CHAPTER 102.

WORKMEN'S COMPENSATION.

102.01 Definitions. (1) The provisions of this chapter may be known, cited and referred to as the "Workmen's Compensation Act" and allowances, recoveries and liabilities under or pursuant to this act constitute and may be known, designated and referred to as "Workmen's Compensation."

(2) "Act" as used in this chapter means "chapter"; "compensation" means workmen's compensation; "primary compensation and death benefit" mean compensation or indemnity for disability, or death benefit, other than increased, double or treble compensation or death benefit; "injury" is mental or physical harm to an employe caused by accident or disease, and also damage to or destruction of artificial members, dental appliances, teeth, and eyeglasses, but, in the case of eyeglasses, only if such damage or destruction resulted from accident which also caused personal injury entitling the employe to compensation therefor (either for disability or treatment); "municipality" includes county, city, town, village, school district, sewer district, drainage district, and other public or quasi-public corporations; "examiner" includes the director of workmen's compensation; and "commission" means the industrial commission of Wisconsin. "Time of injury," "occurrence of injury," or "date of injury" is the date of the accident which caused the injury, or in the case of disease, the last day of work for the last employer whose employment caused disability, except that in case of occupational deafness the definition in s. 102.555 shall control.

History: 1951 c. 382; 1955 c. 281; 1957 c. 204.

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 claim for compensation therefor begins to run from that moment. Zabkowicz 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 Drop Forge Co. v. Industrial

Comm. 265 W 38, 60 NW (2d) 409, 61 NW (2d) 847.

There is no necessity that the actual disability of an employe from occupational disease should have occurred during the course of employment in order to permit recovery of benefits. Maynard Electric Steel C. 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.

102.03 Conditions of liability. (1) Liability under this chapter shall exist against an employer only where the following conditions concur:

(a) Where the employe sustains an injury.

(b) Where, at the time of the injury, both the employer and employe are subject to the provisions of this chapter.

(c) Where, at the time of the injury, the employe is performing service growing out of and incidental to his employment. Every employe going to and from his employment in the ordinary and usual way, while on the premises of his employer, or while in the immediate vicinity thereof if the injury results from an occurrence on the premises, shall be deemed to be performing service growing out of and incidental to his employment; and so shall any fireman responding to a call for assistance outside the limits of his city or village, unless such response is in violation of law. The premises of his employer shall be deemed to include also the premises of any other person on whose premises service is being performed.

(d) Where the injury is not intentionally self-inflicted.

(e) Where the accident or disease causing injury arises out of his employment.

(f) Every employe whose employment requires him to travel shall be deemed to be performing service growing out of and incidental to his employment at all times while on a trip, except when engaged in a deviation for a private or personal purpose. Acts reasonably necessary for living or incidental thereto shall not be regarded as such a deviation. Any accident or disease arising out of a hazard of such service shall be deemed to arise out of his employment.

(2) Where such conditions exist the right to the recovery of compensation pursuant to the provisions of this chapter shall be the exclusive remedy against the employer.

(3) In the case of disease intermittent periods of temporary disability shall create separate claims, and permanent partial disability shall create a claim separate from a claim for any subsequent disability which latter disability is the result of an intervening cause.

(4) The right to compensation and the amount thereof shall in all cases be determined in accordance with the provisions of law in effect as of the date of the injury.

History: 1953 c. 328.

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.

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.

Evidence that 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 that he used a company truck for transportation and for making emergency calls from his home, and that his repair tools were in the truck at the time of his death, sustained the commission's finding that the company furnished such employe with transportation as part of his contract of employment, and this supported the conclusion that he was performing service growing out of and incidental to his employment at the time of his death. West Shore Transportation 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.

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 USCA, 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.

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.

An employer's plant was inclosed 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.

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, and did not warrant the industrial commission's finding that he had left his office for personal reasons and was not engaged in his employment at the time of injury. Andreski v. Industrial Comm. 261 W 234, 52 NW (2d) 135.

Where an employe had entered on the performance of his duties, and the nature of his duties is 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, and in such case an employe injured in an accident must be deemed to have been engaged in performing service growing out of and incidental to his employment at the time of injury. Andreski v. Industrial Comm. 261 W 234, 52 NW (2d) 135.

The evidence warranted a finding of the commission that a county employe, whose office was at the courthouse but whose work as an assistant airport engineer often took him to one of the county airports, and who used a county automobile which he was required to keep in a county garage when not in actual use, picking it up at the county garage and driving it to the courthouse in the morning and returning it to the county garage in the evening, but who was driving his own car on a public highway from his home to the county garage to get the county car for the day when his car skidded off the highway, was merely on his way to work and not yet on the premises of his employer and was not performing services growing out of and incidental to his employment at the time of his injury. There is nothing in the record to sustain the contention that the trip to the garage subjected him to any additional hazard, (1) (f). Makal v. Industrial Comm. 262 W 215, 54 NW (2d) 905.

The evidence in a workmen's compensation proceeding supported findings that a sales manager of a Mineral Point lumber company, who intended to attend a lumbermen's convention in Milwaukee accompanied by his wife, and started from Mineral Point in his automobile accompanied by his wife and children, and was killed in an accident between Madison and Fond du Lac while on the way to Fond du Lac to leave the children there in the care of the wife's parents, had deviated from the course of his employment to accomplish a purely personal objective and was not within the scope of his employment at the time of the accident. The activities of the employe, in departing from his direct route, were not "acts reasonably necessary for living or incidental thereto," within the meaning of (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.

The evidence sustained a finding of the 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 act and the Wisconsin commission had jurisdiction. Western Condensing Co. v. Industrial Comm. 262 W 458, 55 NW (2d) 363.

The evidence sustained a finding of the commission that 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 that the accident causing the injury arose out of his employment. Western Condensing Co. v. Industrial Comm. 262 W 458, 55 NW (2d) 363.

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.

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 as 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 employers. The legislature has the power to vary the rules of the common law as to persons in the relation of employer and employe. Beck v. Hamann, 263 W 131, 56 NW (2d) 837.

In proceedings relating to the death of 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, the evidence supported findings of the industrial commission that such employes were subjected to an increased danger from lightning and that their deaths were caused by injuries arising out of their employment. Stokely Foods, Inc. v. Industrial Comm. 264 W 102, 58 NW (2d) 285.

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 services 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.

In a proceeding for injuries sustained by an employe, who was the president and general manager of a corporation operating a fruit and vegetable market on leased premises, and who went from his home to a public library during the evening and then, after leaving the library, was struck by an automobile while alighting from a streetcar

which he had boarded to take him to the market premises, evidence that he went to the library to look up the law of fixtures, and to read weather reports which would bear on the supply and price of oranges, and was going to the market premises to pick up an existing lease for use in negotiating a new lease the next day, supported findings of the industrial commission that his entire trip constituted service for the employer, and that he was engaged in performing services growing out of and incidental to his employment at the time of his injury. 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 services 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 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 (1) (d). A. O. Smith Corp. v. Industrial Comm. 264 W 510, 59 NW (2d) 471.

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 an injury sustained by a sawmill employe, who suffered a severe pain in his back while bending over to examine a motor about 10 days after he had been employed at the sawmill, and whose injury was diagnosed as a protruded intervertebral disc, and who claimed that the cranking of a heavy motor at the sawmill brought about the injury which caused the protrusion of the disc although the disability did not occur until later when he bent over, the evidence, which included the employe's prior history and a physician's testimony that no one could evaluate the effect of the stress and strain involved in the employe's work with respect to his disability, supported a finding of the industrial commission that the incident on which the employe predicated his injury did not constitute an "accident" arising out of the employment. 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.

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.

Evidence held to support commission's finding that a village marshal, who responded to a call to an auto accident scene one-half mile outside of village limits and was killed when hit by another car while setting out flares at the scene, was performing service growing out of his employment, in responding to what appeared to be an emergency, although he had been forbidden to go outside of the village except in pursuit of offenders. Butler v. Industrial Comm. 265 W 380, 61 NW (2d) 490.

(1) (c) does not require that an injury sustained by an employe be "within the scope of employment" in order to be compensable, but only that at the time thereof the employe be performing service "growing out of and incidental to his employment;" and the phrase "arising out of the employment," (1) (e), is broader and more inclusive than the common-law "scope of employment." Butler v. Industrial Comm. 265 W 380, 61 NW (2d) 490.

The employe's judgment about the existence of an emergency and how to meet it should not be too severely judged in retrospect, and he may get the benefit of the emergency doctrine even if the only emergency was in his imagination, if he acted in good faith. Butler v. Industrial Comm. 265 W 380, 61 NW (2d) 490.

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.

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, held not to be performing service for his employer at the time of the accident. Under the circumstances the commission was not required to accept as a verity the claimant employe's testimony that he was road-testing the customer's car to satisfy the customer that the carburetor was working properly. Hemans v. Industrial Comm. 266 W 100, 62 NW (2d) 406.

Except for the provision in (1) (f), there is no presumption that death arose out of the employment when an employe is found dead at the place of employment during working hours. Evidence that employe had been injured in a noncompensable auto accident, and a failure of evidence that his work had any connection with death, supports a denial of compensation. Rick v. Industrial Comm. 266 W 460, 63 NW (2d) 712.

Under (1) (c), in order for the claimant to establish a valid claim for workmen's compensation benefits against the alleged employer or the latter's insurance carrier, the claimant had the burden of establishing that he was an employe at the time of his injury, and a contention that the claimant was an independent contractor was not in the nature of an "affirmative defense" waived by the insurance carrier's accepting premiums from the alleged employer covering a pay roll which included the claimant's compensation and by making payments of benefits to the claimant after the accident. Scholz v. Industrial Comm. 267 W 31, 64 NW (2d) 204, 65 NW (2d) 1.

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.

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., together with his testimony that he 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 arise out of his employment. The presumption under (1) (f) disappears when rebutting testimony is introduced. Turner v. Industrial Comm. 268 W 320, 67 NW (2d) 392.

The evidence supported findings of the 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 Power & Light Co. v. Industrial Comm. 268 W 513, 68 NW (2d) 44.

Commission finding that injury did not arise out of employment where 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.

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.

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.

A finding of the commission that an employe's injury was caused by his work, was sufficient under (1) (e) as being the equivalent of a finding that the accident or disease causing injury arose out of the employment. Wisconsin Appleton Co. v. Industrial Comm. 269 W 312, 69 NW (2d) 433.

Award sustained where injury occurred while a part-time janitor was salvaging some of the building's old refrigeration piping for use in installing a gas line to his basement workshop, which he used both as janitor and in his private contracting business. Strehlow v. Industrial Comm. 271 W 408, 73 NW (2d) 416.

The commission could find that 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.

(3) does not mean that each period of temporary disability has a separate date of injury. Where the intermittent periods of termporary 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 533, 79 NW (2d) 264, 80 NW (2d) 456.

A municipality acting in its governmental capacity can possess no vested rights as against the state, as of the time when a fatal accident to its employe occurred, to pay only such workmen's compensation benefits as the statutes then in effect provided. Douglas County v. Industrial Comm. 275 W 309, 81 NW (2d) 807.

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. American Motors Corp. v. Industrial Comm. 1 W (2d) 261, 83 NW (2d) 714.

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.

A salesman, whose place of employment is not limited to the employer's premises but 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, unless the evidence shows that he was deviating from his employment for his own private purposes at the time of sustaining injury while traveling. Richardson v. Industrial Comm. 1 W (2d) 393, 84 NW (2d) 98.

102.04 Definition of employer. The following shall constitute employers subject to the provisions of this chapter, within the meaning of section 102.03:

(1) The state, each county, city, town, village, school district, sewer district, drainage district and other public or quasi-public corporations therein.

(2) Every person, firm and private corporation (including any public service corporation) who usually employs 3 or more employes, whether in one or more trades, businesses, professions or occupations, and whether in one or more locations. The provisions of this subsection shall not apply to farmers or to farm labor. Members of partnerships shall not be counted as employes under this subsection. A person under contract of hire for the performance of any service for any employer subject to this act shall not constitute an employer of any other person with respect to such service and such other person shall, with respect to such service, be deemed to be an employe only of such employer for whom the service is being performed.

(3) Every person, firm and private corporation (including any public service corporation) to whom subsection (2) is not applicable, who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the injury to the employe for which compensation may be claimed, shall, in the man-

ner provided in section 102.05, have elected to become subject to the provisions of this chapter, and who shall not, prior to such accident, have effected a withdrawal of such election, in the manner provided in subsection (1) of section 102.05.

(4) As used in this chapter "farming" means the operation of farm premises owned or rented by the operator. "Farm premises" means areas used for operations herein set forth, but shall not include other areas, greenhouses or other similar structures unless used principally for the production of food and farm plants. "Farmer" means any person, firm and private corporation engaged in farming as defined. Operation of farm premises shall be deemed to be the planting and cultivating of the soil thereof; the raising and harvesting of agricultural, horticultural or arboricultural crops thereon; the raising, breeding, tending, training and management of live stock, bees, poultry, fur bearing animals, wild life or aquatic life, or their products, thereon; the processing, drying, packing, packaging, freezing, grading, storing, delivering to storage, to market or to a carrier for transportation to market, distributing directly to consumers or marketing any of the above named commodities, substantially all of which have been planted or produced thereon; the clearing of such premises and the salvaging of timber and management and use of wood lots thereon, but not including logging, lumbering or wood cutting operations unless conducted as an accessory to other farming operations; the managing, conserving, improving and maintaining of such premises or the tools, equipment and improvements thereof and the exchange of labor, services or the exchange of use of equipment with other farmers in pursuing such activities. Operation of such premises shall be deemed to include also any other activities commonly considered to be farming whether conducted on or off such premises by the farm operator.

102.045 Saving provision. If the supreme court shall hold unconstitutional the provisions of subsection (2) of section 102.04, created by section 2 of chapter 87, laws of 1931, then section 1 of said act shall also be void and all elections and withdrawals of elections by employers made prior to the passage of said act shall be construed as being in full force and effect, to the same extent as though the act had not been passed.

102.05 Election by employer, withdrawal. (1) Such election to become subject to the act on the part of the employer shall be made by filing with the commission, a written statement that he accepts the provisions of this chapter. The filing of such statement shall operate to subject such employer to its provisions, unless he shall file in the office of said commission a notice that he desires to withdraw his election, which withdrawal shall take effect 30 days after the date of such filing or at such later date as may be specified in the notice. Unless such withdrawal is filed the employer shall remain subject to the act, except that an employer who shall have had no employe at any time within a continuous period of 2 years shall be deemed to have effected withdrawal which shall be effective on the last day of such period. Such employer, however, shall again become subject to the act if at any time subsequent to such period of no employment he shall have 3 or more employes as provided in subsection (2), except as he may have elected not to accept the provisions of the act as provided in subsection (2).

(2) If any employer shall at any time have 3 or more employes, whether in one or more trades, businesses, professions or occupations, and whether in one or more locations, he shall be deemed to have elected to accept the provisions of this chapter, unless prior to that time such employer shall have filed with the commission a notice in writing that he elects not to accept the provisions hereof. Such employer may withdraw in the manner provided in subsection (1). This subsection shall not apply to farmers or to farm labor. Members of partnerships shall not be counted as employes under this subsection.

