW 501.

The amount of income that will deprive an applicant of the status of total dependency must be decided in every case upon the facts of the case. *McKesson-Fuller-Morrisson Co. v. Industrial Comm.* 212 W 507, 250 NW 396. See also *Neumann v. Industrial Comm.* 257 W 120, 42 NW (2d) 445.

A temporary award of the industrial commission was not *res judicata* as to the basis of computing an employe's compensation and did not preclude the commission from computing the amount of the award for permanent disability on the basis of earnings less than that used in computing the compensation for temporary disability. *Hinrichs v. Industrial Comm.* 225 W 195, 273 NW 545.

Interlocutory orders of the industrial commission are not *res judicata*. *Maryland Cas. Co. v. Industrial Comm.* 230 W 363, 284 NW 36.

Inferences made by the industrial commission from undisputed facts are as binding and conclusive as findings made on disputed facts. *Scandrett v. Industrial Comm.* 235 W 1, 291 NW 845.

An employe filed a claim both for hip and for back injuries, and a hearing was held thereon. The commission's finding that the claimant had sustained a permanent partial disability of the right leg at the hip was a determination that the claimant had suffered an injury only to his hip and had suffered no disability to any other portion of his body; it was not necessary that the commission make a specific finding as to the claimed back injury, there being ample testimony to support the implied finding that the claimant had suffered no compensable disability to his back. *Christnovich v. Industrial Comm.* 257 W 235, 43 NW (2d) 21.

Findings of the industrial commission that an employe's injury did not occur by reason of the employer's failure to comply with any safety order of the commission or with the requirements of the safe-place statute, together with a memorandum stating the facts of the accident and dealing with the specific orders which the injured employe deemed applicable, constituted adequate compliance with the requirements as to the findings to be made by the commission. *Hipke v. Industrial Comm.* 261 W 226, 52 NW (2d) 401.

A claimant for death benefits under the workmen's compensation act had the burden of proving the existence of facts essential to compensation, and if, in the mind of the industrial commission, the claimant failed to do so, it was the commission's duty to deny the application. *Rick v. Industrial Comm.* 266 W 460, 63 NW (2d) 712.

The industrial commission, making a determination of 64% permanent disability and awarding compensation on such basis, could not treat its order as an interlocutory order, find that it was uncertain whether the claimant might sustain renewed temporary disability or further permanent disability or whether she might require further treatment, and reserve jurisdiction to award further benefits in the event of further disability or need for further treatment, the claimant having rejected further surgery and having accepted the existing permanent disability, and there being no competent evidence to support such finding as to future disability or treatment. *California Packing Co. v. Industrial Comm.* 270 W 72, 70 NW (2d) 200.

Where the evidence shows that an employe has a 25% permanent partial disability from silicosis, but may sustain greater disability or medical expense in the future, the industrial commission can make an award and retain jurisdiction to make further awards. *Maynard Electric Steel C. Co. v. Industrial Comm.* 273 W 38, 76 NW (2d) 604.

The industrial commission may not base its finding in a workmen's compensation case merely on something in its past experience rather than any evidence in the record, its experience not being in the record and not being a substitute for evidence. *Wagner v. Industrial Comm.* 273 W 553, 79 NW (2d) 264, 80 NW (2d) 456.

A compensation award fixes the rights of the parties, and a statute which purports to enlarge rights retroactively is invalid to that extent, but this rule does not apply in the case of employes of a municipal corporation.

Douglas County v. Industrial Comm. 275 W 309, 81 NW (2d) 807.

The industrial commission may base its findings on a preponderance of probabilities or of inferences that may be drawn from established facts, but not on mere possibilities. If the evidence before the commission is such as to raise in the minds of the commission a legitimate doubt as to the existence of facts essential to compensation, it is the duty of the commission to deny compensation on the ground that the applicant did not sustain the burden of proving to the satisfaction of the commission that the facts were as he claims them to be. Johnson v. Industrial Comm. 3 W (2d) 173, 87 NW (2d) 822.

The industrial commission has power to enter an order determining the percentage of permanent partial disability of an employe and at the same time to reserve jurisdiction to enter a further order in the event the disability should increase in the future, in a case in which evidence is presented that the employe's disability is likely to increase in the future. Thomas v. Industrial Comm. 4 W (2d) 477, 90 NW (2d) 393.

The claimant had the burden of convincing the industrial commission, and its finding against him is not to be disturbed when the evidence warrants a legitimate and substantial doubt that the facts essential to workmen's compensation existed. Soper v. Industrial Comm. 5 W (2d) 570, 93 NW (2d) 329.

Where there was a question as to causal connection between a chest injury and a coronary condition and paralysis, and the testimony of medical experts disagreed and the testimony of each expert was based on a consideration of all the same factors, and was neither incredible nor inherently unreasonable, it was at least sufficient to raise a legitimate doubt in the minds of the commission as to the existence of facts essential to compensation, so that the commission properly performed its duty in denying compensation, the claimant having been previously awarded compensation for the chest injury. Tuohy v. Industrial Comm. 5 W (2d) 576, 93 NW (2d) 344.

Claims for mental injury should be examined with caution and carefulness, because of the danger inherent of malingering. Compensation for traumatic neurosis may be awarded after all physical symptoms have disappeared. The healing period applicable to a mental injury is not necessarily determined by what would be the healing period for a physical injury if unconnected or not related to such mental harm, but the healing period applied to mental harm would be the period prior to the time when the mental condition becomes stationary, and would require a postponement of fixing permanent disability, if any, to the time when it becomes apparent that the mental condition, to a medical certainty, will become no better or worse. Johnson v. Industrial Comm. 5 W (2d) 584, 93 NW (2d) 439.

Specific findings should be made by the examiner, or by the industrial commission, on each controverted issue. Molinaro v. Industrial Comm. 7 W (2d) 252, 96 NW (2d) 328.

Whether the employe in the instant case suffered an accidental injury, and whether such accident arose out of the employment, pre-

sented ultimate questions of fact, so that the findings thereon were true findings of fact which met the requirements of 102.18 (1). Mrs. Drenk's Foods v. Industrial Comm. 8 W (2d) 192, 99 NW (2d) 172.

When the industrial commission, on sufficient evidence, made a definite finding of no permanent disability, the commission was prohibited thereby from entering an interlocutory order with respect to such issue. Mrs. Drenk's Foods v. Industrial Comm. 8 W (2d) 192, 99 NW (2d) 172.

A finding by the industrial commission, that at the time of his injury a loaned employe was the employe of the special employer, is a finding of an ultimate fact which satisfies the requirements of 102.18 (1), even though the question of whether an employe-employer relationship exists presents a question of law. Where the facts are undisputed and but one reasonable inference can be drawn therefrom, such ultimate finding of fact constitutes but a conclusion of law which is not binding on a reviewing court. Springfield L., F. & F. Co. v. Industrial Comm. 10 W (2d) 405, 102 NW (2d) 754.

Where different hearing examiners hear parts of the testimony in a workmen's compensation proceeding, and all join in the initial findings, the commission has the benefit of the findings, conclusions, and impressions of each hearing examiner who heard any part of the testimony, so that there is no denial of due process in such case. Wright v. Industrial Comm. 10 W (2d) 653, 103 NW (2d) 531.

Those who exercise the quasi-judicial powers intrusted to administrative agencies ordinarily should not be harassed by judicial inquiry directed toward ascertaining how they performed their adjudicative function in a particular case, and the presumption of regularity that attaches to the decisions of administrative agencies should protect against such harassment based on mere suspicion but, on a proper showing of illegal procedure, the reviewing circuit court possesses the power to subpoena industrial commission personnel in a workmen's compensation review proceeding. Wright v. Industrial Comm. 10 W (2d) 653, 103 NW (2d) 531.

The industrial commission's finding that "the silicosis from which the applicant suffers is nondisabling" was a sufficient finding of "ultimate facts" to meet the requirements of 102.18 (1), the commission not being required by the statute to make findings of evidentiary facts. Glodowski v. Industrial Comm. 11 W (2d) 525, 105 NW (2d) 833.

Where the essential finding on which an order of the industrial commission dismissing an application for workmen's compensation rested was that the applicant sustained no permanent disability as a result of his injury, a further finding that his present complaints and alleged disability were due to causes wholly unrelated to his accident or employment was mere surplusage, not requiring that the order of the commission be set aside even if such further finding was based on mere speculation. Franckowiak v. Industrial Comm. 12 W (2d) 85, 106 NW (2d) 51.

The questions of law decided by the supreme court on the first appeal became the law of the case on remand, but the same rule



does not apply to findings of fact made or implied when they are set aside as being erroneous as a matter of law. What was decided on a first appeal as a question of law may be binding on a new trial, but the decision may become inapplicable if the facts change and the question does not arise. *Johnson v. Industrial Comm.* 14 W (2d) 211, 109 NW (2d) 666.

While it is the duty of the industrial commission to deny compensation where the evidence is sufficient in its mind to raise a legitimate doubt, the rule does not permit the commission to exercise its judgment arbitrarily and capriciously; hence there must be in the testimony some inherent inconsistency before the commission is warranted in entertaining a legitimate doubt, and it cannot rely solely upon its cultivated intuition. *Reich v. Dept. of I., L. & H. R.* 40 W (2d) 244, 161 NW (2d) 878.

## 2. Review by Department.

Where a petition to review the findings or order of an examiner is duly filed with the commission and proceedings are duly had thereon, the provisions of 102.18 (3) govern, so that the commission's setting aside of the examiner's findings or order restores the status so as to leave the matter completely open before the commission as though it had never been brought before the examiner, and the commission may then make its findings and order or award without being subject to the time limitation contained in 102.18 (4). *General A. F. & L. Assur. Corp. v. Industrial Comm.* 223 W 635, 271 NW 385.

Where the industrial commission set aside an examiner's award and required the employer to answer a petition filed by the claimant, the whole matter was open for the commission's consideration, and no order requiring the taking of additional testimony was necessary. *Tiffany v. Industrial Comm.* 225 W 187, 273 NW 519.

The review of an examiner's findings by the industrial commission without weighing the evidence is in excess of the commission's powers and is a denial of due process and can be set aside on judicial review of the commission's award. *State ex rel. Madison Airport Co. v. Wrabetz*, 231 W 147, 285 NW 504; *Kaegi v. Industrial Comm.* 232 W 16, 285 NW 845.

The rule that a decision of a lower court stands on appeal when the appellate court is equally divided is inapplicable to the findings and order of an examiner on a review thereof by the industrial commission as a body under 102.18 (3). *State v. Industrial Comm.* 233 W 461, 289 NW 769.

"The commission in reviewing findings and order of an examiner does not act as an appellate body but under its powers in an original proceeding. The commission is to make its own determination." *State v. Industrial Comm.* 233 W 461, 465, 289 NW 769, 771.

The commissioners' resort to and their reliance on a sufficient memorandum of the evidence, prepared by a competent and impartial official member of the commission's staff, is permissible and proper within 102.18 (3) and a determination made by the commission after such use does not constitute a denial of

due process of law. *Berg v. Industrial Comm.* 236 W 172, 294 NW 506.

Where the examiner's notes, containing a sufficient record, are before the industrial commission on its review of the findings and award of an examiner, the commission's review of the examiner's notes constitutes a "review of the evidence," as required by 102.18 (3). *Beem v. Industrial Comm.* 244 W 334, 12 NW (2d) 42.

After an award of workmen's compensation for permanent partial disability based on a stipulation rather than a compromise, the claimant was entitled under 102.16 (1), to make application for additional compensation at any time within 6 years; but her subsequent application to the commission to make a further award based on her method of calculation was such an application, and an examiner's order determining that the original order awarded proper compensation was in effect an order denying such further application, and became final after 20 days where the claimant failed to file within that time a petition for commission review, so that thereafter the commission had no jurisdiction to make an adoptive order and the claimant had no right to a judicial review. *Boehmke v. Industrial Comm.* 253 W 610, 34 NW (2d) 774.

The taking of additional testimony on a review of an examiner's findings and order by the industrial commission is a matter for the sole discretion of the commission. *Christnovich v. Industrial Comm.* 257 W 235, 43 NW (2d) 21.

See note to 102.17, on 6-year statute of limitations, citing *C. F. Trantow Co. v. Industrial Comm.* 262 W 586, 55 NW (2d) 884.

In reviewing the findings of an examiner pursuant to 102.18 (1) and (3), the industrial commission may base its award on a typewritten synopsis of the testimony prepared by the examiner before whom the testimony has been given where the shorthand notes of the reporter are not transcribed and filed until after the entering of the award. Where the examiners' synopses on which the commission relied in making its findings and order are attacked on the ground that certain specific testimony was not summarized, the court should not vacate the award and remand for further proceedings, unless it is convinced that the omission was so prejudicial that it is likely the commission would have reached the opposite conclusion from that which it did if the synopses had set forth an adequate summary of the omitted testimony. *State v. Industrial Comm.* 272 W 409, 76 NW (2d) 362.

In the absence of a claim that typewritten synopses prepared by an examiner were not a fair and full statement of the essential testimony, a review by the industrial commission, based on the synopses rather than on a transcript of the testimony, is a sufficient compliance with 102.18 (3). Where the examiner's typewritten synopses, on which the commission based its order, made erroneous statements of material testimony and conveyed erroneous impressions of the testimony, the claimant employee is deemed not to have had the benefit of the review by the commission which 102.18 (3) requires, and hence the matter should go back to the commission for proper review and such further proceedings



as may then follow. *Matayo v. Industrial Comm.* 5 W (2d) 401, 92 NW (2d) 743.

Where an examiner who heard part of the testimony dies before reporting on the case, his notes as to testimony are not a substitute for his conclusions as to the weight and sufficiency of the evidence. The due process issue need not be raised before the commission, but must be raised in circuit court. *Shawley v. Industrial Comm.* 16 W (2d) 535, 114 NW (2d) 872.

The examiner's synopsis of the testimony must fully and adequately reflect the testimony, and if it does not, the commission's reversal of his findings on the question of applicant's credibility will be remanded for a consideration of the transcript. *Falke v. Industrial Comm.* 17 W (2d) 289, 116 NW (2d) 125.

A petition for review mailed before the 20 days expire but not received by the commission until the 21st day is not timely. *Chevrolet Division, G.M.C. v. Industrial Comm.* 31 W (2d) 481, 143 NW (2d) 532.

Where an examiner hears conflicting testimony and makes findings based upon the credibility of the witnesses, and the commission thereafter reverses its examiner and makes contrary findings, the demands of due process require that the record affirmatively show that the commission had the benefit of the examiner's personal impressions of the material witnesses which may take the form of either adequate notes of the examiner or personal consultation with him. *Braun v. Industrial Comm.* 36 W (2d) 48, 153 NW (2d) 81. See also *Briggs & Stratton Corp. v. Dept. of I., L. & H.R.* 43 W (2d) 398, 168 NW (2d) 817.

A review in a workmen's compensation case by the industrial commission on the basis of an examiner's synopsis constitutes a permissible and proper review of the evidence under 102.18 (3), which requires that the commission's action be based on a review of the evidence submitted; however, this process presupposes that the examiner's synopsis is an adequate and fair summary of the material testimony so that the commissioners are able to get an accurate impression of the testimony elicited. *Vasquez v. Dept. of I., L. & H.R.* 39 W (2d) 10, 158 NW (2d) 331.

The authority of the department to set aside findings and orders of its examiners in workmen's compensation cases is not absolute, exercisable for any reason or for no reason; its fact-finding process and each step therein are subject to the dictates of due process and judicial review. *Burton v. Dept. of I., L. & H.R.* 43 W (2d) 218, 168 NW (2d) 196, 170 NW (2d) 695.

### 3. Modification.

An award for the loss of fingers when all parties were ignorant of the further loss of bones of the hand was a "mistake" which might be corrected after the discovery thereof by a modification of the award, even though an action to review the award was already pending. Such modification might be effected by vacating the old and entering a new award, or by entering an order of modification, allowing the original award to stand as modified; and if the modification required a further hearing brought on upon 10 days' notice, it was in time if the proceedings were com-

menced within the 20 days next following the making of the original award. *Jordan v. Weinman*, 167 W 474, 167 NW 810.

There is no basis for the exercise of the power to set aside an award unless there was in fact a "mistake" or there is in fact "newly discovered evidence," within the well defined and well understood meanings of those terms in the law. *Seaman B. Corp. v. Industrial Comm.* 214 W 279, 252 NW 718.

Power to set aside, modify or change awards in compensation cases for any mistake therein may not be arbitrarily exercised, and its exercise depends upon discovering what is in fact a mistake. The statute does not authorize the industrial commission, after giving a claimant a full hearing and properly denying compensation, to set aside its order as for mistake, where no mistake is specified and none appears in the record, and thereupon to grant a new hearing and award compensation upon claimant's changed testimony as to a material controlling matter. *Edward E. Gillen Co. v. Industrial Comm.* 219 W 337, 263 NW 167.

102.18 (4) did not give the industrial commission jurisdiction to enter an order on April 9th setting aside an award on the grounds of mistake and newly discovered evidence, where an examiner had made an award to an employe on February 19th and entered an amended order on March 4th, since the commission's power under 102.18 (4) exists only for 20 days after the date of the examiner's award or order, and not 20 days after the examiner's award or order has in legal contemplation become that of the commission under 102.18 (3). *Wacho Mfg. Co. v. Industrial Comm.* 223 W 312, 270 NW 63.