(3) Any employer who shall enter into a contract for the insurance of compensation, or against liability therefor, shall be deemed thereby to have elected to accept the provisions of this chapter, and such election shall include farm laborers, domestic servants and employes not in the course of a trade, business, profession or occupation of the employer if such intent is shown by the terms of the policy. Such election shall remain in force until withdrawn in the manner provided in subsection (1).

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 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.

102.06 Joint liability of employer and contractor. An employer shall be liable for compensation to an employe of a contractor or subcontractor under him who is not subject to this chapter, or who has not complied with the conditions of section 102.28 (2) in any case where such employer would have been liable for compensation if such employe had been working directly for him, including also work in the erection, alteration, repair

or demolition of improvements or of fixtures upon premises of such employer which are used or to be used in the operations of such employer. The contractor or subcontractor (if he is subject to the workmen's compensation act) shall also be liable for such compensation, but the employe shall not recover compensation for the same injury from more than one party. In the same manner, under the same conditions, and with like right of recovery, as in the case of an employe of a contractor or subcontractor, described above, an employer shall also be liable for compensation to an employe who has been loaned by him to another employer. The employer who becomes liable for and pays such compensation may recover the same from such contractor, subcontractor or other employer for whom the employe was working at the time of the injury if such contractor, subcontractor or other employer was an employer as defined in section 102.04.

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 fulfil 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.

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.

102.07 Employe defined. "Employe" as used in this chapter means:

(1) Every person, including all officials, in the service of the state, or of any municipality therein whether elected or under any appointment, or contract of hire, express or implied, and whether a resident or employed or injured within or without the state. The state and any municipality may require a bond from a contractor to protect it against compensation to employes of such contractor or employes of a subcontractor under him.

(2) Any peace officer shall be considered an employe while engaged in the enforcement of peace or in the pursuit and capture of those charged with crime.

(3) Nothing herein contained shall prevent municipalities from paying teachers, policemen, firemen and other employes full salaries during disability, nor interfere with any pension funds, nor prevent payment to teachers, policemen or firemen therefrom.

(4) Every person in the service of another under any contract of hire, express or implied, all helpers and assistants of employes, whether paid by the employer or employe, if employed with the knowledge, actual or constructive, of the employer, including minors (who shall have the same power of contracting as adult employes), but not including (a) farm laborers, (b) domestic servants, (c) any person whose employment is not in the course of a trade, business, profession or occupation of his employer, unless, as to any of said classes, such employer has elected to include them. Item (c) shall not operate to exclude an employe whose employment is in the course of any trade, business, profession or occupation of his employer, however casual, unusual, desultory or isolated any such trade, business, profession or occupation may be.

(6) Every person selling or distributing newspapers or magazines on the street or from house to house. Such a person shall be deemed an employe of each independent news agency which is subject to this chapter, or (in the absence of such agencies) of each publisher's (or other intermediate) selling agency which is subject to this chapter, or (in the absence of all such agencies) of each publisher, whose newspapers or magazines he sells or distributes. Such a person shall not be counted in determining whether an intermediate agency or publisher is subject to this chapter.

(7) Every person who is a member of any volunteer fire company or fire department organized under the provisions of chapter 213 shall be deemed an employe of such company or department. If such company or department has not insured its liability for compensation to its employes, the municipality within which such company or department was organized shall be liable for such compensation.

(8) Every independent contractor who does not maintain a separate business and who does not hold himself out to and render service to the public, provided he is not himself an employer subject to this chapter or has not complied with the conditions of subsection (2) of section 102.28, shall for the purpose of this chapter be an employe of any employer under this chapter for whom he is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury.

(9) Members of the national and state guards, when in state service performing official duty under direction of appropriate authority, but only in case federal laws, rules

or regulations provide no benefits substantially equivalent to those provided in this chapter.

History: 1951 c. 247 s. 40; 1953 c. 328; 1955 c. 283; 1957 c. 14.

The provision, that a person caddying on a golf course for a person permitted to play on such course shall be deemed an employe of the golf club or other person operating the course, is unconstitutional as violative of due process of law, in that it attempts by legislative fiat to set up a relationship of employer and employe contrary to fact, that is, in cases where such relationship does not actually exist. Wendlandt v. Industrial Comm. 256 W 62, 39 NW (2d) 854.

Where the inference is clear that there is, or is not, a master and servant relationship, it is made by the court; otherwise the jury determines the question after instruction by the court as to the matters of fact to be determined. In an action against a liquor company and its insurance carrier for injuries sustained in a collision between the plaintiff's automobile and one driven by a liquor salesman who died before the trial, some testimony of the manager of the liquor company would establish the relationship of independent contractor if standing alone, but other testimony of the manager could lead to the opposite conclusion, and on the entire record the inferences were properly for the jury, which found that the liquor company had the right to control the operation of the salesman's car and, in effect, that the salesman was an employe. Thurn v. La Crosse Liquor Co. 258 W 448, 46 NW (2d) 212.

M. owned sufficient equipment for the operation of 5 carnivals and operated some of the units himself but leased one to K. O. responded to a help-wanted advertisement of M. O. had no contacts with M. but was hired and paid by and worked for K. O. was injured while repairing an amusement device at a carnival which was being operated by K. with his leased equipment to fulfil a contract of M. for which M. was unable to use one of his own units. Under above facts, O. was employe of K. Miller v. Industrial Comm. 258 W 321, 46 NW (2d) 323.

Whether an employe, working with a borrowing employer and committing a negligent act resulting in injury to a third person, was an employe of his general employer or of the borrowing employer depends on whose work was being performed at the time and who had the power to direct and control the manner of performing the work. Rogers v. Valley Outdoor Theater Co. 262 W 658, 56 N W(2d) 503.

Where the 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.

In a workmen's compensation proceeding against a town for benefits claimed because of the death of a member of a partnership, who was killed while loading a bulldozer onto a truck for removal to a highway on which certain work was to be done, evidence disclosing that the partnership members were to work as skilled operators of their bulldozer, that the arrangement with the town contemplated that the town officers were to participate in the undertaking only to the extent of designating the portion of the highway on which the work was to be performed, that the town was to compensate the partnership at a specified rate per hour, that the work was to be done at the convenience of the partnership and in the manner chosen by its members, and that the town was interested only in the ultimate result, namely, 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.

For purposes of workmen's compensation, 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 compensation claimant, who was a home builder and who had also been known for many years as a skilled carpenter and cabinetmaker, was, as a matter of law, 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 (8), providing that every independent contractor not maintaining a separate business and not holding himself out to render service to the public, and not himself an employer, shall be an "employe" of an employer for purpose of the act, had no application in determining whether the instant claimant was an employe when injured while doing repair work for a church congregation. St. Mary's Congregation v. Industrial Comm. 265 W 525, 62 NW (2d) 19.

A skilled craftsman engaged on a time-and-material basis, and not under contract for the entire job, is always subject to having his services terminated; and such right of termination as applied to services of skilled craftsmen, who are engaged in an independent calling of their own, would not alone be sufficient to support a finding of an employer-employe relationship, especially in view of the fact that such skilled craftsmen are usually considered to be independent contractors. St. Mary's Congregation v. Industrial Comm. 265 W 525, 62 NW (2d) 19.

In a workmen's proceeding on the claim of a member of a 7-piece orchestra who was injured while being transported to a dance hall where the orchestra was to play, the evidence sustained the commission's finding that 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 that the claimant member was not an employe of the orchestra leader, nor of the dance-hall operator, although the written contract which the orchestra leader had entered into with the dance-hall operator denominated the dance-hall operator as the "employer" and the members of the orchestra as "employes," and stated that the "employer" should at all times have complete control of the services which the "employes" would render. Writings attempting to define the status of parties as independent contractor and principal, or as employer and employe, are important as evidence, but they are not necessarily controlling. Schmidlkofer v. Industrial Comm. 265 W 535, 61 NW (2d) 862.

The fact, that the alleged employer included the claimant on his pay roll for purposes of workmen's compensation insurance coverage, did not constitute an election by the alleged employer to include the claimant under the act, as authorized by (4), since such subsection is only applicable to the situation of employer and employe, and has no application to an independent contractor, such as this claimant. Scholz v. Industrial Comm. 267 W 31, 64 NW (2d) 204, 65 NW (2d) 1.

102.08 Nonelection by epileptics, blind persons, corporation officers. Epileptics and persons who are totally blind may elect not to be subject to the provisions of this chapter for injuries resulting because of such epilepsy or blindness and still remain subject to its provisions for all other injuries. Officers of corporations may also elect not to

be subject to the provisions of this chapter. Such elections shall be made by giving notice to the employer in writing on a form to be furnished by the industrial commission, and filing a copy of such notice with the industrial commission. An election may be revoked by giving written notice to the employer of revocation, and such revocation shall be effective upon filing a copy of such notice with the industrial commission.

102.11 Earnings, method of computation. (1) The average weekly earnings for temporary disability shall be taken at not less than $12.50 nor more than $70; for permanent total disability or death at not less than $20 nor more than $70; and for permanent partial disability at not less than $20 nor more than $52.86. Between said limits the average weekly earnings shall be determined as follows:

(a) Daily earnings shall mean the daily earnings of the employe at the time of the injury in the employment in which he was then engaged. In determining daily earnings under this paragraph, overtime shall not be considered. If at the time of the injury the employe is working on part time for the day, his daily earnings shall be arrived at by dividing the amount received, or to be received by him for such part-time service for the day, by the number of hours and fractional hours of such part-time service, and multiplying the result by the number of hours of the normal full-time working day for the employment involved. The words "part time for the day" shall apply to Saturday half days and all other days upon which the employe works less than normal full-time working hours. The average weekly earnings shall be arrived at by multiplying the daily earnings by the number of days and fractional days normally worked per week at the time of the injury in the business operation of the employer for the particular employment in which the employe was engaged at the time of his injury.

(b) In case of seasonal employment, average weekly earnings shall be arrived at by the method prescribed in paragraph (a), except that the number of hours of the normal full-time working day and the number of days of the normal full-time working week shall be such hours and such days in similar service in the same or similar nonseasonal employment. Seasonal employment shall mean employment which can be conducted only during certain times of the year, and in no event shall employment be considered seasonal if it extends during a period of more than fourteen weeks within a calendar year.

(c) In the case of persons performing service without fixed earnings, or where normal full-time days or weeks are not maintained by the employer in the employment in which the employe worked when injured, or where, for other reason, earnings cannot be determined under the methods prescribed by paragraph (a) or (b), the earnings of the injured person shall, for the purpose of calculating compensation payable under this chapter, be taken to be the usual going earnings paid for similar services on a normal full-time basis in the same or similar employment in which earnings can be determined under the methods set out in paragraph (a) or (b).

(d) Except in situations where paragraph (b) applies, average weekly earnings shall in no case be less than actual average earnings of the employe for the calendar weeks during the year before his injury within which the employe has been employed in the business, in the kind of employment and for the employer for whom he worked when injured. Calendar weeks within which no work was performed shall not be considered under this provision. This paragraph shall be applicable only if the employe has worked within each week of at least six calendar weeks during the year before his injury in the business, in the kind of employment and for the employer for whom he worked when injured.

(e) Where any things of value are received in addition to monetary earnings as a part of the wage contract, they shall be deemed a part of earnings and computed at the value thereof to the employe.

(f) Average weekly earnings shall in no case be less than 30 times the normal hourly earnings, at the time of injury, provided that for injury occurring before September 1, 1947, they shall not be less than 40 times such earnings.

(g) If an employe is under twenty-seven years of age, his average weekly earnings on which to compute the benefits accruing for permanent disability or death shall be determined on the basis of the earnings that such employe, if not disabled, probably would earn after attaining the age of twenty-seven years. Unless otherwise established, said earnings shall be taken as equivalent to the amount upon which maximum weekly indemnity is payable.

(2) The average annual earnings when referred to in this chapter shall consist of fifty times the employe's average weekly earnings. Subject to the maximum limitation, average annual earnings shall in no case be taken at less than the actual earnings of the employe in the year immediately preceding his injury in the kind of employment in which he worked at the time of injury.

(3) The weekly wage loss referred to in this chapter, except under subsection (6) of

section 102.60, shall be such percentage of the average weekly earnings of the injured employe computed according to the provisions of this section, as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the injury, and other suitable employments, the same to be fixed as of the time of the injury, but to be determined in view of the nature and extent of the injury.

History: 1951 c. 382; 1953 c. 328; 1955 c. 281; 1957 c. 204.

102.12 Notice of injury, exception, laches. No claim for compensation shall be maintained unless, within 30 days after the occurrence of the injury or within 30 days after the employe knew or ought to have known the nature of his disability and its relation to his employment, actual notice was received by the employer or by an officer, manager or designated representative of an employer. If no representative has been designated by posters placed in one or more conspicuous places, then notice received by any superior shall be sufficient. Absence of notice shall not bar recovery if it is found that the employer was not misled thereby. Regardless of whether notice was received, if no payment of compensation (other than medical treatment or burial expense) is made, and no application is filed with the commission within 2 years from the date of the injury or death, or from the date the employe or his dependent knew or ought to have known the nature of the disability and its relation to the employment, the right to compensation therefor shall be barred, except that the right to compensation shall not be barred if the employer knew or should have known, within the 2-year period, that the employe had sustained the injury on which claim is based. Issuance of notice of a hearing on the commission's own motion shall have the same effect for the purposes of this section as the filing of an application.

History: 1951 c. 382.

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 compensation claimant may have thought as to the nature of his disability and its relation to his 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 an accidental injury to his knee in April 1948, 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 by the 2-year limitation in this section, and it was not necessary for the industrial commission to find as to the date when the employe "knew or ought to have known the nature of the disability and its relation to his employment," since such quoted provision of the statute, extending the time for filing claim to 2 years from such date, applies only to occupational disease, and not to accidental injury such as involved here. An "accidental injury" is an injury that results from a definite mishap, while an "occupational disease" is a disease acquired as the result of work in the employment over an appreciable period of time, and the mere fact that a diseased condition follows an accident does not make the disease an occupational disease. Zabkowicz v. Industrial Comm. 264 W 317, 58 NW (2d) 677.

Authority of commission to schedule hearings on its own motion, except as authorized under 102.18 (4) and 102.12, questioned. However, the fact that the notice stated that the hearing was on the commission's own motion is immaterial if the hearing was actually at the claimant's request. Zweig v. Industrial Comm. 269 W 324, 69 NW (2d) 440.

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 Examination by physician, competent witnesses, exclusion of evidence, autopsy. (1) Whenever compensation is claimed by any employe, he shall, upon the written request of his employer, submit to reasonable examination by a physician, provided and paid for by the employer, and shall likewise submit to examination from time to time by any physician selected by said commission, or a member or examiner thereof. The employe shall be entitled to have a physician, provided by himself, present at any such examination. So long as the employe, after such written request of the employer, shall refuse to submit to such examination, or shall in any way obstruct the same, his right to begin or maintain any proceeding for the collection of compensation shall be suspended; and if he shall refuse to submit to such examination after direction by the commission, or any member or examiner thereof, or shall in any way obstruct the same, his right to the weekly indemnity which shall accrue and become payable during the period of such refusal or obstruction, shall be barred. Any physician who shall be present at any such examination may be required to testify as to the results thereof. Any physician having attended an employe may be required to testify before the commission when it shall so direct. Notwithstanding any other statutory provisions, any physician attending a workmen's compensation claimant may furnish to the employe, employer, workmen's compensation insurance carrier, or the commission information and reports relative to a com-

pensation claim. The testimony of any physician or surgeon who is licensed to practice where he resides or practices outside the state, may be received in evidence in compensation proceedings.

(2) The commission may refuse to receive testimony as to conditions determined from an autopsy if it appears (a) that the party offering the testimony had procured the autopsy and had failed to make reasonable effort to notify at least one party in adverse interest or the commission at least twelve hours before said autopsy of the time and place it would be performed, or (b) that the autopsy was performed by or at the direction of the coroner for purposes not authorized by ch. 966. The commission may in its discretion withhold findings until an autopsy is held in accordance with its directions.

History: 1951 c. 382.

102.14 Jurisdiction of commission. This chapter shall be administered by the commission.

102.15 Rules of procedure; transcripts. (1) Subject to the provisions of this chapter, the commission may adopt its own rules of procedure and may change the same from time to time.

(2) The commission may provide by rule the conditions under which transcripts of testimony and proceedings shall be furnished.

102.16 Submission of disputes, contributions by employes. (1) Any controversy concerning compensation, including any in which the state may be a party, shall be submitted to said commission in the manner and with the effect provided in this chapter. Every compromise of any claim for compensation may be reviewed and set aside, modified or confirmed by the commission within one year from the date such compromise is filed with the commission, or from the date an award has been entered, based thereon, or the commission may take such action upon application made within such year. Unless the word "compromise" appears in a stipulation of settlement, the settlement shall not be deemed a compromise, and further claim shall not be barred except as provided in s. 102.17 (4) irrespective of whether award is made. The employer or insurer shall have equal rights with the employe to have review of a compromise. Upon petition filed by the employer or insurer with the commission within one year from any award upon a stipulation of settlement the commission shall have power to set aside said award or otherwise determine the rights of the parties.

(2) The commission shall have jurisdiction to pass upon the reasonableness of medical and hospital bills in all cases of dispute where compensation is paid, in the same manner and to the same effect as it passes upon compensation.

(3) No employer subject to the provisions of this chapter shall solicit, receive or collect any money from his employes or make any deduction from their wages, either directly or indirectly, for the purpose of discharging any liability under the provisions thereof; nor shall any such employer sell to an employe, or solicit or require him to purchase medical or hospital tickets or contracts for medical, surgical, or hospital treatment required to be furnished by such employer.

(4) Any employer violating subsection (3) shall be subject to the penalties provided in subsection (3) of section 102.28, and, in addition thereto, shall be liable to an injured employe for the reasonable value of the necessary services rendered to such employe pursuant to any arrangement made in violation of subsection (3) of this section without regard to said employe's actual disbursements for the same.

History: 1953 c. 328.

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 (1), and hence the one-year limitation of such statute did not apply as a bar to a further claim based on the same injury. (J. I. Case Co. v. Industrial Comm. 210 W 574, criticized as erroneously applying the one-year limitation instead of applying a different limitation which was applicable under the facts of that case.) Metropolitan Casualty Ins. Co. v. Industrial Comm. 260 W 298, 50 NW (2d) 399.

See note to 102.17, 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 (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 of facts, in this case a stipulation entered into by the parties to a workmen's compensation proceeding on September 30, 1943, stating that the injured employe had a permanent disability equivalent to a 25 per cent loss of use of his left leg at the hip, 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, (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. Zweig v. Industrial Comm. 269 W 324, 69 NW (2d) 440.

Where an employer joined in proceedings under (1), relating to stipulations and com-

promises, and submitted the matter on a stipulation rather than on a compromise, the 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.

102.17 Procedure; notice of hearing; witnesses, contempt; testimony, medical examination. (1) (a) Upon the filing with the commission by any party in interest of any application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, it shall mail a copy of such application to all other parties in interest and the insurance carrier shall be deemed a party in interest. The commission may bring in additional parties by service of a copy of the application. The commission shall fix a time for the hearing on such application which shall not be more than 40 days after the filing of such application. The commission shall cause notice of such hearing, to be given to each party interested, by service of such notice on him personally or by mailing a copy thereof to him at his last known post-office address at least 10 days before such hearing. In case a party in interest is located without the state, and has no post-office address within this state, the copy of the application and copies of all notices shall be filed in the office of the secretary of state and shall also be sent by registered mail to the last known post-office address of such party. Such filing and mailing shall constitute sufficient service, with the same force and effect as if served upon a party located within this state. Such hearing may be adjourned from time to time in the discretion of the commission, and hearings may be held at such places as the commission shall designate, within or without the state. The commission may also arrange to have hearing held by the commission, officer, or tribunal having authority to hear cases arising under the workmen's compensation law of any other state, of the District of Columbia, or of any territory of the United States, the testimony and proceedings at any such hearing to be reported to the commission and to be part of the record in the case. Any evidence so taken shall be subject to rebuttal upon final hearing before the commission.

(am) Either party shall have the right to be present at any hearing, in person or by attorney, or any other agent, and to present such testimony as may be pertinent to the controversy before the commission. No person, firm or corporation other than an attorney at law, duly licensed to practice law in the state, shall appear on behalf of any party in interest before the commission or any member or employe of the said commission assigned to conduct any hearing, investigation or inquiry relative to a claim for compensation or benefits under this chapter, unless he shall be a citizen of the United States, of full age, of good moral character and otherwise qualified, and shall have obtained from the commission a license authorizing him to appear in matters or proceedings before the commission. Such license shall be issued by the commission under rules to be adopted by it. In such rules the commission may prescribe such reasonable tests of character and fitness as it may deem necessary. There shall be maintained in the office of the commission a registry or list of persons to whom licenses have been issued as provided herein, which list shall be corrected as often as licenses are issued or revoked. Any such license may be suspended or revoked by the commission for fraud or serious misconduct on the part of any such agent. Before suspending or revoking the license of any such agent, the commission shall give notice in writing to such agent of the charges of fraud or misconduct preferred against him, and shall give such agent full opportunity to be heard in relation to the same. Such license and certificate of authority shall, unless otherwise suspended or revoked, be in force from and after the date of issuance until the thirtieth day of June following such date of issuance and may be renewed by the commission from time to time, but each renewed license shall expire on the thirtieth day of June following the issuance thereof.

(as) The contents of verified medical and surgical reports, by physicians and surgeons licensed in, and practicing in, Wisconsin, presented by claimants for compensation shall constitute prima facie evidence as to the matter contained therein, subject to such rules and such limitations as the commission may prescribe. So, also, shall such reports of physicians and surgeons, wherever licensed and practicing, to whom the claimant had been sent for examination or treatment by the employer or insurer, provided that such doctor consents to subject himself to cross-examination. The record of a hospital or sanatorium in Wisconsin operated by any department, agency, or municipality of the federal or state government, or of any other hospital or sanatorium in Wisconsin which is satisfactory to the commission, established by certificate, affidavit, or testimony of the supervising officer or other person having charge of such records, or of a physician or surgeon, to be such record of the patient in question, and made in the regular course of examination or treatment of such patient, shall constitute prima facie evidence in any workmen's compensation proceeding as to the matter contained therein, in so far as it may otherwise be competent and relevant.

(b) The commission may, with or without notice to either party, cause testimony to be taken, or an inspection of the premises where the injury occurred to be had, or the time

books and pay rolls of the employer to be examined by any member of the commission or any examiner appointed by it, and may from time to time direct any employe claiming compensation to be examined by a regular physician; the testimony so taken, and the results of any such inspection or examination, to be reported to the commission for its consideration upon final hearing. All ex parte testimony taken by the commission shall be reduced to writing and either party shall have opportunity to rebut the same on final hearing.

(bm) The provisions of section 326.12 shall not be applicable to proceedings under this act, except as to a witness who is beyond reach of the subpoena of a commissioner or examiner, or in the situations presented in subsections (2), (3) or (4) of section 326.07.

(c) Whenever the testimony presented at any hearing indicates a dispute, or is such as to create doubt, as to the extent or cause of disability or death, the commission may direct that the injured employe be examined or autopsy be performed, or an opinion of a physician be obtained without examination or autopsy, by an impartial, competent physician designated by the commission who is not under contract with or regularly employed by a compensation insurance carrier or self-insured employer. The expense of such examination shall be paid by the employer. The report of such examination shall be transmitted in writing to the commission and a copy thereof shall be furnished by the commission to each party who shall have an opportunity to rebut the same on further hearing.

(2) If the commission shall have reason to believe that the payment of compensation has not been made, it may on its own motion give notice to the parties, in the manner provided for the service of an application, of a time and place when a hearing will be had for the purpose of determining the facts. Such notice shall contain a statement of the matter to be considered. Thereafter all other provisions governing proceedings on application shall attach in so far as the same may be applicable.

(3) Any person who shall wilfully and unlawfully fail or neglect to appear or to testify or to produce books, papers and records as required, shall be fined not less than twenty-five dollars nor more than one hundred dollars, or imprisoned in the county jail not longer than thirty days. Each day such person shall so refuse or neglect shall constitute a separate offense.

(4) The right of an employe, his legal representative or dependent to proceed under this section shall not extend beyond 6 years from the date of the injury or death or from the date that compensation (other than medical treatment or burial expenses) was last paid, or would have been last payable if no advancement were made, whichever date is latest.

(5) This section does not limit the time within which the state may bring an action to recover the amounts specified in subsection (5) of section 102.49 and section 102.59.

(6) If an employe or dependent shall, at the time of injury, or at the time his right accrues, be under 21 years of age, the limitations of time within which he may file application or proceed under this chapter, if they would otherwise sooner expire, shall be extended to one year after he attains the age of 21 years. If, within any part of the last year of any such period of limitation, an employe, his personal representative, or surviving dependent be insane or on active duty in the armed forces of the United States such period of limitation shall be extended to 2 years after the date that the limitation would otherwise expire. The provision hereof with respect to persons on active duty in the armed forces of the United States shall apply only where no applicable federal statute is in effect.

History: 1951 c. 382; 1953 c. 328.

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-year 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 Casualty 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 per cent 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), nor 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.

The purpose of a rule of practice of the commission, providing that parties to a con-

troversy 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 make it unnecessary to hold a formal hearing and 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.

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

Where, exclusive of a written report of the employes' physician, there was sufficient evidence to sustain the commission's findings, it is deemed unnecessary to determine a contention that (1) (as) is discriminatory and denies due process and equal protection of the laws in failing to afford to employers the same right as it accords to employes in having reports of their physicians treated as prima facie evidence. Wisconsin Appleton Co. v. Industrial Comm. 269 W 312, 69 NW (2d) 433.

Where the employer acquiesced in the receipt before the commission of a written report of the employe's physician, admitted in evidence under (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 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 commission asked a physician for an opinion under (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.

102.18 Findings and award. (1) After final hearing the commission shall make and file its findings upon all the facts involved in the controversy, and its order, which shall state its determination as to the rights of the parties. Pending the final determination of any controversy before it, the commission may after any hearing make interlocutory findings, orders and awards which may be enforced in the same manner as final awards. The commission may include in its final award, as a penalty for noncompliance with any such interlocutory order or award, if it shall find that noncompliance was not in good faith, not exceeding twenty-five per cent of each amount which shall not have been paid as directed thereby. Where there is a finding that the employe is in fact suffering from an occupational disease caused by the employment of the employer against whom the application is filed, a final award dismissing such application upon the ground that the applicant has suffered no disability from said disease shall not bar any claim he may thereafter have for disability sustained after the date of said award.

(2) The industrial commission may authorize a commissioner or examiner to make findings and orders, and to review, set aside, modify or confirm compromises of claims for compensation under rules to be adopted by the commissioner. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the industrial commission as a commission to review the findings or order.

(3) If no petition is filed within twenty days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the industrial commission as a body, unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the date that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within ten days after the filing of such petition with the commission the commission shall either affirm, reverse, set aside or modify such findings or order in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another twenty days for filing petition with the commission.

(4) The commission shall have power to remove or transfer the proceedings pending before a commissioner or examiner. It may also on its own motion, set aside, modify or change any order, findings or award (whether made by an individual commissioner, an examiner or by the commission as a body) at any time within twenty days from the date thereof if it shall discover any mistake therein, or upon the grounds of newly discovered evidence. Unless the liability under sections 102.49, 102.57, 102.58, 102.59, 102.60 and 102.61 is specifically mentioned, the order, findings or award shall be deemed not to affect such liability.

(5) If it shall appear to the commission that a mistake may have been made as to cause of injury in the findings, order or award upon an alleged injury based on accident, when in fact the employe was suffering from an occupational disease, the commission may upon its own motion, with or without hearing, within 3 years from the date of such findings, order or award, set aside such findings, order or award, or the commission may

take such action upon application made within such 3 years. Thereafter, and after opportunity for hearing, the commission may, if in fact the employe is suffering from disease arising out of the employment, make new findings and award, or it may reinstate the previous findings, order or award.

(6) In case of disease arising out of the employment, the commission may from time to time review its findings, order or award, and make new findings, order or award, based on the facts regarding disability or otherwise as they may then appear. This subsection shall not affect the application of the limitation in 102.17 (4).

History: 1951 c. 382; 1953 c. 631.

The original 20 days are computed from the date on which an order of an examiner was mailed to an applicant, and the 20 days' extension authorized by the commission is computed from the same date; where the order was mailed on December 29, the 40 days expired on February 7, a Saturday, and the commission was without jurisdiction to review on the applicant's petition filed on February 9, a Monday, although the original 20 days had expired on a Sunday. Margolis Produce Co. v. Industrial Comm. 256 W 248, 40 NW (2d) 586.

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.

The taking of additional testimony on a review of an examiner's findings and order by the commission is a matter for the sole discretion of the commission. 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.

See note to 102.17, citing C. F. Trantow Co. v. Industrial Comm. 262 W 586, 55 NW (2d) 884.

See note to 102.12, citing Zweig v. Industrial Comm. 269 W 324, 69 NW (2d) 440.

The commission, making a determination of 64 per cent 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.

In reviewing the findings of an examiner pursuant to (1) and (3), the 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.

The 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.

Where the evidence shows that an employe has a 25 per cent permanent partial disability from silicosis, but may sustain greater disability or medical expense in the future, the commission can make an award, but retain jurisdiction to make further awards. (California Packing Co. v. Industrial Comm. 270 W 72, 70 NW (2d) 200, distinguished.) Maynard Electric Steel C. Co. v. Industrial Comm. 273 W 38, 76 NW (2d) 604.

The 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.

102.19 Alien dependents; payments through consular officers. In case a deceased employe, for whose injury or death compensation is payable, leaves surviving him alien dependents residing outside of the United States, the duly accredited consular officer of the country of which such dependents are citizens or his designated representative residing within the state shall, except as otherwise determined by the commission, be the sole representative of such deceased employe and of such dependents in all matters pertaining to their claims for compensation. The receipt by such officer or agent of compensation funds and the distribution thereof shall be made only upon order of the commission, and payment to such officer or agent pursuant to any such order shall be a full discharge of the benefits or compensation. Such consular officer or his representative shall furnish, if required by the commission, a bond to be approved by it, conditioned upon the proper application of all moneys received by him. Before such bond is discharged, such consular officer or representative shall file with the commission a verified account of the items of his

receipts and disbursements of such compensation. Such consular officer or representative shall make interim reports to the commission as it may require.

When the consular officer filed an application with the 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 they were named in the application or not 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.