An award based on a stipulation of settlement in which the word "compromise" does not appear has the same status as an award based on a full hearing, so that the industrial commission, on the application of the employer and his insurance carrier, is without jurisdiction to set aside such order more than 20 days after the effective date of such order, in the absence of proceedings for review taken within the 20 days. *Wacker v. Industrial Comm.* 248 W 315, 21 NW (2d) 715.

The industrial commission lacks jurisdiction to issue effective orders in workmen's compensation cases after it has rendered final findings and orders therein, and when the statutory period for review has expired. Jurisdiction cannot be conferred on the commission by consent. *Sheehan v. Industrial Comm.* 272 W 595, 76 NW (2d) 343.

It is implicit that a party may move to set aside an order or award on the ground of newly discovered evidence, at any time within 20 days from the date of such order or award. *Moore v. Industrial Comm.* 4 W (2d) 208, 89 NW (2d) 788.

Where the industrial commission in 1948 issued a final order, and in 1952 suggested that the compensation carrier make further payment because the injury appeared more serious than was found, and the carrier did so, the commission could not grant further compensation at a later date. Jurisdiction cannot be revived by waiver. *Kizewski v. Industrial Comm.* 11 W (2d) 274, 105 NW (2d) 326.

#### 4. New Award.

When the industrial commission in a workmen's compensation proceeding makes findings and a final award for injuries resulting from an accident, it is not passing on merely the employee's right to compensation for certain claimed or then known injuries, but it is passing on all compensation payable for all injuries caused by that accident, except in the case of occupational disease. State ex rel. Watter v. Industrial Comm. 233 W 48, 287 NW 692.

**102.19 History:** 1917 c. 624; Stats. 1917 s. 2394—17m; 1923 c. 291 s. 3; Stats. 1923 s. 102.19; 1931 c. 403 s. 20.

The term "alien" is used generally and as including alien enemies. While the title of an alien enemy is recognized, possession of the compensation is retained, in order that it may be subject to government control and disposition. Milwaukee W. F. Co. v. Industrial Comm. 179 W 223, 190 NW 439.

When the consular officer filed an application with the industrial commission for death benefits on behalf of a purported widow within the required 2 years after the fatal injury, he thereby represented the interest of all dependents of the deceased, whether or not they were named in the application and regardless of whether their respective interests were conflicting, and the commission thereby acquired jurisdiction to award death benefits to the deceased's minor child notwithstanding the absence of any separate application for the child and notwithstanding that the application alleged that no child survived the deceased. Waunakee Canning Corp. v. Industrial Comm. 268 W 518, 68 NW (2d) 25.

See note to 102.12, on actual notice to employer, citing 14 Atty. Gen. 212.

**102.195 History:** 1943 c. 270; Stats. 1943 102.195; 1963 c. 281; 1969 c. 276 s. 584 (1) (a).

**102.20 History:** 1911 c. 50; Stats. 1911 s. 2394—18; 1913 c. 599; 1917 c. 624; 1923 c. 291 s. 3; Stats. 1923 s. 102.20; 1931 c. 403 s. 21.

The circuit court is authorized to take testimony as to existing defaults in payments due under an award of the industrial commission, and to enter judgment in accordance with the award, as disclosed by the certified copy presented and the testimony taken; and such judgment may be entered after expiration of the time permitted for a review of the action of the commission. The employee's application to the commission to modify an interlocutory award did not bar a judgment thereon. Rosandich v. Chicago, N. S. & M. R. R. 185 W 184, 201 NW 391.

Where the insured employer paid the award of workmen's compensation and did not take an appeal therefrom, this was a sufficient compliance with the terms of the policy to entitle the employer to recover thereon as on a "judgment" against him, although he did not have the award entered up in circuit court as a judgment. Hagenah v. Lumbermen's Mut. Cas. Co. 241 W 226, 5 NW (2d) 760.

**102.21 History:** 1915 c. 582; Stats. 1915 s. 2394—18a; 1917 c. 624; 1919 c. 680 s. 3; 1923 c. 291 s. 3; Stats. 1923 s. 102.21; 1931 c. 403 s. 22; 1955 c. 283; 1969 c. 276 s. 584 (1) (a).

**Revisor's Note, 1931:** Municipality includes county, town and school district by definition. See new 102.01. [Bill 380-S, s. 22]

**102.22 History:** 1917 c. 624; Stats. 1917 s. 2394—18m; 1921 c. 451 s. 1; 1923 c. 291 s. 3; Stats. 1923 s. 102.22; 1931 c. 403 s. 23; 1957 c. 204; 1969 c. 276 s. 584 (1) (a); 1969 c. 341.

**102.23 History:** 1911 c. 50; Stats. 1911 s. 2394—19; 1913 c. 599; 1913 c. 773 s. 84; 1915 c. 604 s. 37; 1917 c. 624; 1921 c. 451 s. 3; 1921 c. 551 s. 2; 1923 c. 291 s. 3; 1923 c. 437 s. 2; 1923 c. 449 s. 56; Stats. 1923 s. 102.23; 1929 c. 453 s. 3, 4; 1931 c. 403 s. 24; 1933 c. 402 s. 2; 1939 c. 261; 1949 c. 107; Sup. Ct. Order 275 W v; 1963 c. 429; 1969 c. 276 ss. 392, 584 (1) (a); 1969 c. 341.

**Committee Note, 1969:** This is procedural. It is impossible to have transcript prepared in time to be filed with answer. [Bill 344-S]

1. Adverse party.
2. Fraud.
3. Findings of fact.
4. Review procedure.

#### 1. Adverse Party.

The court obtains no jurisdiction to review an award of the industrial commission unless an action for that purpose is commenced within 20 days after the date of the award, in which the adverse party, namely, the person in whose favor the award was made, is made a defendant. And where such an award for the death of an alien enemy was made payable to the alien property custodian, a nonresident infant dependent of the deceased employee was not the "adverse party." The alien property custodian has title to the award and is the "adverse party" while the infant dependent is a proper but not a necessary party. Milwaukee-Western F. Co. v. Industrial Comm. 172 W 561, 179 NW 763. See also Youghiogheny & Ohio C. Co. v. Lasevich, 171 W 347, 176 NW 855.

An insurance carrier, which has appeared in the proceedings, is an adverse party in an action to set aside an order dismissing the employee's application. Archer v. Industrial Comm. 185 W 587, 201 NW 768.

An employer attempting to subject an insurer to liability for a compensation award was an "adverse party," joinable as a defendant in an insurer's action to vacate an award. Threshermen's Nat. Ins. Co. v. Industrial Comm. 201 W 303, 230 NW 67.

The court cannot amend the findings or order or substitute its judgment for that of the commission, but the court's power is limited to confirming or setting aside the order or award, and judgment, if any. Columbia Cas. Co. v. Industrial Comm. 254 W 310, 35 NW (2d) 904.

The only jurisdiction which the circuit court has to review orders and awards made in workmen's compensation proceedings is conferred by 102.23, Stats. 1965, which in pertinent part provides that action for review be filed within 30 days, and in any such action the adverse party shall be made a defendant. When the department is an adverse party it has the right as the real party in interest to move for dismissal of the action if the circuit court lacks jurisdiction. Holley v. Dept. of I. L. & H. R. 39 W (2d) 260, 158 NW (2d) 910.

### 2. *Fraud.*

The fraud for which an award may be set aside does not include perjury or the concealment of material facts upon the hearing. *Pellett v. Industrial Comm.* 162 W 596, 156 NW 956; *Klug & S. Co. v. Industrial Comm.* 188 W 422, 206 NW 53.

The fraud referred to in 102.23 (1) is the fraud of the industrial commission, not the fraud of the claimant consisting of perjured testimony or the concealment of material facts. *Buehler Bros. v. Industrial Comm.* 220 W 371, 265 NW 227.

The supreme court is without power to reverse a compensation award merely because the conduct during the proceedings before the industrial commission would have warranted reversal of a jury's verdict, since jurisdiction to review an award is limited in this respect to cases of alleged fraud on the part of the commission, and regulation of the conduct of parties and persons in compensation proceedings is committed to the commission. In the absence of a showing of fraud on the part of the commission, a compensation award is not reversible on appeal because the employe had improperly solicited the aid of a state senator who wrote a letter to one of the commissioners urging the expeditious handling of the case and expressing the hope that something worth while could be done. *General A. F. & L. Assur. Corp. v. Industrial Comm.* 223 W 635, 271 NW 385.

The award of death benefits to a deceased employe's widow cannot be set aside on the ground of her fraud in agreeing with the deceased's parents to apply for compensation and pay them half of the amount recovered. *Woman's Home Companion Reading Club v. Industrial Comm.* 231 W 371, 285 NW 745.

The supreme court will not depart from the long-established rule that within the intentment of 102.23 only fraud committed by the industrial commission can be the basis upon which an award of the commission can be set aside, since that rule has become a part of the statute and it is the province of the legislature alone to change it. *Borello v. Industrial Comm.* 26 W (2d) 62, 131 NW (2d) 847.

### 3. *Findings of Fact.*

Findings of fact must have support in the evidence, and in the record. Findings of essential facts, unsupported by evidence, are outside of or in excess of the powers of the commission, and are ground for setting aside its award. *International H. Co. v. Industrial Comm.* 157 W 167, 147 NW 53.

The commission is not held to the same strict rule with respect to the admission of evidence as courts of law; and the admission of incompetent evidence will not operate to reverse the award if there be any basis in the competent evidence to support it. *First Nat. Bank of Milwaukee v. Industrial Comm.* 161 W 526, 154 NW 847.

An award can be set aside upon no ground other than some one of the 3 grounds therein specified. No question of the weight of the evidence can be considered. If there be some credible evidence, which is sufficient to sustain the finding, it must stand. *William Rahr Sons Co. v. Industrial Comm.* 166 W 28, 163 NW 169.

Where the testimony on the question whether one is an employe is undisputed, the finding of the commission is one of law and not conclusive. *Wonewoc v. Industrial Comm.* 178 W 556, 190 NW 469.

102.23 and 102.24 require all findings to be made by the industrial commission. Therefore the supreme court cannot upon appeal supply lacking findings, but must remand to the commission for that purpose. *Frank Martin-Laskin Co. v. Industrial Comm.* 180 W 334, 193 NW 70.

The findings of the industrial commission within its jurisdiction are conclusive, in the absence of fraud; and there is a strong presumption against suicide. In view of these rules, the commission was within its jurisdiction in finding that the death upon which the instant claim is based was accidental and not from suicide. *Menasha W. Co. v. Industrial Comm.* 187 W 21, 203 NW 906.

When the evidence is undisputed but different conclusions may be drawn therefrom, the one reached by the industrial commission is conclusive; but where the problem has 3 elements, viz., undisputed facts, the language of a writing such as a divorce judgment, and the language of the statute, it presents a question of law for the court and the decision of the commission is not conclusive. *Rohan M. Co. v. Industrial Comm.* 188 W 223, 205 NW 930.

Where the proof as to the cause of an employe's disability or death from disease does not pass beyond the stage of possibilities or probabilities because no one can testify positively as to the source from which the germ causing the disease has come, the industrial commission or the court may base its findings on a preponderance of probabilities or of the inferences that may be drawn from established facts. *Pfister & Vogel L. Co. v. Industrial Comm.* 194 W 131, 215 NW 815.

Medical testimony which differs presents a question of fact for the industrial commission, whose determination will not be disturbed. *Nystrom v. Industrial Comm.* 196 W 406, 220 NW 188.

Whether undisputed evidence showing the custom of the president of an employer of taking employes home after work in his car created an implied contract to transport was a question of law, and the conclusion of the commission thereon was not binding upon the court. *Western F. Co. v. Industrial Comm.* 206 W 125, 238 NW 854.

A finding of the industrial commission that at the time of his injury an applicant for compensation was in the employ of a certain corporation and was injured while performing services for such employer, although denominated a finding of fact, was a mere conclusion of law, and, the facts not being in dispute, they may be examined for the purpose of determining whether the commission's conclusion was sound. (*Weyauwega v. Industrial Comm.* 180 W 168, 192 NW 452, and *Tesch v. Industrial Comm.* 200 W 616, 229 NW 194 followed.) *Western W. & I. Bureau v. Industrial Comm.* 212 W 641, 250 NW 834.

Since the conclusion of the commission, upon undisputed facts, that a compensation applicant was performing services growing out of and incidental to his employment at the time

of the accident, is a conclusion of law, the court may review the facts to ascertain whether they support such conclusion of the commission. *Olson Rug Co. v. Industrial Comm.* 215 W 344, 254 NW 519.

A preponderance of mere possibilities, still leaving the solution of the issue in the field of conjecture, is not sufficient to support a finding by the commission as to the cause or origin of a germ disease contracted by an employe. *Loomis v. Industrial Comm.* 216 W 202, 256 NW 693.

As to the quantum of evidence necessary to support findings of the industrial commission, the test in each case is whether there are facts in the evidence which, if unanswered, would justify a person of ordinary reason and fairness in affirming the existence of facts which the claimant is bound to establish. *Hills Dry Goods Co. v. Industrial Comm.* 217 W 76, 258 NW 336.

The supreme court has no power to set aside the industrial commission's award on the ground that the findings were made against the great weight and clear preponderance of evidence, but the findings must have some support in the evidence. *Hills Dry Goods Co. v. Industrial Comm.* 217 W 76, 258 NW 336.

The court is not bound by the industrial commission's conclusions of law but may review the facts to ascertain whether the commission exceeded its authority in making its conclusions of law. Where the question was whether claimant was an employe or an independent contractor, the commission's finding that the claimant was "in the employ of" defendant was a conclusion of law and did not comply with the commission's duty to make findings of fact as to material disputed facts. *Kolman v. Industrial Comm.* 219 W 139, 262 NW 622.

Where the reporter's notes taken at a workmen's compensation hearing before an examiner were lost and were not available for transcription at the time of appeal from the award of the commission, but the award purported to be based upon the entire record, and there was no showing that the notes were not available and actually read to the commission when the matter was under consideration, and evidence returned was sufficient to sustain the findings of the commission, the circuit court erred in setting aside the award and remanding the record for further proceedings. (*International H. Co. v. Industrial Comm.* 157 W 167, distinguished.) *Ducat v. Industrial Comm.* 219 W 231, 262 NW 716.

The industrial commission's holding that where an employer had not notified an employe that he was discharged, and the employe had not notified the employer that he had resigned, the relationship of employer and employe existed up to the time of hearing was a "conclusion of law" which the court could overrule, as distinguished from "conclusion of fact," which the court may not disturb if supported by any credible evidence. *Montreal Mining Co. v. Industrial Comm.* 225 W 1, 272 NW 828.

A finding of an examiner that a logger's action in attempting to stop a motor by grasping an unguarded shaft was out of idle curiosity, was a finding of fact which, when sup-

ported by the evidence, could not be disturbed on appeal. *Peterman v. Industrial Comm.* 228 W 352, 280 NW 379.

Where the facts permit of an inference that an applicant for workmen's compensation was or was not injured while working at his job, a finding of the industrial commission that he was or was not injured while performing service growing out of and incidental to his employment should be construed as a finding of fact, but the mere fact that a finding is denominated a finding of fact by the commission does not make it such or prevent its being found to be a conclusion of law which is reviewable by the court. *Voswinkel v. Industrial Comm.* 229 W 589, 282 NW 62.

Upon appeal from an award of the industrial commission, the question to be determined is whether there is any credible evidence to sustain the findings, and not whether the findings conform to some standard of proof previously set up by the commission. *Prentiss Wabers Prod. Co. v. Industrial Comm.* 230 W 171, 283 NW 357.

On a petition for review of the findings and order of an examiner under 102.18 (3), Stats. 1937, the industrial commission as a body is required to take action and to make a decision, and no effective decision comes into existence until at least 2 of the 3 members of the commission have reached a common conclusion on the matter to be decided, so that where there is a vacancy and the 2 sitting members cannot agree, the petition to review is still before the commission awaiting its action, and so long as this situation continues there can be no final findings and order or decision on which a court review can be had. *State v. Industrial Comm.* 233 W 461, 289 NW 769.

The extent of wage loss caused by an injury sustained by an employe is a question of fact; and the inquiry on appeal from an award of the industrial commission must be directed to the question whether there is credible evidence which supports the finding of the industrial commission. *Milwaukee W. F. Co. v. Industrial Comm.* 245 W 334, 13 NW (2d) 919.

A medical report, which contained a statement merely to the effect that there "might be" a 5 per cent permanent total disability having a causal relation to the accident suffered by the claimant, but which otherwise negated such a disability, did not support a finding of the commission that there was such a disability. *F. A. McDonald Co. v. Industrial Comm.* 250 W 134, 26 NW (2d) 165.

Where the facts are not in dispute but different inferences may be drawn from them, the choice of inference is a question of fact which must be decided before the rule of law is applied. The industrial commission's finding which rests on the inference will be sustained. *Ebner v. Industrial Comm.* 252 W 199, 31 NW (2d) 72.

Whether parents were the "unestranged parents" of the deceased child, so as to be entitled to death benefits, was a question of fact to be determined on substantial evidence by the industrial commission. In reviewing a finding of fact of the commission, the function of the court is to determine whether that finding is supported by credible evidence.

Burt Brothers v. Industrial Comm. 255 W 488, 29 NW (2d) 388.

The evidence as to the claimant's exposure to the inhalation of silica dust in the course of his employment over a great number of years, together with the medical testimony, supported a finding of the industrial commission that as a result of such employment the claimant sustained injury in the nature of silico-tuberculosis. Milwaukee E. R. & T. Co. v. Industrial Comm. 258 W 466, 46 NW (2d) 198.