102.195 Employes confined in institutions; payment of benefits. In case an employe shall be adjudged insane or incompetent and confined in a public institution, and shall have wholly dependent on him for support a person or persons, whose dependency shall be determined as if the employe were deceased, compensation payable during the period of his confinement may be paid to the employe and his dependents, in such manner, for such time and in such amount as the commission may by order provide.

102.20 Judgment on award. Either party may present a certified copy of the award to the circuit court for any county, whereupon said court shall, without notice, render judgment in accordance therewith; such judgment shall have the same effect as though rendered in an action tried and determined by said court, and shall, with like effect, be entered and docketed.

102.21 Payment of awards by municipalities. Whenever an award is made by the commission under this chapter or s. 66.191 against any municipality, the person in whose favor it is made shall file a certified copy thereof with the municipal clerk. Within 20 days thereafter, unless an appeal is taken, such clerk shall draw an order on the municipal treasurer for the payment of the award. If upon appeal such award is affirmed in whole or in part the order for payment shall be drawn within 10 days after a certified copy of such judgment is filed with the proper clerk. If more than one payment is provided for in the award or judgment, orders shall be drawn as the payments become due. No statute relating to the filing of claims against, and the auditing, allowing and payment of claims by municipalities shall apply to the payment of an award or judgment under this section.

History: 1955 c. 283.

102.22 Penalty for delayed payments. If the sum ordered by the commission to be paid shall not be paid when due, such sum shall bear interest at the rate of 6 per cent per annum. The state of Wisconsin shall be liable for such interest on awards issued against it under this chapter. The commission shall have jurisdiction to issue award for payment of such interest at any time within one year of the date of its order or upon appeal within one year after final court determination. Where the employer or his insurer is guilty of inexcusable delay in making payments, the payments as to which such delay is found shall be increased by 10 per cent. Where such delay is chargeable to the employer and not to the insurer s. 102.62 shall be applicable and the relative liability of the parties shall be fixed and discharged as therein provided.

History: 1957 c. 204.

102.23 Judicial review. (1) The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive; and the order or award, either interlocutory or final, whether judgment has been rendered thereon or not, shall be subject to review only in the manner and upon the grounds following: Within thirty days from the date of an order or award originally made by the commission as a body or following the filing of petition for review with the commission under section 102.18 any party aggrieved thereby may commence, in the circuit court for Dane county, an action against the commission for the review of such order or award, in which action the adverse party shall also be made defendant. In such action a complaint, which need not be verified, but which shall state the grounds upon which a review is sought, shall be served with the summons. Service upon the secretary of the commission, or any member of the commission, shall be deemed completed service on all parties, but there shall be left with the person so served as many copies of the summons and complaint as there are defendants, and the commission shall mail one such copy to each other defendant. If the circuit court is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 30 days in which such action may be commenced. The commission shall serve its answer within 20 days after the service of the complaint, and, within the like time, such adverse party shall, if he so desires, serve his answer to said complaint, which answer may, by way of counterclaim or cross complaint, ask for the review of the order or award referred to in the complaint, with the same effect as if such party had commenced a separate action for

the review thereof. With its answer, the commission shall make return to said court of all documents and papers on file in the matter, and of all testimony which may have been taken therein, and of its order, findings and award. Such return of the commission when filed in the office of the clerk of the circuit court shall, with the papers mentioned in s. 251.251, constitute the record and it shall not be necessary to settle a bill of exceptions. Said action may thereupon be brought on for hearing before said court upon such record by either party on 10 days' notice to the other; subject, however, to the provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

(a) That the commission acted without or in excess of its powers.

(b) That the order or award was procured by fraud.

(c) That the findings of fact by the commission do not support the order or award.

(2) Upon the trial of any such action the court shall disregard any irregularity or error of the commission unless it be made to affirmatively appear that the plaintiff was damaged thereby.

(3) The record in any case shall be transmitted to the commission within 5 days after expiration of the time for appeal from the order or judgment of the court, unless appeal shall be taken from such order or judgment.

(4) Whenever an award is made against the state the attorney-general may bring an action for review thereof in the same manner and upon the same grounds as are provided by subsection (1) hereof.

(5) The commencement of action for review shall not relieve the employer from paying compensation as directed, when such action involves only the question of liability as between the employer and one or more insurance companies or as between several insurance companies.

History: Sup. Ct. Order, effective January 1, 1958.

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 commission that as a result of such employment the claimant sustained injury in the nature of silicotuberculosis. The commission's finding on disputed medical testimony is conclusive. Milwaukee E. R. & T. Co. v. Industrial Comm. 258 W 466, 46 NW (2d) 198.

Where there is a difference of opinion between the medical experts as to the cause of an employe's injury or disability, it is for the 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.

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. The constitutionality of the workmen's compensation act depends on the right of judicial review to determine whether the findings of the commission are supported by evidence. Merton Lumber Co. v. Industrial Comm. 260 W 109, 50 NW (2d) 42.

An employe suffered a back injury in an industrial accident in 1941 while in the employment of a certain employer, and suffered a back injury in an industrial accident in 1947 while in the employment of another employer, and suffered a protruding intervertebral disc and disability therefrom in 1949 while on another job. The commission's finding that such disability was caused by the accident of 1947, together with its award directing the payment of compensation for such liability by the employer of 1947, 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, but which did not state their relative contributions, nor 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 commission cannot be disturbed if there is any credible evidence to support them. McCune v. Industrial Comm. 260 W 499, 50 NW (2d) 683.

Under (1) providing that findings of fact by the industrial commission acting within its powers shall in the absence of fraud be "conclusive," it is outside of the powers of the commission to find essential facts that have no support in the evidence, and the test to be applied on review is whether the commission's findings are supported by any credible evidence, and the test in determining what is credible evidence should be whether there are facts in evidence which if unexplained would warrant the commission in making the finding complained of. It is suggested that the judicial review of the industrial commission's findings of fact in workmen's compensation cases is broader in scope than the language of some of the decisions of the supreme court might indicate. Motor Transport Co. v. Public Service Comm. 262 W 31, 56 NW (2d) 548.

When facts are not in dispute but permit 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. A determination by the commission, that H. at the time of his injury while operating a corn picker on G.'s farm was performing labor for G. pursuant to an implied contract arising from the exchange-of-work custom which prevailed among farmers of the community, was a permissible inference from undisputed facts (from which the other permissible inference which the commission could have drawn was that H. was acting as a mere volunteer and not pursuant to any implied contract), and such determination by the commission constituted a finding of ultimate fact beyond the power of the court to review. Gant v. Industrial Comm. 263 W 64, 56 NW (2d) 525.

Findings of fact must be sustained if there is any credible evidence to support them. 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 in a workmen's compensation case 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 commisssion. Wisconsin Telephone Co. v Industrial Comm. 263 W 380, 57 NW (2d) 334.

A contention that the commission could disregard the medical testimony and find a permanent disability from the fact that there were no pains before the accident, that the employe suffered an injury resulting in pain, and that subjective symptoms persisted after a considerable treatment, is rejected as permitting the commission to draw an inference not sustainable on the basis of common or general knowledge nor on the basis of the record in the case. Miller Rasmussen Ice & Coal Co. v. Industrial Comm. 263 W 538, 57 NW (2d) 736.

Although recognizing in workmen's compensation cases that 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 before the commission to ascertain whether there is evidence to support the findings of the commission. Miller Rasmussen Ice & Coal Co. v. Industrial Comm. 263 W 538, 57 NW (2d) 736.

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. In a workmen's compensation proceeding involving an employe who had a basic psychoneurotic personality, and who suffered a slight traumatic injury in 1945 when squeezed between the fender of a truck and the back end of another truck, and who complained of inability to perform useful employment ever since the date of the accident, a psychiatrist's reports are held to be too uncertain and lacking in positiveness in their conclusions to support a finding by the commission to the effect that the trauma of 1945 so upset the employe's basic psychoneurotic personality that he has been unable to perform any useful employment, i. e., that his disability is the result of traumatic neurosis. Miller Rasmussen Ice & Coal 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 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 of suffering from a slipped disc as the result of a back injury, 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, on the ground that it had not been determined whether or not the employe was suffering from a slipped disc and that no myelogram had been taken. Tadin v. Industrial Comm. 265 W 375, 61 NW (2d) 309.

Under (1) (a) the commission acts in excess of its powers if it makes a finding of fact not supported by the evidence. With reference to an order of the commission which makes more than one determination, (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.

When an injured employe filed his application for compensation with the 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 credibility of expert witnesses is for the commission to determine; it is the function of the commission to evaluate medical testimony and decide the weight of the same, and the commission's finding on disputed medical testimony is conclusive. The extent of an injured employe's disability, temporary and permanent, was a question of fact. Keller v. Industrial Comm. 271 W 225, 72 NW (2d) 740.

Under the limited powers of review granted by (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.

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.

102.24 Remanding record. (1) Upon the setting aside of any order or award the court may recommit the controversy and remand the record in the case to the commission, for further hearing or proceedings; or it may enter the proper judgment upon the findings, as the nature of the case shall demand. An abstract of the judgment entered by the trial court upon the review of any order or award shall be made by the clerk thereof upon

the docket entry of any judgment which may theretofore have been rendered upon such order or award and transcripts of such abstract may thereupon be obtained for like entry upon the dockets of the courts of other counties.

(2) After the commencement of an action to review any award of the commission the parties may have the record remanded by the court for such time and under such condition as they may provide, for the purpose of having the commission act upon the question of approving or disapproving any settlement or compromise that the parties may desire to have so approved. If approved the action shall be at an end and judgment may be entered upon the approval as upon an award. If not approved the record shall forthwith be returned to the circuit court and the action shall proceed as if no remand had been made.

102.25 Appeal from judgment on award. (1) Said commission, or any party aggrieved by a judgment entered upon the review of any order or award, may appeal therefrom within 30 days from the date of service by either party upon the other of notice of entry of judgment. However, it shall not be necessary for said commission or any party to said action to execute, serve or file the undertaking required by section 274.11 (3) in order to perfect such appeal; but all such appeals shall be placed on the calendar of the supreme court and brought to a hearing in the same manner as state causes on such calendar. The state shall be deemed a party aggrieved, within the meaning of this subsection, whenever a judgment is entered upon such a review confirming any order or award against it. At any time before the case is set down for hearing in the supreme court, the parties may have the record remanded by the court to the industrial commission in the same manner and for the same purposes as provided for remanding from the circuit court to the industrial commission under section 102.24 (2).

(2) It shall be the duty of the clerk of any court rendering a decision affecting an award of the commission to promptly furnish the commission with a copy of such decision without charge.

See note to 274.11, citing Falk v. Industrial Comm. 258 W 109, 45 NW (2d) 161.

102.26 Fees and costs. (1) No fees shall be charged by the clerk of any court for the performance of any service required by this chapter, except for the docketing of judgments and for certified transcripts thereof. In proceedings to review an order or award, costs as between the parties shall be in the discretion of the court, but no costs shall be taxed against the commission.

(2) Unless previously authorized by the commission, no fee shall be charged or received for the enforcement or collection of any claim for compensation, nor shall any contract therefor be enforcible, where such fee, inclusive of all taxable attorney's fees paid or agreed to be paid for such enforcement or collection, exceeds 20 per cent of the amount at which such claim shall be compromised or of the amount awarded, adjudged or collected, except that in cases of admitted liability where there is no dispute as to amount of compensation due and in which no hearing or appeal is necessary, the fee charged shall not exceed 10 per cent but not to exceed $100, of the amount at which such claim shall be compromised or of the amount awarded, adjudged or collected. The limitation as to fees shall apply to the combined charges of attorneys, solicitors, representatives and adjusters who knowingly combine their efforts toward the enforcement or collection of any compensation claim.

(3) Compensation in favor of any claimant, which exceeds one hundred dollars, shall be made payable to such claimant in person; provided, however, that in any award the commission shall upon application of any interested party and subject to the provisions of subsection (2) fix the fee of his attorney or representative and provide in the award for payment of such fee direct to the person entitled thereto. Payment according to the directions of the award shall protect the employer and his insurer from any claim of attorney's lien.

(4) The charging or receiving of any fee in violation of this section shall be unlawful, and the attorney or other person guilty thereof shall forfeit double the amount retained by him, the same to be collected by the state in an action in debt, upon complaint of the commission. Out of the sum recovered the court shall direct payment to the injured party of the amount of the overcharge.

102.27 Claims unassignable, and exempt. No claim for compensation shall be assignable, but this provision shall not affect the survival thereof; nor shall any claim for compensation, or compensation awarded, or paid, be taken for the debts of the party entitled thereto.

102.28 Preference of claims; employer's liability insurance. (1) The whole claim for compensation for the injury or death of any employe or any award or judgment

thereon, and any claim for unpaid compensation insurance premiums shall be entitled to the same preference in bankruptcy or insolvency proceedings as is given by any law of this state or by the federal bankruptcy act to claims for labor, but this section shall not impair the lien of any judgment entered upon any award.

(2) An employer liable under this act to pay compensation shall insure payment of such compensation in some company authorized to insure such liability in this state unless such employer shall be exempted from such insurance by the industrial commission. An employer desiring to be exempt from insuring his liability for compensation shall make application to the industrial commission showing his financial ability to pay such compensation, and agreeing as a condition for the granting of the exemption to faithfully report all injuries under compensation according to law and the requirements of the commission and to comply with this act, and the rules of the commission pertaining to the administration thereof, whereupon the commission by written order may make such exemption. The commission may from time to time require further statement of financial ability of such employer to pay compensation and may upon ten days' notice in writing, for financial reasons or for failure of the employer to faithfully discharge his obligations according to the agreements contained in his application for exemption, revoke its order granting such exemption, in which case such employer shall immediately insure his liability. As a condition for the granting of an exemption the commission shall have authority to require the employer to furnish such security as it may consider sufficient to insure payment of all claims under compensation. Where the security is in the form of a bond or other personal guaranty, the commission may at any time either before or after the entry of an award, upon at least ten days' notice and opportunity to be heard require the sureties to pay the amount of the award, the same to be enforced in like manner as the award itself may be enforced. Where an employer procures an exemption as herein provided and thereafter enters into any form of agreement for insurance coverage with an insurance company or interinsurer not licensed to operate in this state, his conduct shall automatically operate as a revocation of such exemption. An order exempting an employer from insuring his liability for compensation shall be null and void if the application contains a financial statement which is false in any material respect.

(3) An employer who shall fail to comply with the provisions of subsection (2) of section 102.28 shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment in the county jail for not less than thirty days nor more than six months, or by both such fine and imprisonment. Each day's failure shall be a separate offense. Upon complaint of the commission, the fines specified in this section may be collected by the state in an action in debt.

(4) If it appears by the complaint or by the affidavit of any person in behalf of the state that the employer's liability continues uninsured there shall forthwith be served on the employer an order to show cause why he should not be restrained from employing any person in his business pending the proceedings or until he shall have satisfied the court in which the matter is pending that he has complied with the provisions of subsection (2) of this section. Such order to show cause shall be returnable before the court or the judge thereof at a time to be fixed in the order not less than twenty-four hours nor more than three days after its issuance. In so far as the same may be applicable and not herein otherwise provided, the provisions of chapter 268 relative to injunctions shall govern these proceedings. If the employer denies under oath that he is subject to this act, and furnishes bond with such sureties as the court may require to protect all his employes injured after the commencement of the action for such compensation claims as they may establish, then an injunction shall not issue. Every judgment or forfeiture against an employer, under subsection (3) of this section, shall perpetually enjoin him from employing any person in his business at any time when he is not complying with subsection (2) of this section.

(5) If compensation is awarded under this act, against any employer who at the time of the accident has not complied with the provisions of sub. (2) of this section, such employer shall not be entitled as to such award or any judgment entered thereon, to any of the exemptions of property from seizure and sale on execution allowed in ss. 272.18 to 272.21. If such employer is a corporation, the officers and directors thereof shall be individually and jointly and severally liable for any portion of any such judgment as is returned unsatisfied after execution against the corporation.

(6) Every employer shall upon request of the industrial commission report to it the number of his employes and the nature of their work and also the name of the insurance company with whom he has insured his liability under the workmen's compensation act and the number and date of expiration of such policy. Failure to furnish such report within ten days from the making of a request by registered mail shall constitute presump-

tive evidence that the delinquent employer is violating the provisions of subsection (2) of this section.

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 Casualty 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.

102.29 Third party liability. (1) The making of a claim for compensation against an employer or compensation insurer for the injury or death of an employe shall not affect the right of the employe, his personal representative, or other person entitled to bring action, to make claim or maintain an action in tort against any other party for such injury or death, hereinafter referred to as a third party; nor shall the making of a claim by any such person against a third party for damages by reason of an injury to which sections 102.03 to 102.64 are applicable, or the adjustment of any such claim, affect the right of the injured employe or his dependents to recover compensation. The employer or compensation insurer who shall have paid or is obligated to pay a lawful claim under this chapter shall likewise have the right to make claim or maintain an action in tort against any other party for such injury or death. However, each shall give to the other reasonable notice and opportunity to join in the making of such claim or the instituting of an action and to be represented by counsel. If a party entitled to notice cannot be found, the industrial commission of Wisconsin shall become the agent of such party for the giving of a notice as required herein and the notice, when given to the industrial commission, shall include an affidavit setting forth the facts, including the steps taken to locate such party. Each shall have an equal voice in the prosecution of said claim, and any disputes arising shall be passed upon by the court before whom the case is pending, and if no action is pending, then by a court of record or the industrial commission. If notice is given as herein provided, the liability of the tort feasor shall be determined as to all parties having a right to make claim, and irrespective of whether or not all parties join in prosecuting said claim, the proceeds of such claim shall be divided as follows: After deducting the reasonable cost of collection, one-third of the remainder shall in any event be paid to the injured employe or his personal representative or other person entitled to bring action. Out of the balance remaining, the employer or insurance carrier shall be reimbursed for all payments made by it, or which it may be obligated to make in the future, under the workmen's compensation act, except that it shall not be reimbursed for any payments of increased compensation made or to be made under the provisions of section 102.22, 102.57 or 102.60. Any balance remaining shall be paid to the employe or his personal representative or other person entitled to bring action. If both the employe or his personal representative or other person entitled to bring action, and the employer or compensation insurer, join in the pressing of said claim and are represented by counsel, the attorneys' fees allowed as a part of the costs of collection shall be, unless otherwise agreed upon, divided between such attorneys as directed by the court or by the industrial commission. A settlement of any third party claim shall be void unless said settlement and the distribution of the proceeds thereof is approved by the court before whom the action is pending and if no action is pending, then by a court of record or the industrial commission.

(2) In the case of liability of the employer or insurer to make payment into the state treasury under the provisions of section 102.49 or 102.59, if the injury or death was due to the actionable act, neglect or default of a third party, the employer or insurer shall have a right of action against such third party for reimbursement for any sum so paid into the state treasury, which right may be enforced either by joining in the action mentioned in subsection (1), or by independent action. Any action brought under this subsection may, upon order of the court, be consolidated and tried together with any action brought under subsection (1) hereof.

(3) Nothing in this act shall prevent an employe from taking the compensation he may be entitled to under it and also maintaining a civil action against any physician or surgeon for malpractice. The employer or compensation insurer shall have no interest in or right to share in the proceeds of any civil action against any physician or surgeon for malpractice.

(4) If the insurance carrier of the employer and of the third party shall be the same, or if there is common control of the insurer of each, the insurance carrier of the employer shall promptly notify the parties in interest and the industrial commission of that fact; likewise, if the employer has assumed the liability of the third party he shall give similar

notice; and, in default of such notice, any settlement with an injured employe or beneficiary shall be void. Nothing contained in this subsection shall prevent the employer or compensation insurer from sharing in the proceeds of any third party claim or action, as set forth in subsection (1).

(5) If the insurance carrier of the employer and of the third party shall be the same or if there is common control of the insurer of each, and the insurer fails to commence a third party action, or file a statutory notice of claim, the 2-year statute within which a notice of injury to the person must be served under section 330.19 (5) shall not be pleaded as a bar in any action commenced by the injured employe herein against any such third party subsequent to 2 years from the date of injury, but prior to 6 years from such date of injury, provided that any recovery in such action shall be limited to the insured liability of the third party. In any such action commenced by the injured employe subsequent to the 2-year period, the insurance carrier of the employer shall forfeit all right to participate in such action as a complainant and to recover any payments made under the workmen's compensation act. This subsection shall not apply if the insurance carrier has complied with subsection (4).

History: 1951 c. 382.

Revisor's Note: As to the reference in 102.29 (5) to 330.19 (5), see 330.19 (5) and the revisor's note under it.

Workmen's compensation insurer's complaint against airline which negligently caused death of insured's employe, which complaint was based on implied contract of indemnity states a claim. Wife and children of deceased are neither necessary or proper parties. Travelers Ins. Co. v. Northwest Airlines, 94 F Supp. 620.

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 under the workmen's compensation act 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 this section against the owner of the building as the party responsible for such death. Umnus v. Wisconsin Public Service 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, indicating an employment naturally requiring some traveling by automobile, the liability insurer was acquainted with sufficient facts to put it 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.

The workmen's compensation insurer in the instant case, standing in the shoes of the employer, and receiving the benefits of the workmen's compensation act in confining the employe's widow to the exclusive remedy against the employer of proceeding under the act, was thereby precluded from questioning the constitutionality of the provision in (1) giving the trial court the right to settle a dispute between the 2 plaintiffs herein as to whether a compromise settlement offered by the defendants should be accepted. Bergren v. Staples, 263 W 477, 57 NW (2d) 714.

An employer is not subrogated in the absence of statute to the rights of an employe who is injured by a third person, and a workmen's compensation insurer of the employer would have no cause of action against a third person responsible for the death of an employe were it not for the provision in (1) enabling the compensation insurer to bring such action in tort after it has paid or has become obligated to pay a lawful claim under the workmen's compensation act. When the legislature provides a new remedy it may prescribe the procedure by which the remedy may be enforced. The provision in (1), that disputes arising between the parties in an action thereunder against a third-party tortfeasor for the injury or death of an employe shall be passed on by the trial court, constitutes a part of the contract of employment between an employer and an employe who come within the provisions of the workmen's compensation act, and is tantamount to a waiver of trial by jury by operation of law, by the employer and also by his compensation insurer, who is a party to the contract of employment. Bergren v. Staples, 263 W 477, 57 NW (2d) 714.

An action against a third-party tortfeasor, 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.

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. Liability Ins. Co. v. De Bruin, 271 W 412, 73 NW (2d) 479.

See note to 331.045, citing Employers Mut. Liability Ins. Co. v. Mueller, 273 W 616, 79 NW (2d) 246.

Even though an employer who has paid compensation can share in the recovery by his employes under (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 Power & Light Co. v. Dean, 275 W 236, 81 NW (2d) 486.

See note to 331.045, citing Wisconsin

Power & Light Co. v. Dean, 275 W 236, 81 NW (2d) 486.

See note to 101.06, citing Hrabak v. Madison G. and E. Co., 240 F. (2d) 472.

102.30 Other insurance not affected; liability of insured employer. (1) This act shall not affect the organization of any mutual or other insurance company, nor the right of the employer to insure in mutual or other companies, against such liability, or against the liability for the compensation provided for by this act, or to provide by mutual or other insurance, or by arrangement with his employes, or otherwise, for the payment to such employes, their families, dependents or representatives, of sick, accident or death benefits in addition to the compensation provided herein. But liability for compensation shall not be reduced or affected by any insurance, contribution or other benefit whatsoever, due to or received by the person entitled to such compensation, and the person so entitled shall, irrespective of any insurance or other contract, have the right to recover the same directly from the employer; and in addition thereto, the right to enforce in his own name, in the manner provided in this act, the liability of any insurance company which may have insured the liability for such compensation, and the appearance, whether general or special, of any such insurance carrier by agent or attorney shall be a waiver of the service of copy of application and of notice of hearing required by section 102.17; provided, however, that payment of such compensation by either the employer or the insurance company, shall, to the extent thereof, be a bar to recovery against the other of the amount so paid, and provided, further, that as between the employer and the insurance company, payment by either directly to the employe, or to the person entitled to compensation, shall be subject to the conditions of the policy.

(2) The failure of the assured to do or refrain from doing any act required by the policy shall not be available to the insurance carrier as a defense against the claim of the injured employe or his dependents.

102.31 Liability insurance; policy regulations. (1) (a) Every contract for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this act, and provisions thereof inconsistent with the act shall be void. Such contract shall be construed to grant full coverage of all liability of the assured under and according to the provisions of the act, notwithstanding any agreement of the parties to contrary unless the commission has theretofore by written order specifically consented to the issuance of a policy on a part of such liability, except that an intermediate agency or publisher referred to in section 102.07 (6) may, under its own policy, cover liability of employes as defined in said section 102.07 (6) for an intermediate or independent news agency, provided the policy of insurance of such publisher or intermediate agency is indorsed to cover such persons. If the publisher so covers it shall not be necessary for the intermediate or independent news agency to cover liability for such persons. No policy shall be canceled by either party within the policy period nor terminated upon expiration date until a notice in writing shall be given to the other party, fixing the date on which it is proposed to cancel it, or declaring that the party does not intend to renew the policy upon expiration date. Such cancellation or termination shall not become effective until 30 days after written notice has been given to the commission unless prior thereto the employer obtains other insurance coverage or an order exempting him from carrying insurance as provided in section 102.28 (2). Such notice to the commission shall be served personally or by registered mail on the commission at its office in Madison. Issuance of a new policy shall automatically revoke and terminate any former policy or policies issued by the same company.

(b) If the insured is a partnership, such contract of insurance shall not be construed to grant coverage of the individual liability of the members of such partnership in the course of a trade, business, profession or occupation conducted by them as individuals, nor shall a contract of insurance procured to cover individual liability be construed to grant coverage of a partnership of which the individual is a member, nor to grant coverage of the liability of the individual arising as a member of any partnership.

(2) Each employe shall constitute a separate risk. Five employers or more may join in the organization of a mutual company under subsection (5) of section 201.04 and no such company organized by employers shall be authorized to effect such insurance unless it shall have in force or put in force simultaneously insurance on at least one thousand five hundred separate risks.

(3) The commission may examine from time to time the books and records of any insurance company insuring liability or compensation for an employer in this state. Any such company that shall refuse or fail to allow the commission to examine its books and records shall have its license revoked.

(5) Two or more companies, licensed to carry on the business of workmen's compensation insurance in this state, may with the approval of the commissioner of insurance, form a corporation for the purpose of insuring special risks under the workmen's compensa-

tion act. The articles of incorporation shall contain a declaration that the various company members shall contribute such amounts as may be necessary to meet any deficit of such corporation, such declaration to be in lieu of all capital, surplus and other requirements for the organization of companies and the transaction of the business of workmen's compensation insurance in this state. Such corporation shall be owned, operated and controlled by its company members as may be provided in the articles of incorporation.

(6) If any corporation licensed to transact the business of workmen's compensation insurance shall fail promptly to pay claims for compensation for which it shall become liable or if it shall fail to make reports to the industrial commission as provided in section 102.38, the industrial commission may recommend to the commissioner of insurance that the license of such company be revoked, setting forth in detail the reasons for its recommendation. The commissioner shall thereupon furnish a copy of such report to the corporation and shall set a date for a hearing, at which both the corporation and the industrial commission shall be afforded an opportunity to present evidence. If after such hearing the commissioner is satisfied that the corporation has failed to live up to all of its obligations under this chapter, he shall promptly revoke its license; otherwise he shall dismiss the complaint.

(7) If any corporation licensed to transact the business of workmen's compensation insurance shall encourage, persuade or attempt to influence any employer, arbitrarily or unreasonably to refuse employment to, or to discharge employes, the commissioner of insurance may, upon complaint of the industrial commission, under procedure set out in subsection (6) of section 102.31, revoke the license of such corporation.

(8) If any employer who has by the industrial commission been granted exemption from the carrying of compensation insurance shall arbitrarily or unreasonably refuse employment to or shall discharge employes because of a nondisabling physical condition, the industrial commission shall revoke the exemption of such employer.

See note to 102.28, citing Douglas County v. Industrial Comm. 275 W 309, 81 NW (2d) 807.

102.32 Continuing liability; guarantee settlement, gross payment. In any case in which compensation payments have extended or will extend over six months or more from the date of the injury (or at any time in death benefit cases), any party in interest may, in the discretion of the commission, be discharged from, or compelled to guarantee, future compensation payments as follows:

(1) By depositing the present value of the total unpaid compensation upon a three per cent interest discount basis with such bank or trust company as may be designated by the commission; or

(2) By purchasing an annuity within the limitations provided by law, in such insurance company granting annuities and licensed in this state, as may be designated by the commission; or

(3) By payment in gross upon a three per cent interest discount basis to be approved by the commission; and

(4) In cases where the time for making payments or the amounts thereof cannot be definitely determined, by furnishing a bond, or other security, satisfactory to the commission for the payment of such compensation as may be due or become due. The acceptance of such bond, or other security, and the form and sufficiency thereof, shall be subject to the approval of the commission. If the employer or insurer is unable or fails to immediately procure such bond, then, in lieu thereof, deposit shall be made with such bank or trust company, as may be designated by the commission, of the maximum amount that may reasonably become payable in such cases, to be determined by the commission at amounts consistent with the extent of the injuries and the provisions of the law. Such bonds and deposits are to be reduced only to satisfy such claims and withdrawn only after the claims which they are to guarantee are fully satisfied or liquidated under the provisions of subsection (1), (2) or (3); and

(5) Any insured employer may, within the discretion of the commission, compel the insurer to discharge, or to guarantee payment of its liabilities in any such case under the provisions of this section and thereby release himself from compensation liability therein, but if for any reason a bond furnished or deposit made under subsection (4) does not fully protect, the compensation insurer or uninsured employer, as the case may be, shall still be liable to the beneficiary thereof.

(6) Any time after six months from the date of the injury, the commission may order payment in gross or in such manner as it may determine to the best interest of the injured employe or his dependents. When payment in gross is ordered, the commission shall fix the gross amount to be paid based on the present worth of partial payments, considering interest at three per cent per annum.

(7) No lump sum settlement shall be allowed in any case of permanent total disability upon an estimated life expectancy, except upon consent of all parties, after hearing and

finding by the commission that the interests of the injured employe will be conserved thereby.

102.33 Blanks and records. The commission shall print and furnish free to any employer or employe such blank forms as it shall deem requisite to facilitate efficient administration of this act; it shall keep such record books or records as it shall deem required for the proper and efficient administration of this act.