Where there is a difference of opinion between medical experts as to the cause of an injury or disability, it is for the industrial commission to make a finding as to the matter and, unless such finding is clearly against all of the credible testimony or so inherently unreasonable in itself as not to be entitled to any weight, the conclusion of the commission is final. Hinch v. Industrial Comm. 260 W 47, 49 NW (2d) 714.

The industrial commission's finding that disability was caused by an accident in 1947, together with its award directing the payment of compensation by the 1947 employer, was without support and was in excess of its powers, in view of medical testimony which established such disability as the result of an accumulation of injuries in various jobs for several employers, but which did not state their relative contributions, or even suggest that such disability was all due to the accident of 1947. Merton Lumber Co. v. Industrial Comm. 260 W 109, 50 NW (2d) 42.

The burden of proving the period of temporary total disability is on the injured employe, and the findings of the industrial commission cannot be disturbed if there is any credible evidence to support them. McCune v. Industrial Comm. 260 W 499, 50 NW (2d) 683.

The adjudication of whether an employer-employe relation existed is the ultimate conclusion as to liability and therefore constitutes a conclusion of law even though it may have been labeled a finding of fact by the commission. Gant v. Industrial Comm. 263 W 64, 56 NW (2d) 525.

The proof under which the industrial commission is to act must be based on competent legal evidence, and must amount to more than a mere guess, conjecture or surmise; and a reversal may be required where there is no competent evidence introduced as to a fact which must be established in order to support an essential finding. Findings of the commission in a workmen's compensation case cannot be sustained if they rest on pure hearsay. Since lay witnesses are not competent to give testimony as to whether medical or dental treatment is required to effect a cure or to promote healing, hearsay testimony of a lay witness, that a physician had advised certain treatment as being reasonably required to cure and relieve the effects of the injury, should not be permitted to constitute credible competent evidence to sustain a finding of the commission. Wisconsin T. Co. v. Industrial Comm. 263 W 380, 57 NW (2d) 334.

The industrial commission may not draw an inference not sustainable on the basis of common or general knowledge or on the basis of the record. In workmen's compensation cases the members of the commission are expert

triers of fact, and although deferring to this expertness in situations involving an appraisal of the convincing power of expert testimony, the supreme court cannot abdicate its function of reviewing the record to ascertain whether there is evidence to support the findings of the commission. In giving effect to expert testimony, it is required that evidence, to some degree of reasonable certainty, of a relationship between an injury and a result be shown by a competent opinion. Miller Rasmussen I. & C. Co. v. Industrial Comm. 263 W 538, 57 NW (2d) 736.

On review of a finding of fact made by the commission in a workmen's compensation case, the issue is whether there is any credible evidence which, if unexplained, would support the commission's finding. When facts are not in dispute but permit the drawing of different inferences therefrom, the drawing of one of such permissible inferences by the commission is an act of fact finding, and the inference so derived constitutes a finding of an ultimate fact and not a conclusion of law. Fruit Boat Market v. Industrial Comm. 264 W 304, 58 NW (2d) 689.

Findings of the industrial commission that the presumptions of continuing employment and against suicide were not overcome can be disturbed on appeal only if there is credible evidence which so rebuts these presumptions that they will no longer support the inferences drawn therefrom on which the commission based its findings. A. O. Smith Corp. v. Industrial Comm. 264 W 510, 59 NW (2d) 471.

Where the industrial commission made a sufficient finding against an employe's claim, and the evidence supported such finding, the circuit court, under the limited powers granted to it on review, was without jurisdiction to set aside the commission's order and award and remand the record to the commission for further proceedings. Tadin v. Industrial Comm. 265 W 375, 61 NW (2d) 309.

Whether there has been a failure of the employer to comply with a lawful order of the industrial commission, so as to entitle the employe to increased compensation if such failure caused his injury, presents an issue of fact for the commission, and its findings are conclusive if supported by any credible evidence, as are also its logical inferences from undisputed facts. Van Pool v. Industrial Comm. 267 W 292, 64 NW (2d) 813.

When an injured employe filed his application for compensation with the industrial commission, he presented his entire claim, and where, after hearing, an examiner found temporary total disability and 5 per cent permanent disability, but on review the commission set aside the examiner's findings and found temporary disability only, the commission's finding must be construed as a finding that there was no permanent disability, so that its order directing the payment of compensation for temporary disability, and retaining jurisdiction only to determine the amount of a medical bill, was a final determination of the rights of the parties, rendering the court without jurisdiction to remand the record for further proceedings if the record contained evidence to sustain the finding. Gallenberg v. Industrial Comm. 269 W 40, 68 NW (2d) 550.

An examiner's conclusion that an employe was not performing service for his employer at the time of injury was not a permissible inference drawn from the undisputed facts, but was a conclusion of law properly subject to review by the courts. *Fels v. Industrial Comm.* 269 W 294, 69 NW (2d) 225.

The extent of disability, temporary and permanent, is a question of fact. In view of the provision of 102.23 (1), that the industrial commission's findings of fact are conclusive, such findings must be sustained if there is any credible evidence to support them. *Keller v. Industrial Comm.* 271 W 225, 72 NW (2d) 740.

Under the limited powers of review granted by 102.23 (1), the court possesses no power to lay down a rule that any particular period of exposure to silica dust must be held as a matter of law to have furthered the progress of a pre-existing silicosis to some appreciable extent. *Maynard Electric Steel C. Co. v. Industrial Comm.* 273 W 38, 76 NW (2d) 604.

The test of whether there is evidence which will support a finding of the industrial commission in a workmen's compensation case is whether there is any credible evidence which, if unexplained, would support the finding; and isolated testimony tending to support such a finding, which is completely explained away by other testimony, does not meet such test. *Wagner v. Industrial Comm.* 273 W 553, 79 NW (2d) 264, 80 NW (2d) 456.

Whether the testimony of a medical witness was so impeached by his own conduct and records as to make his testimony not reliable, and whether the evidence indicated prejudice on the part of such witness toward the claimant, were considerations for the commission. *Melli v. Industrial Comm.* 274 W 76, 79 NW (2d) 225.

A finding of fact by the industrial commission cannot be based on mere conjecture. The extent of disability, temporary and permanent, is a question of fact, and the commission's finding thereon, if supported by any evidence, is conclusive. *Shymanski v. Industrial Comm.* 274 W 307, 79 NW (2d) 640.

If when a rule of law is applied to undisputed facts, a final conclusion results, the question presented is one of law, but if something more than the application of a rule of law is required in order to reach a final conclusion, a question of fact is presented. *Rehse v. Industrial Comm.* 1 W (2d) 621, 85 NW (2d) 378.

In reviewing findings of the industrial commission, the circuit court should not weigh the evidence and pass on the credibility of witnesses and thereby invade the province of the commission. It is the function of the commission and the examiners to evaluate medical testimony and determine its weight, and their findings on disputed medical testimony are conclusive. *Borden Co. v. Industrial Comm.* 2 W (2d) 619, 87 NW (2d) 261.

Where the facts are undisputed in a workmen's compensation case, and but one inference can reasonably be drawn from such undisputed facts, a question of law is presented and the finding of the industrial commission to the contrary is not binding on the reviewing court; but if more than one inference can reasonably be drawn, then the finding of the

commission is conclusive. *Van Roy v. Industrial Comm.* 5 W (2d) 416, 92 NW (2d) 818.

Where the claimant had been paid compensation for disability, and his application for additional compensation claimed further disability, and the answer of the insurance carrier admitted part of such further disability, and the commission made no attempt in the supreme court to support its finding that the claimant had been fully compensated for the disability, the case should go back to the commission for the sole purpose of determining to what, if any, compensation the claimant is entitled for the admitted part of such further disability. *Soper v. Industrial Comm.* 5 W (2d) 570, 93 NW (2d) 329.

Whether an injured employe had a true case of traumatic neurosis or hysteria, or was malingering, was a question of fact for the commission to decide. *Johnson v. Industrial Comm.* 5 W (2d) 584, 93 NW (2d) 439.

The determination of the extent or duration of disability of an applicant for workmen's compensation presents a question of fact and not of law, and the findings of the industrial commission are conclusive if supported by credible evidence. *Borum v. Industrial Comm.* 6 W (2d) 168, 93 NW (2d) 860.

Under 102.23 (1) the unappealed award made by the industrial commission was in effect a judgment, not subject to collateral attack. *Mathews v. Big Foot Country Club*, 7 W (2d) 244, 96 NW (2d) 327.

Where an examiner erroneously found that no injury occurred to the claimant, then made certain other findings, and ordered that the application for compensation be dismissed, and the industrial commission, on review by it, struck the examiner's findings, made substituted findings, and affirmed the examiner's order, but made no finding as to whether claimant had sustained an injury, or whether claimant would be entitled to reimbursement for any medical expense, the cause is remanded for the commission to make specific findings on all of the controverted issues, and then to make an order based thereon. *Molinaro v. Industrial Comm.* 7 W (2d) 252, 96 NW (2d) 328.

On judicial review in a workmen's compensation case, the question is not whether there is credible evidence in the record to sustain a finding which the industrial commission did not make, but is whether there is any credible evidence to sustain the finding which the commission did make. Medical reports, in the commission's file but not put in evidence, do not constitute competent evidence in a workmen's compensation proceeding. *Unruh v. Industrial Comm.* 8 W (2d) 394, 99 NW (2d) 182.

The industrial commission acts in excess of its powers if it makes a finding of fact not supported by the evidence. Recognized presumptions may operate in fact findings by the commission in a workmen's compensation case. In the absence of statute limiting the power of the commission in such a situation, the circuit court is not authorized to review the accuracy with which the commission weighs rebutting evidence against a strong presumption. *Zschock v. Industrial Comm.* 11 W (2d) 231, 105 NW (2d) 374.

Where the undisputed facts in a workmen's



compensation proceeding permit of different inferences, a question of fact for the industrial commission, and not a question of law, is presented. *Green Bay W. O., Inc. v. Industrial Comm.* 19 W (2d) 11, 119 NW (2d) 435.

The controlling statute prescribing the standard for review in workmen's compensation proceedings is 102.23, and not 227.20 (1) (d), and this is because of the provision of 227.22 (2). *Seymour v. Industrial Comm.* 25 W (2d) 482, 131 NW (2d) 323.

In a workmen's compensation proceeding on the claim of a city policeman for injuries sustained as a result of falling on an icy pavement, the finding of the industrial commission that the injuries suffered stimulated the development of a spinal tumor theretofore quiescent would not on review be disturbed where supported by authoritative expert testimony substantiating claimant's contention, since it could not be held as a matter of law that such testimony was incredible as contrary to scientific facts or knowledge. *Seymour v. Industrial Comm.* 25 W (2d) 482, 131 NW (2d) 323.

In passing on the issue of whether the evidence sustains the finding of the industrial commission in a workmen's compensation proceeding, the test is whether there is credible evidence which, if unexplained, would support the finding. *Shawley v. Industrial Comm.* 16 W (2d) 535, 114 NW (2d) 872; *Carr v. Industrial Comm.* 25 W (2d) 536, 131 NW (2d) 328.

When facts are not in dispute in a workmen's compensation proceeding but permit the drawing of different inferences therefrom, the drawing of one such permissible inference by the industrial commission is an act of fact finding, and the inference so derived constitutes a finding of an ultimate fact, not a conclusion of law. *Gant v. Industrial Comm.* 263 W 64, 56 NW (2d) 525; *Hanz v. Industrial Comm.* 7 W (2d) 314, 90 NW (2d) 533; *Prentice v. Dept. of I., L. & H. R.* 38 W (2d) 219, 156 NW (2d) 482.

When, upon review of an order or award of the department, it is determined that the undisputed facts permit the drawing of different inferences and that the determination of such inferences constitutes a finding of ultimate fact by the department, it follows that if there is credible evidence to support the department's finding of fact, such finding, in the absence of fraud, is conclusive upon the court. *Escher v. Dept. of I., L. & H. R.* 39 W (2d) 527, 159 NW (2d) 715.

In a workmen's compensation proceeding involving a death-benefit claim, where the sole issue was whether decedent when fatally injured was a "loaned employe" or, as the commission found, had retained his general employment status, the governing standard on review was whether there was credible evidence to sustain the commission's finding in light of the tests applicable in controversies of that nature. *Ryan v. Dept. of I., L. & H. R.* 39 W (2d) 646, 159 NW (2d) 594.

When the facts are undisputed and but one reasonable inference can be drawn therefrom, a question of law and not one of fact is presented, and hence it is within the province of the court to overrule contrary inferences

made by the industrial commission. *Detter v. Dept. of I., L. & H. R.* 40 W (2d) 284, 161 NW (2d) 873.

In reviewing the sufficiency of findings of the department when challenged by the applicant on review in a workmen's compensation case, the question is not whether there is evidence to support a finding that was not made, but whether there is evidence to support a finding that was in fact made by the department; hence, whether there is evidence that would support a contrary inference or conclusion need not be considered. *Brickson v. Dept. of I., L. & H. R.* 40 W (2d) 694, 162 NW (2d) 600. See also *Briggs & Stratton Corp. v. Dept. of I., L. & H. R.* 43 W (2d) 398, 168 NW (2d) 817.

In cases involving alleged back injuries, it is the function of the department and the examiners to evaluate medical testimony and determine its weight, and their finding on disputed medical testimony is conclusive on judicial review. *Schroeder v. Dept. of I., L. & H. R.* 43 W (2d) 12, 168 NW (2d) 144.

It is explicit in the workmen's compensation legislation that the administrative powers vested by the legislature in the department are not to be exercised by the courts; hence a reviewing court, even though it has the complete record before it has no authority to make its own findings of fact, and in setting aside an award it may only determine, as set forth in 102.23, that the findings of fact by the department do not support the order or reward. *R. T. Madden, Inc. v. Dept. of I., L. & H. R.* 43 W (2d) 528, 169 NW (2d) 73. See also *Burks v. Dept. of I., L. & H. R.* 45 W (2d) 1, 172 NW (2d) 27.

The only test to be applied judicially in determining sufficiency of evidence to support findings of the department in workmen's compensation cases is whether there is any credible evidence in the record sufficient to support the finding made by the department, the assumption in that test being that the evidence is relevant, that it is evidentiary in nature and not a conclusion of law, and that it is not so completely discredited by other evidence that a court could find it incredible as a matter of law. *R. T. Madden, Inc. v. Dept. of I., L. & H. R.* 43 W (2d) 528, 169 NW (2d) 73.

In evaluating sufficiency of evidence applying the "credible evidence" test, the following additional concepts are to be observed: (a) The applicant is under no duty to prove his case by a preponderance of the evidence, but merely to produce such credible evidence that the findings will rest upon facts and not upon conjecture or speculations; (b) in applying the "credible evidence" test it is not the duty of a court to weigh the sufficiency of the evidence, in the sense that evidence favoring one party is to be weighed against that supporting another, but to weigh the evidence relied upon by the department to determine whether that evidence is sufficient to justify the finding made; and (c) meeting the "credible evidence" test does not contemplate that a finding may rest on mere scintilla of evidence or upon conjecture and speculation, but simply whether there was any credible evidence sufficient to support the findings of the department. *R. T. Madden, Inc. v. Dept. of I., L. & H. R.* 43 W (2d) 528, 169 NW (2d) 73.

#### 4. Review Procedure.

Relief against a mere formal award pursuant to a compromise is not limited to an action under sec. 2394—19, Stats. 1913, commenced within 20 days in the circuit court; and an application made within a year after the compromise may be treated as a request for a review and vacation of the compromise and a new award may thereupon be made in effect setting aside the compromise and remedying its injustice. *Menominee B. S. L. Co. v. Industrial Comm.* 162 W 344, 156 NW 151.

The industrial commission found that beyond a specified time there was no loss of earning capacity, and that full compensation had been made up to that time, but because there might arise a loss of earning capacity in the future it was stated that the case would be "left open for the statutory period until such contingency may arise." This was an award after a final hearing which might be reviewed under sec. 2394-19, Stats. 1913. *Johnstad v. Lake Superior T. & T. R. Co.* 165 W 499, 162 NW 659.

Strict compliance with sec. 2394-19, Stats. 1915, is necessary to give the circuit court jurisdiction of an action to review an award. Unless the summons and complaint are served upon an adverse party within the 20 days allowed, the circuit court has no jurisdiction. The mother of an employe whose claim for his death was allowed was an adverse party to the widow whose claim for such death was disallowed. *Gough v. Industrial Comm.* 165 W 632, 162 NW 434; *New Dells L. Co. v. Industrial Comm.* 166 W 207, 164 NW 824.

Sec. 2394-19, Stats. 1919, authorizes a review of either an interlocutory or a final award; and a voluntary payment of a temporary award without appealing will not preclude a review of a second and final award, though both are based upon the same findings of fact. *Lange C. Co. v. Industrial Comm.* 183 W 583, 197 NW 722.

A motion that the case be sent back to the industrial commission with directions was properly denied as the court can only affirm the commission's award or set it aside. *Kaegi v. Industrial Comm.* 232 W 16, 285 NW 845.

The industrial commission is a necessary as well as a real party in interest in an action in the circuit court to review an order or award of the commission, and as such the commission has the right to move for the dismissal of such an action because of the court's want of jurisdiction. *Rathjen v. Industrial Comm.* 233 W 452, 289 NW 618.

An order of the industrial commission setting aside an examiner's findings and award and ordering the matter scheduled for further hearing is not subject to judicial review in an action brought to review a subsequent award or an order denying compensation. (Contrary statement in *Schneider F.&S. Co. v. Industrial Comm.* 224 W 298, withdrawn.) *Berg v. Industrial Comm.* 236 W 172, 294 NW 506.