102.34 Nonelection, notice by employer. Knowledge of the fact that an employer is subject to this act shall conclusively be imputed to all employes. Every employer who would be subject to this act but for the fact that he has elected not to accept its provisions thereof, shall post and maintain printed notices of such nonelection on his premises, of such design, in such numbers, and at such places as the commission, shall, by order, determine to be necessary to give information to his employes.

102.35 Penalties. (1) Every employer and every insurance company that fails to keep the records or to make the reports required by chapter 102 or that knowingly falsifies such records or makes false reports shall forfeit to the state not less than $10 nor more than $100 for each offense.

(2) Any employer, or duly authorized agent thereof, who, without reasonable cause, refuses to rehire an employe injured in the course of employment, or who, because of a claim or attempt to claim compensation benefits from such employer, shall discriminate or threaten to discriminate against an employe as to his employment, shall forfeit to the state not less than $50 nor more than $500 for each offense. No action under this subsection shall be commenced except upon request of the industrial commission.

History: 1951 c. 382.

102.37 Employers' records. Every employer of three or more persons and every employer who is subject to the workmen's compensation act shall keep a record of all accidents causing death or disability of any employe while performing services growing out of and incidental to the employment, which record shall give the name, address, age and wages of the deceased or injured employe, the time and causes of the accident, the nature and extent of the injury, and such other information as the industrial commission may require by general order. Reports based upon this record shall be furnished to the industrial commission at such times and in such manner as it may require by general order, upon forms to be procured from the commission.

102.38 Records of payments; reports thereon. Every insurance company which transacts the business of compensation insurance, and every employer who is subject to the workmen's compensation act, but who has not insured his liability, shall keep a record of all payments made under the provisions of chapter 102 of the statutes and of the time and manner of making such payments, and shall furnish such reports based upon these records to the industrial commission as it may require by general order, upon forms to be procured from the commission.

102.39 General orders; application of statutes. The provisions of chapter 101, relating to the adoption, publication, modification and court review of general orders of the commission shall apply to all general orders adopted pursuant to this chapter.

102.40 Reports not evidence in actions. Reports furnished to the commission pursuant to sections 102.37 and 102.38 shall not be admissible as evidence in any action or proceeding arising out of the death or accident reported.

102.42 Incidental compensation. (1) The employer shall supply such medical, surgical and hospital treatment, medicines, medical and surgical supplies, crutches, artificial members, appliances, and training in the use of artificial members and appliances, or, at the option of the employe, if the employer has not filed notice as hereinafter provided, Christian Science treatment in lieu of medical treatment, medicines and medical supplies, as may be reasonably required to cure and relieve from the effects of the injury, and to attain efficient use of artificial members and appliances, and in case of his neglect or refusal seasonably to do so, or in emergency until it is practicable for the employe to give notice of injury, the employer shall be liable for the reasonable expense incurred by or on behalf of the employe in providing the same. The employer shall also be liable for reasonable expense incurred by the employe for necessary treatment to cure and relieve him from the effects of occupational disease prior to the time that the employe knew or should have known the nature of his disability and its relation to employment, and as to such treatment the provisions of section 102.42 (2) and (3) shall not apply.

(2) The employe shall have the right to make choice of his attending physician from a panel of physicians to be named by the employer. Where the employer has knowledge of the injury and the necessity for treatment, his failure to tender the same shall con-

stitute such neglect or refusal. Failure of the employer to maintain a reasonable number of competent and impartial physicians, ready to undertake the treatment of the employe, and to permit the employe to make choice of his attendant from among them, shall constitute neglect and refusal to furnish such attendance and treatment. Nothing contained in this section shall limit the right of the employe to make a second choice of physician from the panel of physicians named by the employer. The commission may upon summary hearing permit an injured employe to make selection of a physician not on the panel.

(3) MEDICAL PANEL. In determining the reasonableness of the size of the medical panel, the commission shall take into account the number of competent physicians immediately available to the community in which the medical service is required, and where only one such physician is available, the tender of attention by such physician shall be construed as a compliance with this section unless specialized or extraordinary treatment is necessary. In such panel, partners and clinics shall be deemed as one physician. Every employer shall post the names and addresses of the physicians on his panel in such manner as to afford his employes reasonable notice thereof.

(4) PREJUDICED PHYSICIAN. Whenever in the opinion of the commission a panel physician has not impartially estimated the degree of permanent disability or the extent of temporary disability of any injured employe, the commission may cause such employe to be examined by a physician selected by it, and to obtain from him a report containing his estimate of such disabilities. If the report of such physician shows that the estimate of the panel physician has not been impartial from the standpoint of such employe, the commission may in its discretion charge the cost of such examination to the employer, if he is a self-insurer, or to the insurance company which is carrying the risk.

(5) CHRISTIAN SCIENCE. Any employer may elect not to be subject to the provisions for Christian Science treatment provided for in this section by filing written notice of such election with the commission.

(6) ARTIFICIAL MEMBERS. Artificial members furnished at the end of the healing period need not be duplicated.

(7) TREATMENT REJECTED BY EMPLOYE. Unless the employe shall have elected Christian Science treatment in lieu of medical, surgical, hospital or sanatorium treatment, no compensation shall be payable for the death or disability of an employe, if his death be caused, or insofar as his disability may be aggravated, caused or continued (a) by an unreasonable refusal or neglect to submit to or follow any competent and reasonable medical or surgical treatment, (b) or, in the case of tuberculosis, by his refusal or neglect to submit to or follow hospital or sanatorium treatment when found by the commission to be necessary. The right to compensation accruing during a period of refusal or neglect under (b) shall be barred, irrespective of whether disability was aggravated, caused or continued thereby.

History: 1951 c. 382; 1953 c. 61; 1957 c. 97.

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 Telephone 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 Telephone Co. v. Industrial Comm. 263 W 380, 57 NW (2d) 334.

102.43 Weekly compensation schedule. If the injury causes disability, an indemnity shall be due as wages commencing with the fourth calendar day, exclusive of Sundays only, excepting where such employes work on Sunday, after the employe leaves work as the result of the injury, and shall be payable weekly thereafter, during such disability. If the disability shall exist after 10 calendar days from the date the employe leaves work as a result of the injury and only if it so exist indemnity shall also be due and payable for the first 3 calendar days, exclusive of Sundays only, excepting where such employes work on Sunday. Said weekly indemnity shall be as follows:

(1) If the injury causes total disability, seventy per cent of the average weekly earnings during such total disability.

(2) If the injury causes partial disability, during the partial disability, such proportion of the weekly indemnity rate for total disability as the actual wage loss of the injured employe bears to his average weekly wage at the time of his injury.

(3) If the disability caused by the injury is at times total and at times partial, the weekly indemnity during each total or partial disability shall be in accordance with subsections (1) and (2), respectively.

(4) If the disability period involves a fractional week, indemnity shall be paid for each day of such week, except Sundays only, at the rate of one-sixth of the weekly indemnity.

(5) Temporary disability, during which compensation shall be payable for loss of earnings, shall include such period as may be reasonably required for training in the use of artificial members and appliances, and shall include such period as the employe may be receiving instruction pursuant to the provisions of section 102.61. Temporary disability on account of receiving instruction of the latter nature, and not otherwise resulting from the injury, shall not be in excess of 40 weeks.

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 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. McCune 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 is 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.

102.44 Maximum limitations. Section 102.43 shall be subject to the following limitations:

(2) In case of permanent total disability aggregate indemnity shall be weekly indemnity for the period that he may live. Total impairment for industrial use of both eyes, or the loss of both arms at or near the shoulder, or of both legs at or near the hip, or of one arm at the shoulder and one leg at the hip, shall constitute permanent total disability. This enumeration shall not be exclusive but in other cases the commission shall find the facts.

(3) For permanent partial disability not covered by the provisions of sections 102.52 to 102.56 the aggregate number of weeks of indemnity shall bear such relation to the number of weeks set out in paragraphs (a) and (b) as the nature of the injury bears to one causing permanent total disability and shall be payable at the rate of 70 per cent of the average weekly earnings of the employe to be computed as provided in section 102.11. Such weekly indemnity shall be in addition to compensation for healing period and shall be for the period that he may live, not to exceed, however, these named limitations, to wit:

(a) One thousand weeks for all persons 50 years of age or less.

(b) For each successive yearly age group, beginning with 51 years, the maximum limitation shall be reduced by 2½ per cent per year, with no reduction in excess of 50 per cent.

(4) Where the permanent disability is covered by the provisions of sections 102.52, 102.53 and 102.55, such sections shall govern; provided, that in no case shall the percentage of permanent total disability be taken as more than 100 per cent.

History: 1951 c. 382; 1953 c. 328.

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.

102.45 Benefits payable to minors; how paid. Compensation and death benefit payable to an employe or dependent who was a minor when his right began to accrue, may, in the discretion of the commission, be ordered paid to a bank, trust company, trustee, parent or guardian, for the use of such employe or dependent as may be found best calculated to conserve his interests. Such employe or dependent shall be entitled to receive payments, in the aggregate, at a rate not less than that applicable to payments of primary compensation for total disability or death benefit as accruing from his twenty-first birthday.

102.46 Death benefit. Where death proximately results from the injury and the deceased leaves a person wholly dependent upon him for support, the death benefit shall equal four times his average annual earnings, but when added to the disability indemnity paid and due at the time of death, shall not exceed seventy per cent of weekly wage for the number of weeks set out in paragraphs (a) and (b) of subsection (3) of section 102.44, based on the age of the deceased at the time of his injury.

102.47 Death benefit, continued. If death occurs to an injured employe other than as a proximate result of the injury, before disability indemnity ceases, death benefit and burial expense allowance shall be as follows:

(1) Where the injury proximately causes permanent total disability, they shall be the same as if the injury had caused death, except that the burial expense allowance shall be included in the items subject to the limitation stated in section 102.46. The amount

available shall be applied toward burial expense before any is applied toward death benefit.

(2) Where the injury promixately causes permanent partial disability, the unaccrued compensation shall first be applied toward funeral expenses, not to exceed $350, any remaining sum to be paid to dependents, as provided in this section and ss. 102.46 and 102.48 and there shall be no liability for any other payments. All computations under this subsection shall take into consideration the present value of future payments.

History: 1951 c. 382; 1953 c. 328.

102.48 Death benefit, continued. If the deceased employe leaves no one wholly dependent upon him for support, partial dependency and death benefits therefor shall be as follows:

(1) An unestranged surviving parent or parents, residing within any of the states or District of Columbia of the United States, shall receive a death benefit of $2,000. If the parents are not living together, the commission shall divide this sum in such proportion as it shall determine to be just, considering their ages and other facts bearing on dependency.

(2) In all other cases the death benefit shall be such sum as the commission shall determine to represent fairly and justly the aid to support which the dependent might reasonably have anticipated from the deceased employe but for the injury. To establish anticipation of support and dependency, it shall not be essential that the deceased employe made any contribution to support. The aggregate benefits in such case shall not exceed twice the average annual earnings of the deceased; or four times the contributions of the deceased to the support of such dependents during the year immediately preceding his death, whichever amount is the greater. In no event shall the aggregate benefits in such case exceed the amount which would accrue to a person solely and wholly dependent. Where there is more than one partial dependent the weekly benefit shall be apportioned according to their relative dependency. The term "support" as used in sections 102.42 to 102.63 shall include contributions to the capital fund of the dependents, for their necessary comfort.

(3) Death benefit, other than burial expenses, except otherwise provided, shall be paid in weekly instalments corresponding in amount to fifty per cent of the weekly earnings of the employe, until otherwise ordered by the commission.

History: 1951 c. 382.

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. Dependency was a question of fact, and as such was for the commission to determine. Neumann v. Industrial Comm. 257 W 120, 42 NW (2d) 445.

102.49 Additional death benefit for children, state fund. (1) Where the beneficiary under s. 102.46 or s. 102.47 (1) is the wife or husband of the deceased employe and is wholly dependent for support, an additional death benefit shall be paid from the funds provided by sub. (5) for each child by their marriage living at the time of the death of the employe, and who is likewise wholly dependent upon him for support. Such additional benefit shall be computed from the date of the death of the employe as follows: For the child one year of age or under (including a posthumous child), a sum equal to 1-1/15 times the average annual earnings of the deceased employe. For children in each successive yearly age group the amount allowed shall be reduced by one-sixteenth part of such sum, with no allowance for any child over 16 years of age at the death of the employe unless such child be physically or mentally incapacitated from earning, in which case the commission shall make such allowance as the equities and the necessities of the case merit, not more, however, than the amount payable on account of a child under one year of age.

(2) A child lawfully adopted by the deceased employe and the surviving spouse, prior to the time of the injury, and a child not his own by birth or adoption but living with him as a member of his family at the time of the injury shall for the purpose of this section be taken as a child by their marriage.

(3) Where the employe leaves a wife or husband wholly dependent and also a child or children by a former marriage or adoption, likewise wholly dependent, aggregate benefits shall be the same in amount as if the children were the children of such surviving spouse, and the entire benefit shall be apportioned to the dependents in such amounts as the commission shall determine to be just, considering their ages and other facts bearing on dependency. The benefit awarded to the surviving spouse shall not exceed four times the average annual earnings of the deceased employe.

(4) Dependency of any child for the purposes of this section shall be determined according to the provisions of subsection (1) of section 102.51, in like manner as would be done if there was no surviving dependent parent.

(5) In each case of injury resulting in death, leaving no person wholly dependent for support, the employer or insurer shall pay into the state treasury such an amount, when added to the sums paid or to be paid on account of partial dependency, as shall equal the death benefit payable to a person wholly dependent, such payment to the state treasury in no event to exceed $11,000. The payment into the state treasury shall be made in all such cases regardless of whether the dependents or personal representatives of the deceased employe commence action against a third party as provided in s. 102.29. If such payment is not made within 20 days after the commisssion makes request therefor, any sum payable shall bear interest at the rate of 6 per cent per annum.

(6) The moneys paid into the state treasury pursuant to subsection (5) with all accrued interest is hereby appropriated to the commission for the discharge of all liability for additional death benefits accruing under this section.

(7) The additional benefits for account of each child shall accrue at the rate of 13 per cent of the surviving parent's weekly indemnity. The commission shall have authority to award such benefits to the surviving parent of such child, to his guardian or to such other person, bank or trust company for his use as may be found best calculated to conserve the interest of the child. In the case of death of a child while benefits are still payable there shall be paid the reasonable expense for burial not exceeding $100.

(8) For the proper administration of the funds available under subsections (5) and (6) the commission shall, by order, set aside in the state treasury suitable reserves to carry to maturity the liability for additional death benefit. Such moneys shall be invested by the state of Wisconsin investment board, in the securities authorized in section 206.34.

History: 1951 c. 382, 511; 1953 c. 328; 1955 c. 281; 1957 c. 58.

See note to 331.045, citing Employers Mut. Liability Ins. Co. v. Mueller, 273 W 616, 79 NW (2d) 246.

See note to 331.045, citing Wisconsin Power & Light Co. v. Dean, 275 W 236, 81 NW (2d) 486.

102.50 Burial expenses. In all cases where death of an employe proximately results from the injury the employer or insurer shall pay the reasonable expense for burial, not exceeding $350.

History: 1953 c. 328.

102.51 Dependents. (1) WHO ARE. The following shall be conclusively presumed to be solely and wholly dependent for support upon a deceased employe: A wife upon a husband with whom she is living at the time of his death; a husband upon a wife with whom he is living at the time of her death; a child under the age of 18 years (or over said age, but physically or mentally incapacitated from earning), upon the parent with whom he is living at the time of the death of such parent, there being no surviving dependent parent. Where a dependent entitled to the presumption in this subsection survives the deceased employe, all other dependents shall be excluded. The charging of any portion of the support and maintenance of a child upon one of the parents, or any voluntary contribution toward the support of a child by a parent, or an obligation to support a child by a parent shall constitute a living with any such parent within the meaning of this section.

(2) WHO ARE NOT. (a) No person shall be considered a dependent unless a member of the family or a spouse, or a divorced spouse who has not remarried, or lineal descendant or ancestor, or brother or sister of the deceased employe.

(b) Where for eight years or more prior to the date of injury a deceased employe has been a resident of the United States, it shall be conclusively presumed that no person who has remained a nonresident alien during that period is either totally or partially dependent upon him for support.

(c) No person who is a nonresident alien shall be found to be either totally or partially dependent on a deceased employe for support who cannot establish dependency by proving contributions from the deceased employe by written evidence or tokens of the transfer of money, such as drafts, letters of credit, canceled checks, or receipts for the payment to any bank, express company, United States post office, or other agency commercially engaged in the transfer of funds from one country to another, for transmission of funds on behalf of said deceased employe to such nonresident alien claiming dependency. This provision shall not be applicable unless the employe has been continuously in the United States for at least one year prior to his injury, and has been remuneratively employed therein for at least 6 months.

(3) DIVISION AMONG DEPENDENTS. If there is more than one person wholly or partially dependent, the death benefit shall be divided between such dependents in such proportion as the commission shall determine to be just, considering their ages and other facts bearing on such dependency.

(4) DEPENDENCY AS OF DATE OF INJURY. Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the injury to the

employe, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions; and the death benefit shall be directly recoverable by and payable to the dependents entitled thereto or their legal guardians or trustees; in case of the death of a dependent whose right to a death benefit has thus become fixed, so much of the same as is then unpaid shall be payable to his personal representatives in gross.

(5) WHEN NOT INTERESTED. No dependent of an injured employe shall be deemed a party in interest to any proceeding by him for the enforcement of his claim for compensation, nor as respects the compromise thereof by such employe. Subject to the provisions of section 102.16 (1), a compromise of all liability entered into by an employe shall be binding upon his dependents.

(6) DIVISION AMONG DEPENDENTS. Benefits accruing to a minor dependent child may be awarded to the mother in the discretion of the commission. Notwithstanding the provisions of subsection (1) the commission may reassign the death benefit, in accordance with their respective needs therefor as between a surviving spouse and children designated in section 102.49.

(7) CERTAIN DEFENSE BARRED. In proceedings for the collection of primary death benefit or burial expense it shall not be a defense that the applicant, either individually or as a partner, was an employer of the deceased.

History: 1951 c. 382.

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 (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.

To be eligible for death benefits as "dependents," those persons conclusively presumed to be dependents under (1) (Stats. 1945) as well as those obliged to establish their dependency by evidence under (2), must have qualified as belonging to a class described in (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.

102.52 Permanent partial disability schedule. In cases included in the following schedule of permanent partial disabilities indemnity shall be paid for the healing period, and in addition thereto, where the employe is 50 years of age or less, for the period specified, at the rate of 70 per cent of the average weekly earnings of the employe, to be computed as provided in section 102.11:

(1) The loss of an arm at the shoulder, 500 weeks;
(2) The loss of an arm at the elbow, 450 weeks;
(3) The loss of a hand, 400 weeks;
(4) The loss of a palm where the thumb remains, 275 weeks;
(5) The loss of a thumb and the metacarpal bone thereof, 125 weeks;
(6) The loss of a thumb at the proximal joint, 100 weeks;
(7) The loss of a thumb at the distal joint, 40 weeks;
(8) The loss of all fingers on one hand at their proximal joints, 225 weeks;
(9) Losses of fingers on each hand as follows:
(a) An index finger and the metacarpal bone thereof, 60 weeks;
(b) An index finger at the proximal joint, 50 weeks;
(c) An index finger at the second joint, 30 weeks;
(d) An index finger at the distal joint, 12 weeks;
(e) A middle finger and the metacarpal bone thereof, 45 weeks;
(f) A middle finger at the proximal joint, 35 weeks;
(g) A middle finger at the second joint, 20 weeks;
(h) A middle finger at the distal joint. 8 weeks:
(i) A ring finger and the metacarpal bone thereof, 26 weeks;
(j) A ring finger at the proximal joint, 20 weeks;
(k) A ring finger at the second joint, 15 weeks;
(l) A ring finger at the distal joint, 6 weeks;
(m) A little finger and the metacarpal bone thereof, 28 weeks;
(n) A little finger at the proximal joint, 22 weeks;
(o) A little finger at the second joint, 16 weeks;
(p) A little finger at the distal joint, 6 weeks;
(10) The loss of a leg at the hip joint, 500 weeks;
(11) The loss of a leg at the knee, 425 weeks;
(12) The loss of a foot at the ankle, 250 weeks;
(13) The loss of the great toe with the metatarsal bone thereof, 83⅓ weeks;
(14) Losses of toes on each foot as follows:
(a) A great toe at the proximal joint, 25 weeks;

(b) A great toe at the distal joint, 12 weeks;
(c) The second toe with the metatarsal bone thereof, 25 weeks;
(d) The second toe at the proximal joint, 8 weeks;
(e) The second toe at the second joint, 6 weeks;
(f) The second toe at the distal joint, 4 weeks;
(g) The third, fourth or little toe with the metatarsal bone thereof, 20 weeks;
(h) The third, fourth or little toe at the proximal joint, 6 weeks;
(i) The third, fourth or little toe at the second or distal joint, 4 weeks;
(15) The loss of an eye by enucleation or evisceration, 275 weeks;
(16) Total impairment of one eye for industrial use, 250 weeks;
(17) Total deafness from accident or sudden trauma, 333⅓ weeks;
(18) Total deafness of one ear from accident or sudden trauma, 50 weeks.

History: 1953 c. 328.

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, 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.

102.53 Multiple injury and age variations. (1) In case an injury causes more than one permanent disability specified in sections 102.44 (3), 102.52 and 102.55, the period for which indemnity shall be payable for each additional equal or lesser disability shall be increased as follows:

(a) In the case of impairment of both eyes, by 200 per cent.

(b) In the case of disabilities on the same hand covered by section 102.52 (9), by 100 per cent for the first equal or lesser disability and by 150 per cent for the second and third equal or lesser disabilities.

(c) In the case of disabilities on the same foot covered by section 102.52 (14), by 20 per cent.

(d) In all other cases, by 20 per cent.

(e) The aggregate result as computed by applying paragraph (a), and the aggregate result for members on the same hand or foot as computed by applying paragraphs (b) and (c), shall each be taken as a unit for applying paragraph (d) as between such units, and as between such units and each other disability.

(2) In cases where the injured employe is above 50 years of age when injured the periods for which indemnity shall be payable, in addition to the healing period, shall be reduced from those specified in section 102.52 by 2½ per cent for each year that the age of such employe exceeds 50, with no reduction in excess of 50 per cent.

History: 1951 c. 382.

102.55 Application of schedules. (1) Whenever amputation of a member is made between any 2 joints mentioned in the schedule in section 102.52 the determined loss and resultant indemnity therefor shall bear such relation to the loss and indemnity applicable in case of amputation at the joint next nearer the body as such injury bears to one of amputation at the joint nearer the body.

(2) For the purposes of this schedule permanent and complete paralysis of any member shall be deemed equivalent to the loss thereof.

(3) For all other injuries to the members of the body or its faculties which are specified in this schedule resulting in permanent disability, though the member be not actually severed or the faculty totally lost, compensation shall bear such relation to that named in this schedule as disabilities bear to the disabilities named in this schedule. Indemnity in such cases shall be determined by allowing weekly indemnity during the healing period resulting from the injury and the percentage of permanent disability resulting thereafter as found by the commission.

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 Occupational deafness; definitions. (1) "Occupational deafness" means permanent partial or permanent total loss of hearing of one or both ears due to prolonged exposure to noise in employment. "Noise" means sound capable of producing occupational deafness. "Noisy employment" means employment in the performance of which an employe is subjected to noise.

(2) No benefits shall be payable for temporary total or temporary partial disability under this act for loss of hearing due to prolonged exposure to noise.

(3) An employe who because of occupational deafness is transferred by his employer to other noisy employment and thereby sustains actual wage loss shall be compensated at

the rate provided in s. 102.43 (2), not exceeding $3,500 in the aggregate from all employers. "Time of injury," "occurrence of injury," "date of injury" in such case shall be the date of wage loss.

(4) Subject to the limitations herein contained and the provisions of s. 102.53 (2) there shall be payable for total occupational deafness of one ear, 36 weeks of compensation; for total occupational deafness of both ears, 180 weeks of compensation; and for partial occupational deafness compensation shall bear such relation to that named herein as disabilities bear to the maximum disabilities herein provided. In cases covered by this subsection "time of injury," "occurrence of injury," or "date of injury" shall be exclusively the date of occurrence of any of the following events to an employe:

(a) Transfer because of occupational deafness to nonnoisy employment by an employer whose employment has caused occupational deafness;

(b) Retirement;

(c) Termination of the employer-employe relationship;

(d) Layoff, provided the layoff is complete and continuous for one year;

(e) No claim under this subsection shall be filed, however, until 6 consecutive months of removal from noisy employment after the time of injury except that under par. (d) such 6 consecutive months' period may commence within the last 6 months of layoff.

(5) The limitation provisions in this act shall control claims arising under this section. Such provisions shall run from the first date upon which claim may be filed, or from the date of subsequent death, provided that no claim shall accrue to any dependent unless an award has been issued or liability admitted.

(6) No payment shall be made to an employe under this section unless he shall have worked in noisy employment for a total period of at least 90 days for the employer from whom he claims compensation.

(7) An employer shall become liable for the entire occupational deafness to which his employment has contributed; but if previous deafness is established by a hearing test or other competent evidence, whether or not the employe was exposed to noise within the 6 months preceding such test, he shall not be liable for previous loss so established nor shall he be liable for any loss for which compensation has previously been paid or awarded.

(8) Any amount paid to an employe under this section by any employer shall be credited against compensation payable by any employer to such employe for occupational deafness under subs. (3) and (4). No employe shall in the aggregate receive greater compensation from any or all employers for occupational deafness than that provided in this section for total occupational deafness.

History: 1955 c. 281; 1957 c. 204.

102.56 Disfigurement. If an employe is so permanently disfigured about the face, head, neck, hand or arm as to occasion loss of wage, the commission may allow such sum for compensation on account thereof, as it may deem just, not exceeding his average annual earnings as defined in section 102.11.

102.565 Silicosis, nondisabling; medical examination; conditions of liability. (1) When an employe working subject to this chapter is, because he has a nondisabling silicosis, discharged from the employment in which he is engaged, or when an employe ceases such employment and it is in fact inadvisable for him on account of a nondisabling silicosis to continue in it, and suffers wage loss by reason of such discharge, or such cessation, the commission may allow such compensation on account thereof as it may deem just, not exceeding $3,500. In case of such discharge prior to a finding by the industrial commission that it is inadvisable for him to continue in such employment, the liability of the employer who shall so discharge his employe shall be primary, and the liability of the insurer shall be secondary, under the same procedure and to the same effect as provided by s. 102.62.

(2) Upon application of any employer or employe the commission may direct any employe of such employer or such employe who, in the course of his employment, has been exposed to the inhalation of silica, to submit to examination by a physician or physicians to be appointed by the industrial commission to determine whether such employe has silicosis, and the degree thereof. The cost of such medical examination shall be borne by the person making application. The results of such examination shall be submitted by the physician to the industrial commission, which shall submit copies of such reports to the employer and employe, who shall have opportunity to rebut the same provided request therefor is made to the commission within 10 days from the mailing of such report to the parties. The commission shall make its findings as to whether or not it is inadvisable for the employe to continue in his employment.

(3) If an employe shall refuse to submit to such examination after direction by the commission, or any member or examiner thereof, or shall in any way obstruct the same, his right to compensation under this section shall be barred.

(4) No payment shall be made to an employe under this section unless he shall have worked for the employer from whom he claims compensation in work exposing him to inhalation of silica for a total period of at least 90 days.

(5) Payment of a benefit under this section to an employe shall estop such employe from any further recovery whatsoever from any employer under this section.

History: 1953 c. 328; 1955 c. 281.

The enactment of ch. 328, Laws 1953, amending this section, which specifically applies to cases of impairment of hearing as the result of exposure to industrial noise, did not establish prior legislative intent that both wage loss and termination of employment were necessary for recovery under the act before this amendment. Green Bay Drop Forge Co. v. Industrial Comm. 265 W 38, 60 NW (2d) 409, 61 NW (2d) 847.

102.57 Violations of safety provisions, penalty. Where injury is caused by the failure of the employer to comply with any statute or any lawful order of the commission, compensation and death benefits as provided in this chapter shall be increased 15 per cent. Failure of an employer reasonably to enforce compliance by employes with such statute or order of the commission shall constitute failure by the employer to comply with such statute or order.

History: 1953 c. 328.

In a workmen's compensation proceeding involving injuries sustained by a paper-mill employe who was working in a passageway adjoining a blow pit when paper pulp treated with acid and cooked with steam under pressure was blown into the pit and, because another employe had failed to close one of the doors or ports of the pit, steam and fumes escaped into the passageway, and burned the former before he could reach either of the 2 stairways provided for exit from the passageway, the evidence supported the commission's finding that the injuries did not occur by reason of the employer's failure to comply with the requirements of the safe-place statute or with safety orders of the commission relating to passageways and exits. Hipke v. Industrial Comm. 261 W 226, 52 NW (2d) 401.

Whether there was a failure of the employer to comply with a statute or a lawful order of the commission, so as to entitle the employe to increased compensation, 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. It is the claimant's burden to establish that a statute or an order of the commission was violated by the employer. Hipke v. Industrial Comm. 261 W 226, 52 NW (2d) 401.

In a proceeding wherein an award of increased compensation to an employe who was injured while setting sheave plates in an "open-frame hammer" was based on the employer's failure to comply with a safety order relating to "drop hammers," the evidence established that there is a well-defined distinction in the trade or industry between a "drop hammer" and an "open-frame hammer" and that the understanding in the trade is that drop hammers do not include open-frame hammers, and require the conclusion that the term "drop hammer" in the order, without further specification, does not include an open-frame hammer such as was here being used. Harnischfeger Corp. v. Industrial Comm. 263 W 76, 56 NW (2d) 499.

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, citing Northern Light Co. v. Industrial Comm. 264 W 313, 58 NW (2d) 653.

Whether there has been a failure of the employer to comply with a lawful order of the 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. 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 Safety Order 3537, 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 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 Bridge & Iron Co. v. Industrial Comm. 273 W 266, 77 NW (2d) 413.

A safety order requiring an employer to attach every counterweight with a safety chain that "will prevent" the weight from falling is held invalid for unreasonableness in requiring a greater degree of safety than is required by the general statute on which it is promulgated, and for vagueness and indefiniteness in merely directing that the counterweight shall be inclosed or attached with a safety chain that will prevent the weight from falling to a distance of less than 7 feet from the floor or working level. Manitowoc Co. v. Industrial Comm. 273 W 293, 77 NW (2d) 693.