The filing of a petition for commission review of findings and award is a condition precedent to commencement of an action for court review. *Wichman v. Industrial Comm.* 237 W 13, 296 NW 78.

An order of the industrial commission, confirming a compromise of a claim for workmen's compensation, is not appealable, only

orders denying or awarding compensation being subject to judicial review under 102.23, Stats. 1943. *Harrison v. Industrial Comm.* 246 W 106, 16 NW (2d) 303.

The act of the industrial commission in refusing to allow an attorney a higher fee than 10 per cent of the award in a workmen's compensation case is not reviewable by the courts in an action by the attorney, only orders denying or awarding compensation being subject to judicial review. An attorney representing a claimant in a workmen's compensation proceeding is not a "party" within the meaning of the provision in 102.23, authorizing a "party" aggrieved by an order or award of the commission to commence an action in the circuit court for a review, the term, "parties", referring to persons claiming compensation and those resisting the claims. *Cranston v. Industrial Comm.* 246 W 287, 16 NW (2d) 865.

The conclusiveness of findings of fact made by the industrial commission in workmen's compensation proceedings was not altered by the enactment of the uniform administrative procedure act, since that act does not include proceedings in matters arising out of the workmen's compensation act. *Bellrichard v. Industrial Comm.* 248 W 231, 21 NW (2d) 395.

There can be no judicial review of material not in the record, and to subject the rights of either employe or employer to decisions based on facts or expert opinions which do not appear of record would be a denial of due process of law. *Merton Lumber Co. v. Industrial Comm.* 260 W 109, 50 NW (2d) 42.

With reference to an order of the industrial commission which makes more than one determination, 102.23 (1) does not restrict the power of the reviewing court to setting aside only the portion of the order as to which the commission exceeded its powers, and such statute is construed as authorizing the court in its discretion to set aside the entire order. *M. & M. Realty Co. v. Industrial Comm.* 267 W 52, 64 NW (2d) 413.

Under 102.23 (1), mere error on the part of the industrial commission is not reviewable but only an action by it which is in excess of its powers, but the commission does act in excess of its powers when it fails to pass on a timely application to open up the case on the ground of newly discovered evidence. *Moore v. Industrial Comm.* 4 W (2d) 208, 89 NW (2d) 788.

Although all erroneous orders of the industrial commission, which are not supported by credible evidence, may be attacked in timely instituted actions for court review on the ground that the commission exceeded its powers, such orders are not necessarily void. The problem is analogous to that of deciding whether the same act on the part of a court of limited jurisdiction would be held to be void or merely erroneous. An employer has an adequate remedy to review the commission's unauthorized entry of an interlocutory instead of a final order by instituting a timely action for court review, but this is the only remedy to challenge such an interlocutory order, and the employer waives his right to later attack such an order if he has failed to take advantage of such remedy. *Thomas v. Industrial Comm.* 4 W (2d) 477, 90 NW (2d) 393.

An appeal would not lie where the indus-

trial commission issued no order but only by letter refused to review an examiner's order because the petition for review was filed one day late. *Chevrolet Division, G.M.C. v. Industrial Comm.* 31 W (2d) 481, 143 NW (2d) 532.

**102.24 History:** 1911 c. 50; Stats. 1911 s. 2394—20, 2394—21 (2); 1913 c. 599; 1917 c. 624; 1923 c. 291 s. 3; Stats. 1923 s. 102.24, 102.25 (2); 1931 c. 403 s. 25, 27; Stats. 1931 s. 102.24; 1969 c. 276 s. 584 (1) (a).

If the industrial commission fails properly to apply the existing law to the facts found, the supreme court will apply the law and direct the entry of the proper judgment. *Employers M. L. Ins. Co. v. McCormick*, 195 W 410, 217 NW 738.

Where the industrial commission's findings were supported by evidence, the circuit court had no power to vacate a compensation award or to recommit the case to the commission for further testimony. *Albion v. Industrial Comm.* 201 W 15, 231 NW 249.

The determination of the ultimate facts as to how, in the first instance, decedent and his passengers came to embark on the flight, and how subsequently the airplane proceeded and dove or fell, must be left to the commission; hence instead of supplying those findings by its own determination, the circuit court should have remanded the record to the commission for further hearing and proceedings. *Sheboygan Airways, Inc. v. Industrial Comm.* 209 W 352, 245 NW 178.

A judgment vacating an order of the industrial commission and remanding the record is appealable as a final judgment. A person who feels aggrieved by the subsequent award of the commission made in pursuance of an order vacating the original award and remanding the case must institute a new action. *Van Domelon v. Industrial Comm.* 212 W 22, 249 NW 60.

Where the industrial commission found that an employe had been disabled "since the day of his discharge" without fixing a particular day on which disability occurred, it was not error to conclude that the commission did not find the time when the claimant first suffered a compensable disability, and the court properly remanded the record to the commission. *Schaefer & Co. v. Industrial Comm.* 220 W 384, 265 NW 393.

Where an award made by the industrial commission was confirmed by the circuit court, but the judgment of the circuit court was reversed and the cause remanded by the supreme court with directions to set aside the award, the circuit court could recommit the matter to the commission, which was then required to correct its award. On return of the matter to the commission by the circuit court after remand, the commission acted within its powers. *Hills Dry Goods Co., Inc. v. Industrial Comm.* 222 W 439, 267 NW 905, cert. denied, *Hills Dry Goods Co., Inc. v. Klicka*, 300 US 654.

The power to authorize the taking of further evidence before the commission on the remand of a compensation case to it, to the extent that such power exists, is in the circuit court and not in the commission, and on a remand merely for further findings the commission would not be authorized to reopen the

case and receive further evidence. *Liberty Foundry v. Industrial Comm.* 233 W 177, 288 NW 752.

Where the parties erred, as a matter of law, in stipulating that the only issue was whether the deceased was an employe of the county or an independent contractor, and by reason of such error it was evidently not considered necessary to submit proof in relation to the material issue as to whether the deceased held himself out to and rendered service to the public, the circuit court should have set aside the commission's order of dismissal of the widow's application for death benefits, and recommitted the controversy and remanded the record to the commission for such further hearing and proceedings as necessary to determine all essential issues. *Dryden v. Industrial Comm.* 246 W 283, 16 NW (2d) 799.

**102.25 History:** 1911 c. 50; Stats. 1911 s. 2394—21; 1913 c. 599; 1917 c. 624; 1921 c. 551 s. 3; 1923 c. 291 s. 3; 1923 c. 437 s. 3; 1923 c. 449 s. 56; Stats. 1923 s. 102.25; 1931 c. 403 s. 26, 27; 1939 c. 261; 1943 c. 270; 1969 c. 276 ss. 393, 584 (1) (a).

An appeal may be taken from a part or the whole of the judgment of the circuit court. *William Rahr Sons Co. v. Industrial Comm.* 166 W 28, 163 NW 169.

The notice of appeal from a judgment of the circuit court affirming an award of the industrial commission need not be served on the attorney general. *Frontier M. Co. v. Industrial Comm.* 168 W 157, 169 NW 312.

When the judgment of the lower court is affirmed, the supreme court cannot grant a new trial as a matter of favor, either to the commission or to the parties to the controversy. *Pruno v. Industrial Comm.* 187 W 358, 204 NW 576.

On the claimant's appeal from a judgment confirming an order of the industrial commission dismissing his application for workmen's compensation against his employer and the employer's compensation carrier, the interest of the compensation carrier, which appeared in the action, was adverse to the claimant's interest, so that the claimant was required by 274.11 (1) to serve notice of appeal on such adverse party and within the 30-day period allowed by 102.25 (1), Stats. 1949; since claimant failed to do so, his appeal must be dismissed. Service of notice of appeal within the statutory period allowed therefor is an absolute prerequisite of appeal, and no relief from failure in this respect is authorized by 274.32. *Falk v. Industrial Comm.* 258 W 109, 45 NW (2d) 161.

Under 102.25, Stats. 1965, the state is the "party aggrieved" for purposes of appeal to the supreme court whenever the circuit court on review enters judgment confirming any order or award made against it. *Holley v. Dept. of I., L. & H. R.* 39 W (2d) 260, 158 NW (2d) 910.

**102.26 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—22; 1913 c. 599; 1917 c. 624; 1921 c. 551 s. 4; 1923 c. 291 s. 3; Stats. 1923 s. 102.26; 1931 c. 403 s. 28; 1935 c. 465; 1949 c. 467; 1961 c. 329; 1963 c. 281; 1969 c. 276 s. 584 (1) (a).

**Revisor's Note, 1931:** The provision as to

attorney general is transferred to new 102.64. [Bill 380-S, s. 28]

An award of costs against the plaintiff will not be set aside by the supreme court in the absence of an abuse of discretion. *Ninnesman v. Industrial Comm.* 171 W 190, 176 NW 909.

The terms of 102.26 (2) and (3), limiting the fee of an attorney for a compensation claimant, control any contract made by an attorney with his client in such matter, so that the statute cannot be challenged by the attorney as being unconstitutional. *Cranston v. Industrial Comm.* 246 W 287, 16 NW (2d) 865.

Costs will not be taxed in actions for review under chs. 102 or 108 unless the court expressly directs such taxation. *Rice Lake Creamery Co. v. Industrial Comm.* 17 W (2d) 177, 115 NW (2d) 756.

**102.27 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—23; 1913 c. 599; 1917 c. 624; 1923 c. 291 s. 3; Stats. 1923 s. 102.27; 1931 c. 403 s. 29.

An employe's claim under the workmen's compensation act may be waived in consideration of an agreement by the employer to make proper compensation by testamentary provision. *Frieders v. Estate of Frieders*, 180 W 430, 193 NW 77.

**102.28 History:** 1911 c. 50; Stats. 1911 s. 2394—24; 1913 c. 599; 1915 c. 121; 1917 c. 624; 1919 c. 680 s. 3; 1921 c. 148; 1921 c. 451 s. 1, 2; 1923 c. 291 s. 3; 1923 c. 437 s. 2, 3; 1923 c. 449 s. 56; Stats. 1923 s. 102.28; 1929 c. 453 s. 3; 1931 c. 403 s. 30; 1969 c. 276 s. 584 (1) (a).

1. Preference.
2. Insurance.

#### 1. Preference.

Claims for unpaid compensation insurance premiums have not the status of labor claims under the bankruptcy act, but they are entitled to priority in bankruptcy under sec. 64b (5). *In re Inglis M. Co.* *In re Michie C. Co.* 292 F 907.

A creditor by taking a note which covered compensation insurance premiums and other debts, and afterwards reduced the note to judgment, did not thereby lose his right to priority for his claim upon the insurance premium debt. He was entitled to priority for such premium under this section, and the provision of the federal bankruptcy act. *In re Deason & Co.* 19 F (2d) 275.

#### 2. Insurance.

An insurance policy in general terms, procured by an employer in compliance with secs. 2394-24 (2) and 2394-27 (1), Stats. 1917, covers its mechanic employed as a pitman during an automobile race who was killed while venturing onto the track, although the insurer had not filed premium rates or classification of employes engaged in such racing and there was some evidence that the insured employer had not regarded accidents occurring during automobile races as covered by the policy. *Frint M. C. Co. v. General A., F. & L. A. Corp.* 173 W 109, 180 NW 121.

Requiring the employer to obtain insurance is not to indemnify the employer but to as-

sure the employe or his dependent that the employer's liability will be discharged. *Thomas v. Industrial Comm.* 243 W 231, 10 NW (2d) 206.

Where there is liability by the employer to the injured employe as of the instant that the accident occurs, there is liability on the part of the employer's insurance carrier, and such latter liability continues even though the injured employe may be unable thereafter to enforce his claim for workmen's compensation against the employer because of the latter ceasing to exist, as in this case of an employer corporation which was dissolved after an employe's first claim had been paid by the insurance carrier, but before a further claim for the same injury was filed. *Metropolitan Cas. Ins. Co. v. Industrial Comm.* 260 W 298, 50 NW (2d) 399.

Under 102.28 and 102.31 (1) (a), when an insurance company issues a policy of workmen's compensation insurance to a municipal corporation, its obligation is to pay whatever workmen's compensation benefits the legislature may have seen fit to impose on the insured municipality. *Douglas County v. Industrial Comm.* 275 W 309, 81 NW (2d) 807.

There is no authority for the procuring of insurance against liability under the workmen's compensation law by any department of the state government. 8 Atty. Gen. 132.

Counties are not required to carry workmen's compensation insurance, but the county board may provide for carrying it. 31 Atty. Gen. 76.

**102.29 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—25; 1913 c. 599; 1917 c. 624; 1919 c. 680 s. 3; 1923 c. 291 s. 3; 1923 c. 437 s. 2; 1923 c. 449 s. 56; Stats. 1923 s. 102.29; 1925 c. 384 s. 2; 1929 c. 453 s. 3; 1931 c. 132; 1931 c. 403 s. 31; 1931 c. 469 s. 7; 1935 c. 465; 1947 c. 475; 1949 c. 107; 1951 c. 382; 1959 c. 523, 562; 1969 c. 276 s. 584 (1) (a).

**Editor's Note:** Subsection (2) was given its present form by ch. 523, Laws 1959. Relevant decisions are: *Western Cas. & Surety Co. v. Shafton*, 231 W 1, 285 NW 408; *Employers Mut. L. Ins. Co. v. Mueller*, 273 W 616, 79 NW (2d) 246; and *Wisconsin P. & L. Co. v. Dean*, 275 W 236, 81 NW (2d) 486.

1. Third-party actions.
2. Recovery of payment to state.
3. Malpractice.
4. Notice requirement.

#### 1. Third-Party Actions.

Liability under the workmen's compensation law is exclusive of all other liability as to those subject to the act and within its terms. Such liability is an incident to the employment, and is contractual in its nature. Employes of an independent contractor are not counted in determining whether or not the principal contractor is under the act. When a foreign corporation is the principal contractor, employes without the state are not counted. A foreign corporation which is not an employer under the act, cannot be a principal contractor and is, therefore, a "third party" or "other party" as to the employes of an independent contractor, within the meaning of 102.29, Stats. 1921. *Sheban v. A. M. Castle & Co.* 185 W 282, 201 NW 379.

102.29 does not affect rights of action which existed under common law in any cases except those in which parties involved sustained toward each other the relationship of employer and employe, since the phrase "third person" is construed to include all who do not occupy relationship of employer and employe. *McGonigle v. Gryphan*, 201 W 269, 229 NW 81.

A stipulation in a compensation proceeding against the employer of the deceased that he left no one dependent upon him did not bar the parents of such deceased from recovering against a third party, who caused the death, for other elements of pecuniary injury for which recovery is authorized. Parents' right to recover is not given by 102.29 but by survival of action statutes. *Sandeen v. Willow River P. Co.* 214 W 166, 252 NW 706.

Where the driver of a truck was guilty of contributory negligence imputable to his employer, the owner of the truck, the fact that the employer, who paid awards under the workmen's compensation act for the deaths of 2 other employes riding in the truck, will, by operation of 102.29 be reimbursed from the amounts recovered against the railroad company for such deaths, does not constitute a defense to the railroad company on the ground of inequitable and unjust result. *Clark v. Chicago, M. St. P. & P. R. Co.* 214 W 295, 252 NW 685.

A right of action against a third party tortfeasor, hospital, medical and surgical bills constitute "compensation" for which the employer is entitled to be reimbursed, since such items constitute a lawful "claim" under the workmen's compensation act, and the word "compensation" as used in 102.29 does not mean merely wage loss sustained. *Klotz v. Pfister & Vogel L. Co.* 220 W 57, 264 NW 495.

Negligence on the part of the subcontractor, who was the employer of the injured employe and liable for his injuries under the workmen's compensation act, would not defeat the liability of the owner of the premises to the injured employe as a "frequenter" by reason of the owner's failure to comply with the safe-place statute. *Criswell v. Seaman Body Corp.* 233 W 606, 290 NW 177.

Where an employe, awarded workmen's compensation against his employer, to be paid in 712 instalments, also brings a third party action under 102.29 (1), the proceeds of the judgment must be applied in accordance with the statute, which requires that, after deduction of costs and the employe's one-third distributive share, there shall be paid to the employer's compensation insurer so much of the remainder as is necessary to discharge its compensation liability, and not merely such amount as will reimburse it for compensation payments already made. *Rightman v. Honkamp*, 245 W 68, 13 NW (2d) 597.

A complaint of an employe and his employer's compensation insurer against a contractor and the owner of a garage under construction, as third parties responsible for injuries sustained by such employe, was not demurrable as improperly uniting 2 causes of action in alleging that the employe's injuries were caused by the defendant's failure to furnish a safe place of employment and by other acts of

negligence, since the complaint sought to enforce but one primary right against both defendants, and both were subject to the safe-place statute, and, further, such statute does not create a cause of action but merely makes a violator thereof guilty of negligence. *Morrison v. Steinfert*, 254 W 89, 35 NW (2d) 335.

Under 102.29 a workmen's compensation insurer, by reason of its payment of compensation, had a right to maintain or join in an action in tort against a third party responsible for the wrongful death of an employe, and in this case either the compensation insurer or the lineal descendants of the employe, or both, could sue, the employe's widow being deceased. There is no separate cause of action created in a workmen's compensation carrier by this section, but its cause of action is derivative, and it stands in the shoes of the employe or, in the instant case of a deceased employe whose widow has died, of his lineal descendants. In an action for wrongful death, where a suing workmen's compensation carrier has an interest because of this section, and suing lineal descendants of the deceased employe have an interest because of 331.04, the measure of recovery must be the pecuniary injury resulting to the lineal descendants, and such amount is subject to the claim of the compensation carrier. *Eleason v. Western C.&S. Co.* 254 W 134, 35 NW (2d) 301.

In an employe's action in tort against a third party allegedly responsible for injuries sustained by the employe while working for an employer, who had paid workmen's compensation and hence had an interest in the recovery in the employe's action, the denial of the defendant's motion to implead the plaintiff's employer was not error, the presence of the plaintiff's employer in the plaintiff's action against the tort-feasor being unnecessary to the determination of the issues, and the plaintiff's employer having waived its right to participate in such action. Since the interest of the plaintiff's employer, which had paid workmen's compensation for the employe's injuries, was substantial and undisputable, and went to the credibility of its employes who appeared as witnesses in such action, the trial court's refusal to permit the defendant's counsel to comment to the jury on the interest which the plaintiff's employer had in the litigation was prejudicial error necessitating a new trial. *Johannsen v. Peter P. Woboril, Inc.* 260 W 341, 51 NW (2d) 53.

That the contractor, liable in compensation for the death of his employe, was by contract obligated to indemnify the owner of the building for any judgment based on a violation of the safe-place statute, did not preclude the widow of such employe from bringing an action in tort under 102.29 against the owner of the building as the party responsible for such death. *Umnus v. Wisconsin P.S. Corp.* 260 W 433, 51 NW (2d) 42.

Where the automobile liability insurer of a driver involved in a collision knew that the other driver was employed by a credit company as insurance investigator, the liability insurer was put on inquiry as to whether such other driver was traveling in the course of his employment at the time of the accident, and where, without having made inquiry as to

this, it entered into a settlement and release with such other driver alone, the release was not binding on the workmen's insurance carrier of the releasor's employer, and would not preclude such insurance carrier from bringing an action under the workmen's compensation act. *Doyle v. Teasdale*, 263 W 328, 57 NW (2d) 381.

An employer and his insurer would have no cause of action against a third party for the death of an employe in the absence of this statute. The insurer, receiving the benefits of the exclusive remedy provisions of the act, was precluded from challenging the constitutionality of the provision that disputes arising between the parties in an action against a third-party tort-feasor shall be passed on by the trial court. Such provision is a part of the contract of employment and is a waiver of trial by jury by operation of law, by the employer and his insurer, who is also a party to the employment contract. *Bergren v. Staples*, 263 W 477, 57 NW (2d) 714.

An action against a third-party tort-feasor, who is an additional insured under an automobile liability policy and is not in an employer relationship to the injured employe, is not barred as against the defendant automobile liability insurer by an exclusion clause of the policy purporting to deny coverage as to "any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law." *Severin v. Luchinske*, 271 W 378, 73 NW (2d) 477.

Even though an employer who has paid compensation can share in the recovery by his employes under 102.29 (1), the negligence of the deceased employe-driver is not imputed to his fellow employes or the employer, and therefore will not constitute a defense, nor can the employer be held for contribution. *Wisconsin P.&L. Co. v. Dean*, 275 W 236, 81 NW (2d) 486.

Where the trial court erroneously ruled as a matter of law that an employe was the special employe of the defendant so that he could not maintain his present action against the defendant as a third-party tort-feasor, and the court made an order denying the motion of the compensation insurer of the general employer to serve a supplemental complaint against the defendant under 102.06, the order should be modified to allow such insurer to renew its motion in the pending action or to commence an independent action under 102.06, such independent action to be held in abeyance until final determination of the pending action if the insurer so elects. *Braun v. Jewett*, 1 W (2d) 531, 85 NW (2d) 364.

102.16 (3) was not intended to bar an employer who has paid workmen's compensation benefits for injuries to or the death of an employe, or the employer's compensation insurer, from sharing in the proceeds of a judgment or settlement obtained by the insured employe, or by his representative in case of his death, in an action brought against a third-party tort-feasor, all pursuant to express provisions of 102.29 (1). *Quante v. Erickson*, 2 W (2d) 527, 87 NW (2d) 249.

The amount of compensation for which an employer may be liable to his employe under the workmen's compensation act is not rele-

vant to the amount of damages properly awardable for the same injury in a tort action at law against the tort-feasor. *Hardware Mut. Co. v. Harry Crow & Son, Inc.* 6 W (2d) 396, 94 NW (2d) 577.

An employer's workmen's compensation insurer, who has paid benefits for the death of employe caused by negligence of a third party, has no right of action under 102.29 (1) for reimbursement against third-party wrongdoer where deceased employe left no survivors who could bring an action for wrongful death under 331.03 and 331.04. The insurer is limited to whatever rights are provided by the workmen's compensation act, and has no independent right of action for reimbursement against such wrongdoer on the theory of implied contract of indemnity. *Murray v. Dewar*, 6 W (2d) 411, 94 NW (2d) 635.

See note to 102.03, on exclusive remedy, citing *Albert v. Regal Ware*, 6 W (2d) 519, 95 NW (2d) 240.

An agreement by a compensation carrier to settle a third-party claim and submit the settlement for approval would constitute a bar to an action on the claim until such submission. The word "void" in 102.29 (1) means "voidable." *Lumbermens Mut. Cas. Co. v. Royal Indem. Co.* 10 W (2d) 380, 103 NW (2d) 69.

In an action brought under the Illinois wrongful death act against a third-party tort-feasor the reimbursement provision of Wisconsin will apply to all proceeds, not just the portion that the Illinois wrongful death act would distribute to the widow. *Gall v. Robertson*, 10 W (2d) 594, 103 NW (2d) 903.

In a third-party action under 102.29 (1), the proceeds of a settlement of the employe's case must be divided in accordance with the statutory formula for division of proceeds; the statute does not give the trial court power to vary the formula without the consent of the parties, nor does the statutory formula apply only to the "proceeds of such claim" when recovered by judgment and not when liquidated by settlement. *Huck v. Chicago, St. P., M. & O. R. Co.* 14 W (2d) 445, 111 NW (2d) 434.

An insurance company which was both the liability and workmen's compensation carrier for plaintiff's employer, and which paid plaintiff, the employe, \$14,000 plus additional weekly compensation, and thereafter in settlement with the defendant driver in connection with his claim against the employer and employe, took a release from defendant driver, discharging him without reservation of rights, and similarly settled its subrogation claim as collision carrier without any reservation of rights in the release—was estopped from participating in so much of the judgment as was allocable to it under 102.29 (1), and the judgment must be reduced by the share allocable to the carrier. *Pagel v. Kees*, 23 W (2d) 462, 127 NW (2d) 816.

Third-party actions under 102.29 (2) are derivative in nature and are subject to the statute of limitations which is applicable to a cause of action which existed in favor of the workmen's compensation beneficiary. *Shelby Mut. Ins. Co. v. Home Mut. Ins. Co.* 25 W (2d) 25, 130 NW (2d) 296.

An insurer which was both the liability and workmen's compensation carrier for plaintiff's



employer and which paid workmen's compensation benefits to plaintiff, who thereafter instituted a third-party action which he contended was settled for a lesser sum than his claim was worth because of defenses which were made known by the insurer to the other defendants—was not barred from sharing in the proceeds derived from the settlement of said action, where the record failed to support the charge that the insurer disclosed defensive techniques which it learned only by reason of its status as workmen's compensation insurer, and since aside from the foregoing, by express statutory provision the insurer was entitled to share in the proceeds. *Rice v. Gruetzmacher*, 30 W (2d) 222, 140 NW (2d) 238.

An injured employe who has collected compensation cannot bring a third-party action against the compensation insurer on the ground of negligence in making safety inspections even though the insurer was also the public liability carrier of the employer. *Kerner v. Employers Mut. L. Ins. Co.* 35 W (2d) 391, 151 NW (2d) 72.

While, by virtue of the workmen's compensation act an employer's liability to his injured employe is limited to the liability imposed by the act, an employer can forego his statutory limitation of liability to third persons by an express agreement for indemnification. *Young v. Anaconda American Brass Co.* 43 W (2d) 36, 168 NW (2d) 112.

Where, after recovery of workmen's compensation benefits from a general employer's insurer, the employe brought a third-party suit against defendant upon whose premises he was injured, the contention of the latter that plaintiff employe was its special or loaned employe at the time of the injury and limited to workmen's compensation recovery is, on defendant's motion for summary judgment, sustained, under evidence revealing that all of the answers to the test questions as to whether plaintiff was a special employe at the time of his injury were favorable to defendant. *Freeman v. Krause Milling Co.* 43 W (2d) 392, 168 NW (2d) 599.

See note to 101.06, on liability of owner to contractor's employes, citing *Hrabak v. Madison G. & E. Co.* 240 F (2d) 472.

A workmen's compensation insurer's complaint against an airline which negligently caused the death of insured's employe, which complaint was based on implied contract of indemnity states a claim. *Travelers Ins. Co. v. Northwest Airlines*, 94 F Supp. 620.

Third-party actions and products liability. *Arnold*, 46 MLR 135.

Unrecognized third-party actions. *Phillips*, 46 MLR 146.

## 2. Recovery of Payment to State.

This subsection is not in conflict with the due process and equal protection clauses of the 14th amendment, U. S. Constitution. *Verhelst C. Co. v. Galles*, 204 W 96, 235 NW 556.

The compensation insurer of the town, on paying the required amount into the state treasury pursuant to 102.29 (5) and an award of the commission thereunder, had a right to bring an independent action for reimbursement against a third party whose negligent act caused the death of the employe involved,

and the town, not having paid anything into the state treasury, had no right of action against such third party for reimbursement, and had no authority to release the insurer's claim against such third party. The right of a compensation insurer to reimbursement from a third-party tort-feasor is statutory and is not dependent on the subrogation clause of its policy. *Standard Surety & Cas. Co. v. Spewachek*, 233 W 158, 288 NW 758.

A workmen's compensation insurer who has paid the sum required by 102.49 (5) into the state fund may recover the amount from the insurer of the responsible third-party tort-feasor as "damages" within the meaning of the coverage clause of the automobile liability policy. *Employers Mut. L. Ins. Co. v. De Bruin*, 271 W 412, 73 NW (2d) 479.

## 3. Malpractice.

Damages awarded to a plaintiff for the pain which he suffered on account of delayed removal of a particle of steel from his eye should not be reduced by the compensation paid him under the workmen's compensation act, as this element of damages is not compensable under that act. *Kosak v. Boyce*, 185 W 513, 201 NW 757.

Actions for malpractice brought by the compensated employe and the employer were not premature because the commission had not separated the compensation payable on account of the original injury from that payable by reason of the malpractice, a prior determination of the proper separation of damages not being a condition precedent to the bringing of either action. *Lakeside B. & S. Co. v. Pugh*, 206 W 62, 238 NW 872.

## 4. Notice Requirement.

Where it appeared that an employe in the course of his employment and while a passenger in his employer's truck was injured in a collision attributed to the negligence of his co-employe (the driver) and the company which was both compensation and liability insurer had issued a policy covering the coemploye's liability as well, it was required under 102.29 (4) to promptly notify the employe of that fact. *Wolff v. Sisters of St. Francis*, 41 W (2d) 594, 164 NW (2d) 501.

**102.30 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—26; 1913 c. 599; 1917 c. 624; 1921 c. 451 s. 1; 1923 c. 291 s. 3; Stats. 1923 s. 102.30; 1931 c. 403 s. 32; 1963 c. 281; 1969 c. 276 s. 584 (1) (a).

The payment of money, as a gratuity, to an injured employe by an employer during the period of temporary disability does not relieve the insurance carrier from its obligation to meet the indemnity provided by the workmen's compensation act, and, while liability under the act is for wage loss, an employer or his insurance carrier is not relieved from liability where the employer has made gifts or donations to the injured employe. *Modern Equip. Co. v. Industrial Comm.* 247 W 517, 20 NW (2d) 121.

**102.31 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—27; 1913 c. 599; 1917 c. 624; 1917 c. 637 s. 1; 1921 c. 451 s. 1; 1923 c. 291 s. 3; 1923 c. 437 s. 1, 2; 1923 c. 449 s. 56; Stats. 1923

s. 102.31; 1927 c. 125; 1929 c. 453 s. 2, 3; 1931 c. 244; 1931 c. 403 s. 33; 1933 c. 402 s. 2; 1937 c. 180; 1939 c. 261, 351; 1943 c. 270; 1961 c. 621; 1967 c. 350; 1969 c. 276 s. 584 (1) (a), (2) (a); 1969 c. 392 s. 87 (29).

The erection of a building was not an operation necessary, incident, or appurtenant to the excavation of the basement, described in the declaration of the insured as the nature of the business, so as to entitle the insurer to premiums based on the compensation paid to employees of the contractors erecting the superstructure; and the insurer, not being liable under the policy for injuries to employees of the contractor engaged in other work than that described in such declaration, cannot recover premiums based on the compensation paid to such employees. A workmen's compensation insurance policy should be construed, if possible, to cover all workmen of contractors employed to erect a building by the insured on the principle that a person is presumed to have taken a course which is in accord with the law rather than one in direct violation thereof. *Continental C. Co. v. Woerpel*, 190 W 122, 208 NW 882.

Under 102.31 (1) (a) and 102.28 an insurer of a municipal corporation is obligated to pay whatever compensation benefits the legislature may have seen fit to impose on the insured municipality. *Douglas County v. Industrial Comm.*, 275 W 309, 81 NW (2d) 807.

Compensation insurance policies are referable to statutes as to coverage, and where the law is changed so as to bring new persons under the workmen's compensation act, the policy is thereby extended. In such cases the insurance company is entitled to additional compensation upon the payroll audit. 21 Atty. Gen. 286.

**102.32 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—28; 1913 c. 599; Stats. 1913 s. 2394—9 (5) (e), 2394—28; 1915 c. 378; Stats. 1915 s. 2394—9 (5) (L), 2394—28; 1917 c. 624; 1923 c. 291 s. 3; Stats. 1923 s. 102.09 (5) (L), 102.32; 1931 c. 403 s. 34, 35; Stats. 1931 s. 102.32; 1969 c. 276 s. 584 (1) (a).

**Revisor's Note, 1931:** Paragraph (L) of (5) of 102.09 is brought here to better the arrangement. This amendment conforms the language to the meaning as construed in *Flanner Co. v. Industrial Comm.*, 193 W 46, 213 NW 660. (7) is from the seventh subdivision of (d) of (2) of 102.09. [Bill 380-S, s. 35]

**102.33 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—29 (1st sentence); 1913 c. 599; 1919 c. 680 s. 3; 1923 c. 291 s. 3; Stats. 1923 s. 102.33 (1st sentence); 1931 c. 403 s. 36; Stats. 1931 s. 102.33; 1969 c. 276 s. 584 (1) (a).

**102.34 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—29 (except 1st sentence); 1913 c. 599; 1917 c. 624; 1919 c. 680 s. 3; 1923 c. 291 s. 3; Stats. 1923 s. 102.33 (except 1st sentence); 1931 c. 403 s. 37; Stats. 1931 s. 102.34; 1969 c. 276 s. 584 (1) (a).

**102.35 History:** 1927 c. 310; Stats. 1927 s. 102.41; 1931 c. 403 s. 45; Stats. 1931 s. 102.35; 1943 c. 270; 1951 c. 382; 1969 c. 276 s. 584 (2) (a).

**102.37 History:** 1927 c. 310; Stats. 1927 s. 102.37; 1931 c. 403 s. 41; 1969 c. 276 s. 584 (1) (a).

**102.38 History:** 1927 c. 310; Stats. 1927 s. 102.38; 1931 c. 403 s. 42; 1969 c. 276 s. 584 (1) (a).

**102.39 History:** 1927 c. 310; Stats. 1927 s. 102.39; 1931 c. 403 s. 43; 1969 c. 276 s. 584 (1) (a).

**102.40 History:** 1927 c. 310; Stats. 1927 s. 102.40; 1929 c. 453 s. 3; 1931 c. 403 s. 44; 1939 c. 261; 1969 c. 276 s. 584 (1) (a).

**102.42 History:** 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—9 (1); 1913 c. 599; 1915 c. 369; 1917 c. 624; 1919 c. 568; 1919 c. 692 s. 1; 1921 c. 414; 1923 c. 291 s. 3; 1923 c. 328; 1923 c. 449 s. 44; Stats. 1923 s. 102.09 (1); 1925 c. 405; 1929 c. 453; 1931 c. 403 s. 47; Stats. 1931 s. 102.42; 1931 c. 469 s. 9; 1937 c. 180; 1939 c. 261; 1943 c. 270; 1945 c. 537; 1949 c. 107; 1951 c. 382; 1953 c. 61; 1957 c. 97; 1965 c. 166; 1967 c. 43 ss. 170, 181m; 1967 c. 291 s. 14; 1969 c. 276 ss. 394, 584 (1) (a).

On third-party liability, for malpractice, see notes to 102.29.

The cost of a nurse actually required to assist the attending physician or surgeon may be charged. The expense of a nurse serving as such and not as a necessary assistant to the physician, or serving as a member of the injured person's family without expecting any compensation, is not chargeable. *Milwaukee v. Miller*, 154 W 652, 144 NW 188.

There is an implied liability on the part of the employer for any aggravation of an injury by the malpractice of the attending physician. *Pawlak v. Hayes*, 162 W 503, 156 NW 464.

Whether the refusal of an injured employe to wear a brace as prescribed by the employer's physician was unreasonable, presents an issue of fact to be decided by the industrial commission. Where the evidence as to the necessity of an operation, which the employer's physician declared unnecessary and refused to perform was conflicting, an order of the commission requiring the payment of medical expenses was proper. *Chain B. Co. v. Industrial Comm.*, 188 W 414, 206 NW 209.

Whether the employer failed to furnish medical and surgical attendance to an injured employe by not furnishing a panel from which the employe could select a physician presents a law question, the facts not being disputed. That the employer promptly took an employe with an injured nose to a specialist is no evidence of failure to maintain a panel from which the employe could select a physician. If the injured employe was dissatisfied with the doctor the employer furnished, she should have requested a panel from which to select another. That the employer furnished the employe no treatment for injuries must be proved to sustain an award for medical treatment by the employe's physicians without the employer's consent. *Whiterock M. S. Co. v. Horwatich*, 200 W 123, 227 NW 291.

The only medical treatment the expense of which is recoverable is that administered by a "physician," who, within the definition of the term in ch. 147, must be a doctor of medicine, and a chiropractor is not such a physician.

Corsten v. Industrial Comm. 207 W 147, 240 NW 834.

An employer's statutory liability for hospitalization furnished to an employe in a compensation case was not discharged by the employer having procured indemnity insurance from a surety company, nor by the hospital first seeking payment from the insurance carrier at the suggestion of the employer. *St. Mary's Hospital v. Atlas Warehouse & C. S. Co.* 226 W 568, 277 NW 144.

Only expert medical testimony is competent testimony to establish that treatment procured by an injured employe, such as removal of teeth in this case, was "reasonably required to cure and relieve from the effects of the injury" so as to impose liability on the employer therefor. *Wisconsin T. Co. v. Industrial Comm.* 263 W 380, 57 NW (2d) 334.

The mere fact that a physician is listed on an employer's panel under the workmen's compensation act does not ipso facto make such physician the employer's agent so as to render the employer liable for any and all treatment ordered by such physician for an injured employe. *Wisconsin T. Co. v. Industrial Comm.* 263 W 380, 57 NW (2d) 334.

An injured employe who needs treatment in a nonemergency must give his employer reasonable notice of such need before the employer can be said to have neglected or refused reasonably to do so within the meaning of 102.42 (1). *Cutler-Hammer, Inc. v. Industrial Comm.* 5 W (2d) 247, 92 NW (2d) 824.

Since it is in the context of treatment after the accident that the legislature by 102.42 (7) obliges the employe to accept reasonable medical treatment, it was not intended to impose a duty on the employe to follow medical treatment for a nonemployment-related condition simply because of a possibility that the condition might be aggravated or accelerated by or subject to a breakdown during employment activity. *Tews L. & Co. v. Dept. of I., L. & H. R.* 38 W (2d) 665, 158 NW (2d) 377.

**102.43 History:** 1911 c. 50; Stats. 1911 s. 2349—9 (2) (intro. para.), (a), (b), (c); 1913 c. 599; 1917 c. 624; 1921 c. 462; 1923 c. 291 s. 3; Stats. 1923 s. 102.09 (2) (intro. par.), (a), (b), (c); 1931 c. 66 s. 2; 1931 c. 101; 1931 c. 403 s. 48; 1931 c. 469 s. 10, 11; Stats. 1931 s. 102.43; 1935 c. 465; 1939 c. 261; 1943 c. 270; 1949 c. 107.

**Editor's Note:** The history of this, and related sections, and the cases which interpreted the various amendments, are discussed in *Northern States P. Co. v. Industrial Comm.* 252 W 70, 30 NW (2d) 217.

An insurance carrier's payment of workmen's compensation to an injured employe, prior to hearing, from the date of injury through the following April 30th, and a letter to the industrial commission stating that the injured employe had been paid compensation through April 30th, did not constitute an admission that the employe was entitled to temporary total disability through April 30th, and did not preclude the commission from finding that temporary total disability ended on an earlier date and applying the overpayment as a credit against the award made by the commission for permanent partial disability. *Mc-*

*Cune v. Industrial Comm.* 260 W 499, 50 NW (2d) 683.

Where dermatitis is due to sensitization of the skin in the course of employment and is so severe that the employe can never work in an industrial plant again, he has a permanent disability not limited to his hands, but equivalent to disability of the whole body. *Wagner v. Industrial Comm.* 273 W 553, 79 NW (2d) 264, 80 NW (2d) 456.

No allowance can be made in a workmen's compensation award for physical or mental suffering of an employe, however acute, which does not interfere with the employe's earning capacity. *Shymanski v. Industrial Comm.* 274 W 307, 79 NW (2d) 640.

An employe need not be wholly unable to work in order to be entitled to temporary disability benefits during the healing period of his injury, and temporary partial disability compensation benefits may be awarded to an employe while he is convalescing and undergoing treatment, if at the same time he is able to do some work because his injury is of such a nature as does not totally disable him. *Larsen Co. v. Industrial Comm.* 9 W (2d) 386, 101 NW (2d) 129.

A disability is no longer temporary when treatment and convalescence is not likely to result in more improvement, and the industrial commission should award compensation for permanent disability; if the determination cannot be made that the disability will not increase, the commission should enter an interlocutory award, but temporary total disability should not be continued until the final disability rate can be finally determined. *Larsen Co. v. Industrial Comm.* 9 W (2d) 386, 101 NW (2d) 129.

Temporary benefits under workmen's compensation. *Jolivette*, 1966 WLR 949.

**102.44 History:** 1911 c. 50; Stats. 1911 s. 2394—9 (2) (d); 1913 c. 599; 1917 c. 624; 1919 c. 680 s. 3; 1923 c. 291 s. 3; 1923 c. 328; 1923 c. 449 s. 44; Stats. 1923 s. 102.09 (2) (d); 1925 c. 384; 1929 c. 453; 1931 c. 66 s. 1; 1931 c. 403 s. 49; Stats. 1931 s. 102.44; 1937 c. 180; 1939 c. 261; 1943 c. 270; 1945 c. 532; 1947 c. 475; 1951 c. 382; 1953 c. 328; 1969 c. 276 s. 584 (1) (a).

An employe suffering injury, impairing the vision of both eyes, but leaving a vision of 16-200 in one eye and 10-200 in the other, and good protective vision, enabling him to do coarse work and earn \$3.37 per day as a janitor, is not entitled to compensation under sec. 2394-9, Stats. 1921, as for total blindness of both eyes. *Nestle's Food Co. v. Industrial Comm.* 178 W 646, 190 NW 434.

Under 102.44 (3), the industrial commission may make an award for permanent partial disability, without a showing of actual wage loss or impairment of earning capacity, in cases not falling into the schedule or relative-injury class governed by other statutory provisions, it being considered that 102.11 (3), requiring that a wage loss be determined by considering the proportionate extent of impairment of the employe's earning capacity, etc., now applies only to temporary disabilities, because of 102.43 (2). *Northern States P. Co. v. Industrial Comm.* 252 W 70, 30 NW (2d) 217.

Where permanent partial disability cannot be determined by objective examination, it must be determined on the basis of wage impairment, although the ordinary determination is on the basis of physical impairment. *Wagner v. Industrial Comm.* 273 W 553, 79 NW (2d) 264, 80 NW (2d) 456.

The fact that the applicant was doing a hard day's work every day in the woods before his injury, together with testimony of his attending physician that the accident aggravated and accelerated a pre-existing osteoarthritis causing it to become disabling, and other medical testimony, was sufficient to support the industrial commission's finding that the applicant had sustained a permanent partial disability of 7½% as a result of the accident and injury. *Chequamegon Forest Products v. Industrial Comm.* 7 W (2d) 487, 96 NW (2d) 706.

In amending the workmen's compensation law of 1923, the legislature intended that the injuries of an applicant (nonschedule but permanent total or partial) are to be compared medically with injuries that would render a person permanently totally disabled for industrial purposes as provided in 102.44 (2), Stats. 1963, and not to injuries that would totally disable a person functionally without regard to loss of earning capacity. *Kurschner v. Dept. of I., L. & H. R.* 40 W (2d) 10, 161 NW (2d) 213. See also *Kohler Co. v. Dept. of I., L. & H. R.* 42 W (2d) 396, 167 NW (2d) 431.

**102.45 History:** 1945 c. 537; Stats. 1945 s. 102.45; 1969 c. 276 s. 584 (1) (a).

**102.46 History:** 1911 c. 50; Stats. 1911 s. 2394—9 (3); 1913 c. 599; 1917 c. 624; 1919 c. 692 s. 1; 1923 c. 291 s. 3; 1923 c. 328; 1923 c. 449 s. 44; Stats. 1923 s. 102.09 (3); 1931 c. 403 s. 50; Stats. 1931 s. 102.46; 1937 c. 180.

Where an employe having dependents is injured and temporarily disabled for a period exceeding a week, and subsequently dies as the result of his injuries, there are 2 distinct claims for indemnity: One by the employe himself for his temporary disablement, and the other by the dependents for the death, neither of which can be discharged by the owner of the other. *Milwaukee C. & G. Co. v. Industrial Comm.* 160 W 247, 151 NW 245.

No death benefits could be awarded where an employe's claim became barred by his failure to file an application within the period limited by 102.09, Stats. 1929. *Kohler v. Industrial Comm.* 224 W 369, 271 NW 383.

To be totally dependent, the claimant must be wholly and solely dependent on the deceased employe for support. *Burrows v. Industrial Comm.* 246 W 152, 16 NW (2d) 434.

**102.47 History:** 1913 c. 599; Stats. 1913 s. 2394—9 (4); 1915 c. 369; 1917 c. 624; 1919 c. 680 s. 3; 1923 c. 291 s. 3; 1923 c. 328; 1923 c. 449 s. 44; Stats. 1923 s. 102.09 (4); 1925 c. 171; 1927 c. 517; 1931 c. 403 s. 51; Stats. 1931 s. 102.47; 1945 c. 537; 1951 c. 382; 1953 c. 328; 1965 c. 166.

Where an employer and an employe entered into a stipulation of compromise, upon which the industrial commission made an award of compensation for occupational disease, payable in instalments, the right of the employe

was not contractual and disposition of the proceeds of the award remained subject to the workmen's compensation act regardless of the fact that the award was based upon a stipulation, and, accordingly, upon the employe's death before all instalments have been paid, his executor could not bring an action for unaccrued instalments, since, under the act, unaccrued instalments were to go for funeral expenses and to dependents, and the commission had primary jurisdiction in the matter of determining who were dependents. *Dowe v. Specialty Brass Co.* 219 W 192, 262 NW 605.

A widow, as a person wholly dependent on an employe receiving workmen's compensation for permanent partial disability and dying from causes not connected with his injury before disability indemnity ceased, is entitled to the employe's unaccrued compensation as a death benefit, but is limited to an amount not greater than the death benefit payable in cases of permanent total disability where the employe's death results from his injury, which death benefit is as fixed by 102.46, Stats. 1943. (*Milwaukee v. Industrial Comm.* 185 W 307, distinguished.) *Vander Heiden v. Industrial Comm.* 246 W 543, 17 NW (2d) 898.

**102.48 History:** 1913 c. 599; Stats. 1913 s. 2394—9 (4) (c), (e); 1915 c. 369; 1917 c. 624; 1923 c. 291 s. 3; 1923 c. 328; 1923 c. 449 s. 44; Stats. 1923 s. 102.09 (4) (c), (4n) (b); 1925 c. 171; Stats. 1925 s. 102.09 (4a), (4n) (b); 1929 c. 453; 1931 c. 403 s. 52; 1931 c. 469 s. 3; Stats. 1931 s. 102.48; 1937 c. 180; 1947 c. 475; 1951 c. 382; 1959 c. 280; 1967 c. 350; 1969 c. 276 s. 584 (1) (a).

Since the parents of the deceased employe were partially dependent on him, the parents were entitled to the death benefit notwithstanding that they had inherited from him more than they would have received from him had he continued to live, and that such inheritance made it improbable that the public would ever be called on to support them. *Wisconsin B. & I. Co. v. Industrial Comm.* 222 W 194, 268 NW 134.

The evidence, although conflicting as to the existence of friendly relations between a deceased employe and his divorced parents, was sufficient to sustain a finding of the commission that they were the "unestranged" parents of the deceased, so as to be entitled to death benefits. *Burt Brothers v. Industrial Comm.* 255 W 488, 39 NW (2d) 388.

A widowed mother, living with a daughter in the daughter's home without paying any rent under an arrangement whereby the mother had sold her house to the daughter, was not wholly dependent for support on a son who had his lodging at certain premises which the mother owned; hence the mother was entitled to benefits only for partial dependency following the son's death from injuries incurred in his employment. *Neumann v. Industrial Comm.* 257 W 120, 42 NW (2d) 445.

**102.49 History:** 1923 c. 291 s. 3; 1923 c. 328; 1923 c. 449 s. 44; Stats. 1923 s. 102.09 (4m); 1925 c. 384; 1927 c. 517; 1929 c. 453, 491; 1931 c. 403 s. 53; 1931 c. 469 s. 4; Stats. 1931 s. 102.49; 1935 c. 465; 1939 c. 513 s. 31; 1943 c. 270; 1947 c. 475; 1951 c. 382; 1951 c. 511 s. 47; 1953

c. 328; 1955 c. 281; 1957 c. 58; 1959 c. 10; 1963 c. 281; 1969 c. 276 ss. 395, 584 (1) (a).

See notes to secs. 2 and 8, art. VIII, citing *B. F. Sturtevant Co. v. Industrial Comm.* 186 W 10, 202 NW 324.

The obligation of an employer to pay the designated amount into the state treasury, where the employe dies leaving no person wholly dependent, is not restricted to cases of partial dependency. If there are no dependents, the state receives the entire amount. *Wisconsin G. & E. Co. v. Industrial Comm.* 202 W 314, 232 NW 699.

Payment to the state fund is sustained despite the contention that the compensation act did not apply to the employment contract. *Interstate P. Co. v. Industrial Comm.* 203 W 466, 234 NW 889.

102.49, Stats. 1965, is an expression of the public policy of the state to provide a state fund to afford additional death benefits for the welfare of dependent children of employes who sustain injuries, in the course of their employment, which result in death. *Holley v. Dept. of I., L. & H. R.* 39 W (2d) 260, 158 NW (2d) 910.

An insurer who paid money to Wisconsin under 102.49 in a case of a covered employe killed in Minnesota could not maintain an action in Minnesota against the tortfeasor. *Shelby Mut. Ins. Co. v. Girard Steel Supply Co.* 224 F Supp. 690.

When an injured employe makes settlement during his lifetime which disposes of the entire claim of himself and his wife and this has been approved by the industrial commission, his minor children cannot claim a benefit under this section after his death. 24 Atty. Gen. 267.

**102.50 History:** 1911 c. 50; Stats. 1911 s. 2394—9 (4) (d); 1913 c. 599; 1917 c. 624; 1919 c. 680 s. 3; 1923 c. 328; 1923 c. 449 s. 44; Stats. 1923 s. 102.09 (4n) (a); 1925 c. 171; 1931 c. 403 s. 54; Stats. 1931 s. 102.50; 1945 c. 537; 1953 c. 328; 1963 c. 281.

**102.51 History:** 1911 c. 50; Stats. 1911 s. 2394—10 (4), (5), (6); 1913 c. 599; 1915 c. 462; 1917 c. 624; 1923 c. 291 s. 3; Stats. 1923 s. 102.11 (4), (5), (6); 1929 c. 453 s. 1, 2; Stats. 1929 s. 102.09 (4p), (4r), (4s) to (4u); 1931 c. 14; 1931 c. 403 s. 55; 1931 c. 433; 1931 c. 469 s. 12; Stats. 1931 s. 102.51; 1939 c. 437; 1943 c. 270; 1945 c. 537; 1949 c. 107; 1951 c. 382; 1969 c. 276 s. 584 (1) (a).

1. Who are dependents.
2. Limitation.
3. Dependency as of date of injury.
4. Division among dependents.

#### 1. Who Are Dependents.

A widow, whose mind had been impaired for years and who had passed much time at various hospitals, was living temporarily with a son in another city when her husband was killed. A finding that the widow was living with her husband at the time of his death established a conclusive presumption that she was wholly dependent on him for support, even though she had an independent income. *Belle C. M. I. Co. v. Rowland*, 170 W 293, 174 NW 899.

Where the minor son, living most of the time with his father, worked on the father's farm 6½ months of the year immediately preceding his death, and received board and a home during the entire year except for about one month, the excess of the value of his services more than equaled the 4½ months' board for which the father received nothing; and a finding by the industrial commission that such excess was \$150 was amply supported by evidence on which to base the award for the son's death. Services rendered by a son to a partially dependent father are a proper basis of compensation, as it is not necessary that the son's contribution be in cash. *Thunder Lake L. Co. v. Industrial Comm.* 188 W 418, 206 NW 177.

To support an award under 102.11 (3) (c), Stats. 1923, in favor of 2 minor children of a deceased employe there must be sufficient legal evidence to warrant the conclusion that they were living with the deceased at the time of his death and that there was no surviving dependent parent. A wife, who had left her husband and for 4 years lived with another man, is not a dependent parent. *Lloyd McAlpine L. Co. v. Industrial Comm.* 188 W 642, 206 NW 914.

The right of children under 18 years of age to compensation for the death of their father not living with his wife at the time of death is not affected by the provision restricting the right to cases where there is no surviving dependent parent, where it was not contended that the employe's wife was dependent upon him for support. The provision that the charging of full support of a child upon a divorced parent shall constitute living with the parent so charged is applicable only after a divorce is adjudged. *Olson-Walker v. Industrial Comm.* 207 W 576, 242 NW 350.

A son of an employe by a divorced first wife was "dependent," and entitled to share compensation awarded for the employe's death with the employe's second wife, although the divorce decree awarded the mother custody of the son, since the employe still had an obligation to support the son at the time of the employe's death. *Shea v. Industrial Comm.* 217 W 263, 258 NW 779.

Under provisions in the workmen's compensation act the legislative intent was to give a husband, a wife, or a child under the age of 18 years if there is no surviving dependent parent, the benefit of a conclusive presumption of being solely and wholly dependent on the deceased employe, and to require other dependents to establish their dependency in order to share in the death benefit, but the words "solely" and "wholly" as used in 102.51 (1) are synonymous, meaning total dependency on the deceased employe, and do not exclude other dependents from sharing in the death benefit. Hence, where a son under 18 and a son over 18 were both totally dependent for support on their father, and there was no surviving dependent parent, the death benefit should have been divided between the 2 sons, instead of being awarded solely to the son under 18. *Krueger v. Industrial Comm.* 237 W 158, 295 NW 33.

On a record in a workmen's compensation proceeding showing that a wife had left her

husband 11 days preceding his death, removed some of her personal effects, and commenced an action for divorce, but that there was not such ill will or such definite termination of their mutual affection and desire to preserve their marital relations as to reasonably admit of finding that there was an estrangement and such actual separation in the nature of an estrangement as to constitute a severance of the marital relation, the wife was entitled to death benefits under the provision in 102.51 (1), that a wife is conclusively presumed to be solely and wholly dependent for support on a husband "with whom she is living" at the time of his death. *Samp v. Industrial Comm.* 240 W 559, 3 NW (2d) 371.

The evidence warranted the commission's finding that a minor child under the age of 18, who was sent to live with her brother and sister-in-law as a matter of convenience to all concerned after the death of her mother, was "living with" her widowed father, within the meaning of 102.51 (1) at the time of his death, so that she was conclusively presumed to be solely and wholly dependent on him for support. *C. F. Trantow Co. v. Industrial Comm.* 262 W 586, 55 NW (2d) 884.

Under 102.51 (1) a child was within the described category, even though she was not actually living with such parent and he had never supported her, so that she was entitled to death benefits under the act. *Speelmon Elevated Tank Serv. v. Industrial Comm.* 2 W (2d) 181, 85 NW (2d) 834.

Illegitimate children not living with deceased employe, but to whom he sent clothing and gifts, are conclusively presumed dependents under 102.51 (1); 102.51 (2) (a) does not exclude them, since it was intended to limit the class of those not entitled to the conclusive presumption of dependency but who otherwise establish dependency in fact. *Zschock v. Industrial Comm.* 11 W (2d) 231, 105 NW (2d) 374.

## 2. Limitation.

Dependence of parents upon their children will not be presumed. Parents claiming dependency must establish that fact by a preponderance of the evidence, the burden of proof being the same as in ordinary civil actions. *Wisconsin D. Co. v. Industrial Comm.* 161 W 42, 152 NW 460.

Compensation could not be awarded to a sister of an employe sustaining fatal injuries as one wholly dependent upon him, where the evidence showed among other things that the brother and sister were on friendly terms, that during 5 months prior to his death he had partly paid for her care, board and lodging furnished to her by an uncle, that she will probably be able to provide partially for her own needs, and that if he had lived he would probably have continued to contribute to her support. *Jackson v. Industrial Comm.* 164 W 94, 159 NW 561.

A person is not "a member of the family of the deceased" who claimed to be his wife, but whose right to that designation was based upon a void marriage. *Hall v. Industrial Comm.* 165 W 364, 162 NW 312.

A finding that a son under 18 years of age living in a foreign country who received contributions of money from his father, who died

before the hearing, was wholly dependent on deceased was proper. But the presumption of continuance of life is insufficient to sustain a finding that such son was alive at the death of his father so as to entitle him to benefits under the workmen's compensation act. *Milwaukee W. F. Co. v. Industrial Comm.* 179 W 223, 190 NW 439.

A widow with two children furnished board and lodging to a deceased employe of a corporation pursuant to agreement which he or she might terminate at any time. The deceased sometimes contributed groceries and clothing to help carry on the household. The widow was not a member of the deceased's "family" nor one of his "dependents." *Illinois S. Co. v. Industrial Comm.* 184 W 273, 199 NW 154.

Except as provided by statute, dependency is not presumed but must be found as a fact. Where the father of an adult son was living in a home abundantly provided for by the joint efforts of himself and his wife, and owned considerable property, the fact that the son gave his father \$35 which the latter used to purchase clothing does not justify an award to the father as a dependent. *Baraboo v. Industrial Comm.* 185 W 555, 201 NW 809.

In an award to a father for the death of a minor son, dependency of the father must be found as a primary fact. The right of a father to the wages and services of a minor son is by virtue of parenthood, and this right is entirely apart from the question of dependency. Evidence of contributions to a father by a deceased son only become material as a measure of the award when partial dependency in fact exists. *Interlake P. & P. Co. v. Industrial Comm.* 186 W 228, 202 NW 175.

Whether a minor child of a deceased employe from whom the mother had been divorced was wholly dependent on decedent for support at the time of his death presents a question of law; and a finding of the industrial commission on undisputed evidence is not conclusive, as a construction of the statute and of the provisions of the divorce judgment as to the support of the child. *Rohan M. Co. v. Industrial Comm.* 188 W 223, 205 NW 930.

Evidence that the wife of a deceased employe lived in a foreign country, that although her husband had lived 10 years in America, he had made no plans for her to join him, and that for 4 years he had not contributed to her support, is sufficient to justify a finding of the industrial commission that claimant was not living with her husband at such time, the question being one not of law but of fact, the determination of which by the industrial commission will not be disturbed if supported by any evidence. *Stojic v. Industrial Comm.* 188 W 228, 205 NW 795.

An unmarried woman 51 years old, who had remained at home all her life and had been supported solely by her father, helping with the housework because of filial devotion, is wholly dependent on her father and entitled to compensation as a total dependent. *Janesville S. & G. Co. v. Industrial Comm.* 197 W 421, 222 NW 317.

No award can be made of compensation to parents for the loss of a child who has never been able to contribute more than the cost of



his support and maintenance. Present dependency must be shown, and that failing, there can be no award for future expectations of contributions, nor any imposition upon an employer of burial expenses. *Wisconsin M. L. Co. v. Industrial Comm.* 184 W 203, 199 NW 221; *Thunder Lake L. Co. v. Industrial Comm.* 188 W 418, 206 NW 177; *Milwaukee v. Industrial Comm.* 198 W 583, 225 NW 203.

A divorced daughter residing with her father, doing housework and receiving \$15 weekly, was not a wage earner, and was entitled to receive compensation for her father's death. *Milwaukee C. Co. v. Kimball*, 201 W 516, 230 NW 627.

A 35-year-old son of a deceased employe, if being supported by the employe at the time of the latter's injury without any contractual obligation to do so, was "dependent," within the workmen's compensation act, so as to be entitled to a death benefit, even though the son was physically fit and mentally competent, especially where the son was being supported by the employe because the son could not find work owing to the economic depression. *Northern Hotel Co. v. Industrial Comm.* 223 W 297, 270 NW 66.

There being no conclusive presumption of grandchildren's dependency on an employe, their partial dependency is a fact question. *Universal Foundry Co. v. Industrial Comm.* 224 W 311, 272 NW 23.

A person not related to the employe by blood or marriage may be a member of the family of the deceased employe, so as to be entitled to compensation on his death. An award of benefits, on the ground of dependency, to the stepdaughter of a deceased employe, who had lived in her house, could not be based on the total contributions made by him toward the current household expenses, but must be based on the difference between the total contributions he made and the cost of his support. *Duluth-Superior Milling Co. v. Industrial Comm.* 226 W 187, 275 NW 515, 276 NW 300.

Under 102.51 (2) the family relationship contemplated, although it need not be a blood relationship, must consist of legitimate ties; hence an unmarried woman living with a married man cannot be considered a member of his family, and likewise her child living with them cannot be so considered. *T. J. Moss Tie Co. v. Industrial Comm.* 251 W 57, 27 NW (2d) 725.

To be eligible for death benefits as "dependents," those persons conclusively presumed to be dependents under 102.51 (4), Stats. 1945, as well as those obliged to establish their dependency by evidence under 102.51 (2), must have qualified as belonging to a class described in 102.51 (2). An illegitimate minor child, who was a member of her father's family, and who was living with him at the time of his death and was being properly supported by him, was a "dependent" of his notwithstanding the absence of a legal marriage between her parents. *Waunakee Canning Corp. v. Industrial Comm.* 268 W 518, 68 NW (2d) 25.

Under 102.51 (1) and (2) (a) two illegitimate children of a deceased employe were not precluded from sharing in death benefits

awarded by the industrial commission merely because they were not in fact living with the decedent and his wife at the time of his death. *Zschock v. Industrial Comm.* 11 W (2d) 231, 105 NW (2d) 374.

Determination of partial dependency of an adult. 22 MLR 110.

### 3. *Dependency as of Date of Injury.*

The determination of a deceased employe's dependents and the extent of their dependency is made as of the time of his injury, not as of the time of his death. Every claimant must prove that at the date of the injury he was within one of the dependent classes enumerated. Under these rules a wife at date of the death is not a dependent unless she was a wife at date of the injury; and a child begotten by the deceased before the accident, legitimized by the marriage of the father and mother after the accident, and born after the father's death, was not a dependent. *Kuetbach v. Industrial Comm.* 166 W 378, 165 NW 302.

Whether husband and wife were living, each with the other, at the time of an injury is a question of fact to be decided by the industrial commission; and testimony strongly tending to show that they were estranged and an actual separation had existed for more than a year and a half prior to the injury was held sufficient to support a finding that they were not then living together. *Smith v. Scheidegger Brothers*, 170 W 162, 174 NW 462.

It is the intent of the statutes, although fixing the status of "dependents," such as a wife, and their rights to death benefits, as of the date of injury, to provide only for dependents who also are alive at the time of the death of the injured person. *Chilovi v. Industrial Comm.* 246 W 482, 17 NW (2d) 575.

### 4. *Division Among Dependents.*

102.51 (6) authorizes the industrial commission, in a proper case, to reassign a death benefit as between a widow and her children. *Gall v. Robertson*, 10 W (2d) 594, 103 NW (2d) 903.

**102.52 History:** 1913 c. 599; Stats. 1913 s. 2394—9 (5); 1915 c. 378; Stats. 1915 s. 2394—9 (5) (a); 1917 c. 624; 1919 c. 680 s. 2 to 5; 1923 c. 291 s. 3; 1923 c. 328; 1923 c. 449 s. 44; Stats. 1923 s. 102.09 (5) (a); 1927 c. 517; 1931 c. 210; 1931 c. 403 s. 56; 1931 c. 469 s. 13; Stats. 1931 s. 102.52; 1947 c. 475; 1953 c. 328; 1965 c. 166.

The mere naming of an injury not listed in the statutory schedule is not a sufficient fact basis for a conclusion of law as to the proper compensation. *Gerue v. Medford B. Co.* 205 W 68, 236 NW 528.

The "healing period" is the period prior to the time when the condition becomes stationary, and requires the postponement of fixing permanent partial disability to a time when it becomes apparent that the injured member will get no better or no worse because of the injury. Evidence that injury to an employe's leg incapacitates him from working, is still causing pain, and that the prognosis is a likelihood of necessity of amputation, warrants the conclusion of the industrial commission that the healing period has not passed, even though such evidence is opposed by very

strong testimony that the condition is at present fixed and that the permanent partial disability is of much less extent than would result in the case of amputation. *Knobbe v. Industrial Comm.* 208 W 185, 242 NW 501.

See note to 102.55, citing *Moen v. Industrial Comm.* 242 W 337, 8 NW (2d) 368.

If the loss of a member, or impairment of a faculty, as a result of occupational disease is a disability provided for in the schedule in 102.52, Stats. 1951, or is a partial loss, or impairment, as to which the percentage formula provided for in 102.55 (3) is applicable, this in itself establishes a compensable disability under the workmen's compensation act as existing in 1951, irrespective of any wage loss. *Green Bay Drop Forge Co. v. Industrial Comm.* 265 W 38, 60 NW (2d) 409, 61 NW (2d) 847.

See note to 102.43, citing *Wagner v. Industrial Comm.* 273 W 553, 79 NW (2d) 264, 80 NW (2d) 456.

A workman who had only 4% vision in one eye because of preexisting conditions can recover only 4% of the scheduled amount. *Mednis v. Industrial Comm.* 27 W (2d) 439, 134 NW (2d) 416.

**102.53 History:** 1947 c. 475; Stats. 1947 s. 102.53; 1951 c. 382.

The provision for reduction of compensation where an employe is above a certain age does not apply to death benefits. *Milwaukee v. Ritzow*, 158 W 376, 149 NW 480.

**102.55 History:** 1923 c. 291 s. 3; 1923 c. 328; 1923 c. 449 s. 4; Stats. 1923 s. 102.09 (5) (em) to (g) except (fn); 1931 c. 403 s. 59; Stats. 1931 s. 102.55; 1943 c. 207; 1947 c. 475; 1969 c. 276 s. 584 (1) (a).

Where an employe suffered an injury which resulted in an aphakic eye, and, because of consequent inability to correlate the vision of the injured eye with the uninjured eye, the employe had little or no use of the injured eye, but, in case the vision of the uninjured eye should be lost, the injured eye could be fitted with lenses which would give useful vision, it was within the jurisdiction of the commission to find that the impairment or loss of vision of the injured eye for industrial use was not total but was 74.48%. *Moen v. Industrial Comm.* 242 W 337, 8 NW (2d) 368.

See note to 102.52, citing *Green Bay Drop Forge Co. v. Industrial Comm.* 265 W 38, 60 NW (2d) 409, 61 NW (2d) 847.

**102.555 History:** 1955 c. 281; Stats. 1955 s. 102.555; 1957 c. 204; 1959 c. 280; 1967 c. 350; 1969 c. 341.

**Committee Note, 1969:** This enables dependents to make claim where the employe died if hearing tests have been made as provided. [Bill 344-S]

A provision of the Wisconsin administrative code to the effect that, in determining loss of hearing due to industry in workmen's compensation cases, allowance and specified deductions should be made for loss of hearing which accompanies advancing age (presbycusis), is not in conflict with provisions in 102.555 (4), Stats. 1957, for deductions on account of the life-expectancy factor. *Janiszewski v. Industrial Comm.* 9 W (2d) 171, 100 NW (2d) 347.

Where an award was made on a claim for workmen's compensation for hearing loss under the 1951 statutes, additional injury due to subsequent exposure constitutes a new and separate claim. 48 Atty. Gen. 140.

**102.56 History:** 1923 c. 291 s. 3; 1923 c. 328; 1923 c. 449 s. 44; Stats. 1923 s. 102.09 (5) (fn); 1931 c. 403 s. 60; Stats. 1931 s. 102.56; 1959 c. 280; 1969 c. 276 s. 584 (1) (a).

**102.565 History:** 1935 c. 465, 488; Stats. 1935 s. 102.565; 1937 c. 180; 1949 c. 107; 1953 c. 328; 1955 c. 281; 1961 c. 269; 1969 c. 276 s. 584 (1) (a).

**Editor's Note:** The amendatory legislation of 1953 (ch. 328, Laws 1953) was considered in *Green Bay Drop Forge Co. v. Industrial Comm.* 265 W 38, 60 NW (2d) 409.

Compensation of occupational disease. *Rabinovitz*, 12 WLR 198.

**102.57 History:** 1913 c. 599; Stats. 1913 s. 2394—9 (5) (a); 1915 c. 378; Stats. 1915 s. 2394—9 (5) (h); 1923 c. 291 s. 3; Stats. 1923 s. 102.09 (5) (h); 1931 c. 403 s. 61; Stats. 1931 s. 102.57; 1953 c. 328; 1967 c. 350; 1969 c. 276 s. 584 (1) (a).

An injury is caused by the failure of an employer to guard a machine in compliance with an order of the industrial commission, if the particular injury in question would not have happened if the machine had been guarded as required. *Manitowoc B. Works v. Industrial Comm.* 165 W 592, 163 NW 172.

The allowance of a 15 per cent increase in an award of the industrial commission, because of the failure of the employer to comply with the order of the commission, requiring portable electric lights to be equipped with a certain extension cord, is improper where the employe, who had been instructed to use a properly equipped portable light which the employer supplied, was injured while using a different cord, which had been equipped as a temporary cord for an electric drill, although he had not been specifically instructed not to use this cord for a portable light. *Cream City F. Co. v. Industrial Comm.* 188 W 648, 206 NW 875.

Evidence which establishes only the existence of an unguarded opening in a building under construction, and that the deceased employe fell through it, the cause of the fall and the circumstances thereof being wholly speculative, does not authorize an award of increased compensation, under 102.09 (5) (h), Stats. 1923, for a violation of a safety order of the industrial commission which required a railing about the opening. *Wm. Esser & Co. v. Industrial Comm.* 191 W 473, 211 NW 150.

Where deceased was caught in a belt idling on the pulley of the engine and was killed, claimant was not entitled to increased compensation, the accident being due primarily to a failure to stop the engine, and not to a failure to furnish a safe place of employment. *Northwestern C. & S. Co. v. Industrial Comm.* 194 W 337, 216 NW 485.

In order to justify the 15 per cent penalty, it must appear that the industrial commission's order was within its powers. *Bentley Brothers v. Industrial Comm.* 194 W 610, 217 NW 316.

To recover the 15 per cent additional compensation for failure of the employer to com-

ply with a safety order of the industrial commission on the ground that the employer did not use a basket guard, the claimant was required at least to prove that the employer had knowledge of the existence of such a guard and that it was available for sale on the market, and that its use would be practicable. *Milwaukee C. Co. v. Industrial Comm.* 197 W 414, 222 NW 251.

The industrial commission may prescribe standards and require the adoption of safety equipment, but it has no power to issue orders with respect to the actual operation of the physical plant. The statute does not empower the industrial commission to order that "the landing doors" of passenger elevators "must be closed and locked." *Saxe O. Corp. v. Industrial Comm.* 197 W 552, 222 NW 781.

Compensation can be awarded for failure to comply with a safety order only where the employer would be liable for a penalty or forfeiture under 101.28. *Fritschler v. Industrial Comm.* 209 W 588, 245 NW 669.

A claim for increased compensation is not barred by 6-year limitations, since such claim is not a separate cause of action. Increased compensation imposed where injury is caused by an employer's violation of safety orders is not a "penalty" or "forfeiture" within the 2-year limitation for actions on statutory penalties or forfeitures. *R. J. Wilson Co. v. Industrial Comm.* 219 W 463, 263 NW 204.

In order to support a finding that the employer failed to keep the elevator gate in proper operating condition, the evidence had to show that the gate was not in such condition, that it did not function at the time of the employe's injury, and that the employer knew or ought to have known of such condition. *Badger Dye Works v. Industrial Comm.* 221 W 407, 266 NW 787.

The employer's obligation to pay increased compensation for his failure to provide a safety device of the standard required by the industrial commission's order is not excused by the fact that the employe failed to use a noncomplying, inefficient and awkward device. *Daniels v. Industrial Comm.* 241 W 649, 6 NW (2d) 640.

When increased compensation is claimed in a workmen's compensation proceeding on the ground that the injury was caused by the employer's failure to comply with a "lawful" order of the industrial commission, there must be, as an essential basis for the recovery of such penalty, an order, "in conformity with law"; and when it appears in an action to vacate an award for such increased compensation that the order relied on is not in conformity with law and is therefore unlawful, the award must be set aside. *Robert A. Johnston Co. v. Industrial Comm.* 242 W 299, 7 NW (2d) 854.

Where the employe's injury while attempting to feed paper into the horizontal feed roll of a converting machine was caused by the absence of a guard at that point, the injury was caused by the employer's failure to comply with a safety order of the industrial commission requiring the top, "front," and open sides of horizontal feed rollers to be inclosed by a cover, warranting an award of 15 per cent increased compensation under this section, since

the "front" of the roll in question was the side where the paper being processed entered. *Marinette Paper Co. v. Industrial Comm.* 251 W 60, 27 NW (2d) 722.

Before being subjected to a penalty for failure to comply with a safety order of the industrial commission, an employer engaged in any work ought to be reasonably advised or informed as to what safety devices or safeguards are required in order that the question as to whether he is or is not complying therewith may be at least reasonably clear. *Harnischfeger Corp. v. Industrial Comm.* 263 W 76, 56 NW (2d) 499.

See note to 101.06, on safe employment, citing *Northern Light Co. v. Industrial Comm.* 264 W 313, 58 NW (2d) 653.

When one owing a duty to make a place or an employment safe fails to do so and that accident occurs which the performance of the duty was designed to prevent, then the law presumes that the damage was caused by such failure; and if such presumption is not rebutted by evidence, the plaintiff has met his burden of proof. *Van Pool v. Industrial Comm.* 267 W 292, 64 NW (2d) 813.

Where injuries resulted when a movable crane being used to move steel beams was negligently swung the wrong way and hit a power line 37 feet away, the location of the crane did not violate a safety order of the industrial commission, nor was the safe place statute violated, and the employer was not liable for increased compensation. *L. G. Arnold, Inc. v. Industrial Comm.* 267 W 521, 66 NW (2d) 176.

An employer will not be subjected to a penalty where the injury to an employe is the result of negligent or inadvertent acts of its employes. The presumption, that there was a causal connection between injury to an employe and violation of a safety order by an employer where the injury was such as the order was intended to prevent, does not attach until such violation of the safety order is shown by evidence. *Wisconsin B.&I. Co. v. Industrial Comm.* 273 W 266, 77 NW (2d) 413.

See note to 101.10, citing *Manitowoc Co. v. Industrial Comm.* 273 W 293, 77 NW (2d) 693.

Where a contractor hired a certified blaster for demolition work and furnished all required supplies, he is not liable for the penalty when the blaster was killed because he failed to obey the rules of the industrial commission. *L. G. Arnold, Inc. v. Industrial Comm.* 2 W (2d) 186, 85 NW (2d) 821.

In a workmen's compensation proceeding on the claim of a subcontractor's employe who, while assisting in installing flashing on a roof of a building, fell through an opening in the roof created by the general contractor, the evidence supported the industrial commission's finding that the subcontractor-employer had violated certain safety orders in failing to place any guard railings or toeboards around the opening, and hence warranted an award of 15% increased compensation. The responsibility for providing the safeguards in question rested with the immediate employer, in the absence of an assignment of such responsibility as authorized by such order. *Wisconsin B.&I. Co. v. Industrial Comm.* 8 W (2d) 612, 99 NW (2d) 612.

Where a foreman told a lineman to start work, on the mistaken assumption that the current in the line had been cut off, the assessment of the 15% penalty was proper. Even though accident happened because of human error or negligence, the employer failed to provide safe employment. *Eau Claire Electric Co-op v. Industrial Comm.* 10 W (2d) 209, 102 NW (2d) 274.

An employer may not be penalized where the violation of the safety order was attributable to the momentary negligence of a fellow employe who was not a supervisor. *Icke Construction Co. v. Industrial Comm.* 30 W (2d) 63, 139 NW (2d) 841.

Where an employe had an accident which involved a violation of a safety order but no compensation was paid and he later suffered another injury which the examiner found aggravated the first injury, no increase in compensation is payable where the industrial commission determined that all of the disability was attributable to the 2nd injury. *Casey v. Industrial Comm.* 30 W (2d) 542, 141 NW (2d) 232.

Mere violation of the safe-place statute does not sustain an award of 15% increased benefits under 102.57, Stats. 1963, but the applicant must show that the violation was the cause of the accident if the penalty is to be imposed. *Van Sluys v. Dept. of I., L. & H. R.* 38 W (2d) 419, 157 NW (2d) 606.

**102.58 History:** 1913 c. 599; Stats. 1913 s. 2394—9 (5) (b) to (d); 1915 c. 378; Stats. 1915 s. 2394—9 (5) (i) to (k); 1917 c. 624; 1919 c. 680 s. 3; 1923 c. 291 s. 3; Stats. 1923 s. 102.09 (5) (i) to (k); 1931 c. 403 s. 62; Stats. 1931 s. 102.58; 1943 c. 270; 1945 c. 537; 1949 c. 107; 1965 c. 166; 1967 c. 350; 1969 c. 276 s. 584 (1) (a).

To reduce compensation 15% where the injury resulted from the employe's wilful failure to obey any reasonable rule adopted by his employer for his safety, the disobedience must, in order to have that effect, have been deliberate, not merely a thoughtless act on the spur of the moment. *Frint M. C. Co. v. Industrial Comm.* 168 W 436, 170 NW 285.

Where an employe, intoxicated and in no condition to counsel the driver of an automobile or act for his own safety, got into the car and rode with the drunken driver, the employe's own intoxication proximately contributed to his injuries when the car left the road because of the drunken driver's default, and the compensation to which the employe would otherwise have been entitled was subject to a 15% deduction. *Nutrine Candy Co. v. Industrial Comm.* 243 W 52, 9 NW (2d) 94.

On the issue of intoxication of an employe at the time of an accident, so as to reduce the amount of a compensation award by 15%, the employer has the burden of proving all facts necessary for such decrease. The employe not only must have been intoxicated but the injury must have resulted from the intoxication. *Massachusetts B. & Ins. Co. v. Industrial Comm.* 8 W (2d) 606, 99 NW (2d) 809.

The 15% penalty may be assessed against employes of governmental subdivisions. 17 Atty. Gen. 438.

**102.59 History:** 1919 c. 680; Stats. 1919 s.

2394—9 (6); 1923 c. 291 s. 3; Stats. 1923 s. 102.09 (6); 1925 c. 384; 1927 c. 517; 1929 c. 453, 491; 1931 c. 403 s. 63; Stats. 1931 s. 102.59; 1933 c. 402 s. 2; 1939 c. 261; 1939 c. 513 s. 31; 1943 c. 270; 1951 c. 382; 1951 c. 511 s. 47; 1953 c. 328; 1955 c. 281, 621; 1957 c. 97; 1967 c. 350; 1969 c. 276 ss. 584 (1) (a), 598 (1).

**102.60 History:** 1917 c. 624; Stats. 1917 s. 2394—9 (6); 1919 c. 680 s. 1; Stats. 1919 s. 2394—9 (7); 1923 c. 291 s. 3; Stats. 1923 s. 102.09 (7); 1925 c. 384; 1927 c. 517; 1929 c. 453; 1931 c. 403 s. 64; 1937 c. 401; Spl. S. 1937 c. 6; 1945 c. 537; 1957 c. 204; 1967 c. 350.

**Editor's Note:** Statutory provisions on the same subject, in effect prior to the adoption of the amendatory legislation of 1925, were considered in the following cases: *Brenner v. Heruben*, 170 W 565, 176 NW 228; *Lupinski v. Industrial Comm.* 188 W 409, 206 NW 195; and *New Holstein v. Industrial Comm.* 191 W 93, 209 NW 695.

If the parents of a boy under 16 years of age who had falsely represented his age in order to secure employment did not make any representations whatever to the employer, and there is no evidence that they knew of the false representations made by the boy, the double compensation was properly awarded by the industrial commission. Dependency of parents on a minor child will not be presumed but must be proved by a fair preponderance of the evidence, and as a prerequisite to an award of compensation. *Zurich G. A. & L. Co. v. Industrial Comm.* 196 W 159, 216 NW 137, 220 NW 377.

Where a county judge had issued a permit to employ a minor, the employer was not liable for double compensation for the minor's death, notwithstanding the employer did not have the permit on file. *Calvetti v. Gasbarri*, 201 W 297, 230 NW 130.

Double the amount otherwise recovered should be allowed for the death of a minor of permit age engaged in digging a sewer without a permit for such employment. *Aylward v. Industrial Comm.* 202 W 171, 228 NW 133, 231 NW 599, 232 NW 535.

A father, claiming treble compensation for the death of a minor son injured while operating an elevator, had the burden of proving that the son's operation or use of the elevator was with the knowledge or consent of his employer. *Rutta v. Industrial Comm.* 216 W 238, 257 NW 15.

The burden of proof was upon the employe, claiming treble damages for injuries alleged to have been sustained while he was illegally permitted to operate an elevator, to establish that he was engaged in operating the elevator when injured. *Hills D. G. Co. v. Industrial Comm.* 217 W 76, 258 NW 336.

Under 102.60, Stats. 1931, a minor is entitled to double compensation, though the minor was an employe only by virtue of 102.07 (4), enlarging the term so as to include all helpers and assistants of employes, whether paid by the employer or the employe, if employed with knowledge actual or constructive of the employer. *Milwaukee News Co. v. Industrial Comm.* 224 W 130, 271 NW 78.

An award of treble compensation to a minor injured in an employment prohibited as to

minors of his age will not be set aside because of false representations as to age by the minor to the employer in obtaining the employment. *Bloomer Brewery, Inc. v. Industrial Comm.* 239 W 605, 2 NW (2d) 226.

For purposes of primary compensation an employe is impliedly authorized to do work other than that for which he may be specifically employed; but for purposes of treble compensation to an employe who is a minor, 102.60 (3) requires that he shall be "employed, required, suffered, or permitted" to work at prohibited employment, and contemplates that the authority to do the prohibited work in which he was engaged at the time of injury shall be fairly inferred from the terms of a specific employment or pursuant to a specific requirement imposed without its terms or that it shall be done with the employer's knowledge and acquiescence. *Anderson v. Industrial Comm.* 250 W 330, 27 NW (2d) 499.

The child-labor laws are for the protection of the child, and the duty of obeying such laws is on the employer and not on the minor. The liability of an employer for double compensation under 102.60, where the injured employe was a minor employed without a required labor permit, is not predicated on the negligence of the employer and he is liable even though the failure to have such permit was not a cause of the injury, and even though the minor obtained his employment by falsifying his age and practicing deceit. *Hertz Drivurself Stations v. Industrial Comm.* 254 W 308, 35 NW (2d) 910.

**102.61 History:** 1921 c. 534; Stats. 1921 s. 2394—9m; 1923 c. 291 s. 3; Stats. 1923 s. 102.10; 1931 c. 403 s. 65; Stats. 1931 s. 102.61; 1937 c. 349; 1949 c. 107; 1969 c. 276 s. 584 (1) (a).

In administering 102.61, Stats. 1949, the industrial commission has no power to interpret the federal and state rehabilitation laws and only a limited, if any, power of review of action of the state vocational education board in respect thereto. *Massachusetts B. & I. Co. v. Industrial Comm.* 275 W 505, 82 NW (2d) 191.

**102.62 History:** 1917 c. 624; Stats. 1917 s. 2394—9 (7); 1919 c. 680 s. 1; Stats. 1919 s. 2394—9 (8); 1921 c. 451; 1921 c. 590 s. 28; 1923 c. 291 s. 3; Stats. 1923 s. 102.09 (8); 1931 c. 403 s. 66; Stats. 1931 s. 102.62; 1951 c. 382; 1969 c. 276 s. 584 (1) (a).

A compromise agreement between an injured employe and a workmen's compensation insurance carrier, which purported to release the insurer and employer from all liability, did not relieve the employer from the statutory liability for increased compensation for injury caused by the employer's violation of safety orders, since the insurer, whose liability for such increased compensation was secondary, could not, under the workmen's compensation act, bargain for release of the primary liability of the employer. *R. J. Wilson Co. v. Industrial Comm.* 219 W 463, 263 NW 204.

**102.63 History:** 1925 c. 171; Stats. 1925 s. 102.09 (9); 1931 c. 403 s. 67; Stats. 1931 s. 102.63; 1969 c. 276 s. 584 (1) (a).

**102.64 History:** 1931 c. 403 s. 68; Stats. 1931

s. 102.64; 1953 c. 328; 1967 c. 43 s. 181m; 1967 c. 291 s. 14; 1969 c. 276.

**Revisor's Note, 1931:** This section is from third and fourth sentences of 102.16 (1); and 102.17 (5); and the second sentence of 102.26 (1) without change of meaning. [Bill 380-S, s. 68]

102.64 (3) does not require the attorney general to appear where the industrial commission acquiesces in the trial court's decision. *Cathey v. Industrial Comm.* 25 W (2d) 184, 130 NW (2d) 777.

## CHAPTER 103.

### Employment Regulations.

**103.01 History:** 1913 c. 381; Stats. 1913 s. 1728—1; 1923 c. 291 s. 3; Stats. 1923 s. 103.01; 1935 c. 329; 1969 c. 392 s. 84.

**103.02 History:** 1867 c. 83; 1877 c. 289; 1878 c. 187; R. S. 1878 s. 1728; 1883 c. 135; Ann. Stats. 1889 s. 1728; Stats. 1898 s. 1728; 1911 c. 548; Stats. 1911 s. 1728, 1728—1; 1913 c. 381; Stats. 1913 s. 1728—2; 1923 c. 117, 185; 1923 c. 291 s. 3; 1923 c. 449 s. 60b; Stats. 1923 s. 103.02; 1925 c. 27; 1931 c. 235; 1943 c. 375 s. 37; 1955 c. 10; 1957 c. 672; 1969 c. 276 s. 584 (1) (a).

On legislative power generally and on delegation of power see notes to sec. 1, art. IV.

Sec. 1728-2, Stats. 1915, requires that women shall not be permitted to work in any place for such a period of time as will be prejudicial to their health; and it authorizes the industrial commission upon investigation to determine what employments are dangerous or prejudicial to the life, health, safety or welfare of women, and to determine how long women may be engaged in any employment without incurring such danger or prejudice, and to establish by general orders the times which women may labor in such employments. *State v. Lange C. Co.* 164 W 228, 157 NW 777, 160 NW 57.

This section, regulating hours of labor for women, is applicable to municipal corporations in the performance of their proprietary functions. 12 Atty. Gen. 99.

An employer has no right to employ a woman during a day she has already worked the maximum length of time allowed under the statute. 13 Atty. Gen. 255.

A female apprentice is not limited by 103.02 (1), Stats. 1923, but comes under special provisions of 106.01. 13 Atty. Gen. 431.

A newspaper establishment engaged exclusively in printing and publishing a newspaper is not subject to regulations pertaining to hours of labor of female employes set forth in 103.01 to 103.04; but a newspaper establishment which carries on the business of job printing in connection with publication of a newspaper becomes subject to said regulations with respect to its business of job printing. 18 Atty. Gen. 38.

**103.04 History:** 1911 c. 548; Stats. 1911 s. 1728—1; 1913 c. 381; Stats. 1913 s. 1728—4; 1923 c. 291 s. 3; Stats. 1923 s. 103.04; 1931 c. 235; 1949 c. 262; 1969 c. 276 s. 584 (1) (a).

**103.06 History:** 1911 c. 522; Stats. 1911 s. 1728a—11; 1917 c. 677 s. 43; Spl. S. 1918 c. 2 s.