102.58 Decreased compensation. Where injury is caused by the wilful failure of the employe to use safety devices where provided in accordance with any statute or lawful order of the commission and adequately maintained, and their use is reasonably enforced, by the employer, or where injury results from the employe's wilful failure to obey any reasonable rule adopted by the employer for the safety of the employe and of which the employe has notice, or where injury results from the intoxication of the employe, the compensation, and death benefit provided herein shall be reduced 15 per cent.

102.59 Pre-existing disability, indemnity, state fund, investment. (1) If an employe has at the time of injury permanent disability which if it had resulted from such

injury would have entitled him to indemnity for 250 weeks less 2½ per cent thereof for each year of age above 50 years with no reduction in excess of 50 per cent, and, as a result of such injury, incurs further permanent disability, which entitles him to indemnity for 250 weeks less 2½ per cent thereof for each year of age above 50 years with no reduction in excess of 50 per cent, he shall be paid from the funds provided in this section additional compensation equivalent to the amount which would be payable for said previous disability if it had resulted from such injury or the amount which is payable for said further disability, whichever is the lesser, provided, that if said disabilities result in permanent total disability the additional compensation shall be in such amount as will complete the payments which would have been due had said permanent total disability resulted from such injury. Such additional compensation shall accrue from the end of the period for which compensation for permanent disability resulting from such injury is payable by the employer, and shall be subject to the provisions of s. 102.32 (6) and (7).

(2) In the case of the loss or of the total impairment of a hand, arm, foot, leg or eye, the employer shall be required to pay $1,500 into the state treasury. The payment shall be made in all such cases regardless of whether the employe, his dependent or personal representatives, commence action against a third party as provided in s. 102.29.

(3) The moneys so paid into the state treasury, with all accrued interest, is hereby appropriated to the commission for the discharge of all liability for special additional indemnity accruing under this section.

(4) For the proper administration of the funds available under this section the commission shall, by order, set aside in the state treasury suitable reserves to carry to maturity the liability for special additional indemnity in each case, and for any contingent death benefit. Such moneys shall be invested by the state of Wisconsin investment board, in the securities authorized in section 206.34.

History: 1951 c. 382, 511; 1953 c. 328; 1955 c. 281, 621; 1957 c. 97.

102.60 Minor illegally employed, compensation. When the injury is sustained by a minor illegally employed, compensation and death benefits shall be as follows:

(1) Double the amount otherwise recoverable, if the injured employe is a minor of permit age, and at the time of the injury is employed, required, suffered or permitted to work without a written permit issued pursuant to chapter 103, except as provided in subsection (2).

(2) Treble the amount otherwise recoverable, if the injured employe is a minor of permit age, and at the time of the injury is employed, required, suffered or permitted to work without a permit in any place of employment or at any employment in or for which the commission acting under authority of chapter 103, has adopted a written resolution providing that permits shall not be issued.

(3) Treble the amount otherwise recoverable if the injured employe is a minor of permit age, or over, and at the time of the injury is employed, required, suffered, or permitted to work at prohibited employment.

(4) Treble the amount otherwise recoverable, if the injured employe is a minor under permit age and illegally employed.

(5) A permit unlawfully issued by an officer specified in chapter 103, or unlawfully altered after issuance, without fraud on the part of the employer, shall be deemed a permit within the provisions of this section.

(6) If the amount recoverable under this section for temporary disability shall be less than the actual loss of wage sustained by the minor employe, then liability shall exist for such loss of wage.

(7) The provisions of subsections (1) to (6) of section 102.60 shall not apply to employes as defined in subsection (6) of section 102.07 if the agency or publisher shall establish by affirmative proof that at the time of the injury the employe was not employed with the actual or constructive knowledge of such agency or publisher.

(8) This section shall not apply to liability arising under s. 102.06 unless the employer sought to be charged knew or should have known that the minor was illegally employed by the contractor or subcontractor.

(9) The increased compensation or increased death benefits recoverable under sub. (1) shall not exceed $5,000. The increased compensation or increased death benefits recoverable under subs. (2), (3) or (4) shall not exceed $7,500.

History: 1957 c. 204.

102.61 Indemnity under rehabilitation law. An employe who is entitled to receive and has received compensation pursuant to this chapter, and who is entitled to and is receiving instructions pursuant to the provisions of the act of congress known as the vocational rehabilitation act, and amendments thereto (Public Law 113-78th Congress) as administered by the state in which he holds residence or in which he resided at the time

of becoming physically handicapped, shall, in addition to his other indemnity, be paid his actual and necessary expenses of travel and, if he receives such instructions elsewhere than at the place of his residence, his actual and necessary costs of maintenance, during rehabilitation, subject to the following conditions and limitations:

(1) He must undertake the course of instruction within 60 days from the date when he has sufficiently recovered from his injury to permit of his so doing, or as soon thereafter as the officer or agency having charge of his instruction shall provide opportunity for his rehabilitation.

(2) He must continue in rehabilitation training with such reasonable regularity as his health and situation will permit.

(3) He may not have expenses of travel and costs of maintenance on account of training for a period in excess of 40 weeks in all.

(4) The commission shall determine the rights and liabilities of the parties under this section in like manner and with like effect as it does other issues under compensation.

See note to 41.71, citing Massachusetts Bonding & Ins Co. v. Industrial Comm. 275 W 505, 82 NW (2d) 191.

102.62 Primary and secondary liability; unchangeable. In case of liability for the increased compensation or increased death benefits provided for by section 102.57, or included in section 102.60, the liability of the employer shall be primary and the liability of the insurance carrier shall be secondary. In case proceedings are had before the commission for the recovery of such increased compensation or increased death benefits the commission shall set forth in its award the amount and order of liability as herein provided. Execution shall not be issued against the insurance carrier to satisfy any judgment covering such increased compensation or increased death benefits until execution has first been issued against the employer and has been returned unsatisfied as to any part thereof. Any provision in any insurance policy undertaking to guarantee primary liability or to avoid secondary liability for such increased compensation or increased death benefits shall be void. In case the employer shall have been adjudged bankrupt, or have made an assignment for the benefit of creditors, or if the employer, other than an individual, have gone out of business or have been dissolved, or if a corporation, its charter have been forfeited or revoked, the insurer shall be liable for the payment of increased compensation and death benefits without judgment or execution against the employer, but without altering the primary liability of the employer.

History: 1951 c. 382.

102.63 Refunds by state. Whenever the commission shall certify to the state treasurer that excess payment has been made under section 102.59 or under subsection (5) of section 102.49 either because of mistake or otherwise, the state treasurer shall within five days after receipt of such certificate draw an order against the fund in the state treasury into which such excess was paid, reimbursing such payor of such excess payment together with interest actually earned thereon.

102.64 Attorney general shall represent state and commission. (1) The attorney general shall represent the state in all cases involving payment into or out of the state treasury under s. 20.550 (1) or s. 102.49 or 102.59. He shall have power to compromise the amount of such payments but such compromises shall be subject to review by the commission. If the wife or husband of the deceased employe compromises her or his claim for primary death benefit, the claim of the children of such employe under s. 102.49 shall be compromised on the same pro rata basis subject to approval by the commission.

(2) In all proceedings upon claims for compensation against the state, the attorney general may appear on behalf of the state.

(3) In any action to review an order or award of the commission, and upon any appeal therein to the supreme court, the attorney-general shall appear on behalf of the commission, whether any other party defendant shall be represented or not, except that in actions brought by the state the governor shall appoint an attorney to appear on behalf of the commission.

History: 1953 c. 328.

102.65 Workmen's compensation security funds. (1) DEFINITIONS. As used in this section, unless the context or subject matter otherwise require:

(a) "Stock fund" means the stock workmen's compensation security fund created by this section.

(b) "Mutual fund" means the mutual workmen's compensation security fund created by this section.

(c) "Reciprocal fund" means the reciprocal compensation security fund created by this section.

(d) "Funds" means the stock workmen's compensation security fund, the mutual workmen's compensation security fund and the reciprocal workmen's compensation security fund.

(e) "Fund" means either the stock workmen's compensation security fund, the mutual workmen's compensation security fund or the reciprocal fund as the context may require.

(f) "Fund year" means the calendar year.

(g) "Policy year" means the calendar year in which the policies of compensation insurance became effective or were renewed.

(h) "Stock carrier" means any stock insurance company authorized to transact the business of workmen's compensation insurance in this state, except an insolvent stock carrier.

(i) "Mutual carrier" means any mutual insurance company authorized to transact the business of workmen's compensation insurance in this state, except an insolvent mutual carrier.

(j) "Reciprocal carrier" means any association or group of persons exchanging contracts of insurance or indemnity on the reciprocal or interinsurance plan, authorized to transact the business of workmen's compensation insurance in this state, except an insolvent reciprocal carrier.

(k) "Carrier" means either a stock carrier, a mutual carrier or a reciprocal carrier as the context may require.

(l) "Insolvent stock carrier" or "insolvent mutual carrier" or "insolvent reciprocal carrier" means a stock carrier or a mutual carrier or a reciprocal carrier as the case may be, which has failed to make payment of compensation due on a valid order of the industrial commission, or as to which an order of rehabilitation or of liquidation shall have been made after the effective date of this section, or a foreign stock or mutual or reciprocal carrier which withdraws from or discontinues operation in this state and fails to meet payments due under the workmen's compensation act, but not including carrier, whether a domestic or foreign insurer, which shall have been rehabilitated and allowed to resume business after any such rehabilitation and meets its obligations as they become due.

(2) STOCK WORKMEN'S COMPENSATION SECURITY FUND. There is created a fund to be known as "the stock workmen's compensation security fund," for the purpose of assuring to persons entitled thereto the benefits provided by this chapter for employments insured in insolvent stock carriers. Such fund shall be applicable to the payments due under the provisions of this chapter, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this section, of an insolvent stock carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by stock carriers, as herein defined, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the commissioner of insurance and the industrial commission in accordance with the provisions of this section.

(3) REPORTS AND PAYMENTS INTO STOCK FUND. (a) Every stock carrier shall, on or before July 1, 1936, file with the commissioner of insurance, under oath, on a form prescribed and furnished by the commissioner of insurance, stating the amount of earned premiums on policy year nineteen hundred thirty-four under policies issued or renewed to insure payment of benefits under this chapter. Thereafter, on or before the first day of July of each year, each such carrier shall file similar returns, stating the amount of such earned premium on policy years after nineteen hundred thirty-four.

(b) For the privilege of having carried on and carrying on the business of workmen's compensation insurance in this state, every stock carrier shall pay into the stock fund on the first day of July, nineteen hundred thirty-six, a sum equal to one per centum of the earned premiums as shown by the return hereinbefore prescribed for policy year nineteen hundred thirty-four, and thereafter each such stock carrier, upon filing each annual return, shall pay a sum equal to one per centum of the earned premiums for the period covered by such return. When the aggregate amount of all such payments into the stock fund, together with accumulated interest thereon, less all its expenditures and known liabilities, becomes equal to five per centum of the loss reserves of all stock carriers for the payment of benefits under this section as of December thirty-first, next preceding, as reported to the commissioner of insurance upon blanks furnished for such purpose, no further contributions to said fund shall be required to be made; provided, however, that whenever thereafter the amount of said fund shall be reduced below five per centum of such loss reserves as of said date by reason of payments from and known liabilities of said stock fund, then such contributions to said fund shall be resumed forthwith, and shall continue until said fund, over and above its known liabilities, shall be equal to at least five per

centum of such reserves. Payments to the stock fund shall not be discontinued, however, unless said fund consists of at least twenty-five thousand dollars over and above its known liabilities.

(4) MUTUAL WORKMEN'S COMPENSATION SECURITY FUND. There is created a fund to be known as "the mutual workmen's compensation security fund," for the purpose of assuring to persons entitled thereto the benefits provided by this chapter for employments insured in insolvent mutual carriers. Such fund shall be applicable to the payments due under the provisions of this chapter, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this section, of an insolvent mutual carrier. Expenses of administration shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by mutual carriers, as defined, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the commissioner of insurance and the industrial commission in accordance with the provisions of this section.

(5) REPORTS AND PAYMENTS INTO MUTUAL FUND. (a) Every mutual carrier shall, on or before July 1, 1936, file with the commissioner of insurance, under oath, on a form prescribed and furnished by the commissioner of insurance, stating the amount of earned premiums on policy year nineteen hundred thirty-four under policies issued or renewed to insure payment of benefits under this chapter. Thereafter, on or before the first day of July of each year, each such carrier shall file similar returns, stating the amount of such earned premium on policy years after nineteen hundred thirty-four.

(b) For the privilege of having carried on and carrying on the business of workmen's compensation insurance in this state, every mutual carrier shall pay into the mutual fund on July 1, 1936, a sum equal to one per centum of the earned premium as shown by the return hereinbefore prescribed for policy year nineteen hundred thirty-four, and thereafter each such mutual carrier, upon filing each annual return, shall pay a sum equal to one per centum of its earned premiums for the period covered by such return. When the aggregate amount of all such payments into the mutual fund, together with accumulated interest thereon, less all its expenditures and known liabilities, becomes equal to five per centum of the loss reserves of all mutual carriers for the payment of benefits under this section as of December thirty-first, next preceding, as reported to the commissioner of insurance upon blanks furnished for such purpose, no further contributions to said fund shall be required to be made; provided, however, that whenever thereafter the amount of said fund shall be reduced below five per centum of such loss reserves as of said date by reason of payments from and known liabilities of said mutual fund, then such contributions to said fund shall be resumed forthwith, and shall continue until said fund, over and above its known liabilities, shall be equal to at least five per centum of such reserves. Payments to the mutual fund shall not be discontinued, however, unless said fund consists of at least twenty-five thousand dollars over and above its known liabilities.

(6) RECIPROCAL WORKMEN'S COMPENSATION SECURITY FUND. There is created a fund to be known as "the reciprocal workmen's compensation security fund," for the purpose of assuring to persons entitled thereto the benefits provided by this chapter for employments insured in insolvent reciprocal carriers. Such fund shall be applicable to the payments due under the provisions of this chapter, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this section, of an insolvent reciprocal carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by reciprocal carriers, as herein defined, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the commissioner of insurance and the industrial commission in accordance with the provisions of this section.

(7) REPORTS AND PAYMENTS INTO RECIPROCAL FUND. (a) Every reciprocal carrier shall, on or before July 1, 1936, file with the commissioner of insurance, under oath, on a form prescribed and furnished by the commissioner of insurance, stating the amount of earned premiums on policy year nineteen hundred thirty-four under policies issued or renewed to insure payment of benefits under this chapter. Thereafter, on or before the first day of July of each year, each such carrier shall file similar returns, stating the amount of such earned premium on policy years after nineteen hundred thirty-four.

(b) For the privilege of having carried on and carrying on the business of workmen's compensation insurance in this state, every reciprocal carrier shall pay into the reciprocal fund on July 1, 1936, a sum equal to one per centum of the earned premiums as shown by the return hereinbefore prescribed for policy year nineteen hundred thirty-four, and thereafter each such reciprocal carrier, upon filing each annual return, shall pay a sum

equal to one per centum of its earned premium for the period covered by such return. When the aggregate amount of all such payments into the reciprocal fund, together with accumulated interest thereon, less all its expenditures and known liabilities, becomes equal to five per centum of the loss reserves of all reciprocal carriers for the payment of benefits under this act as of December thirty-first, next preceding, as reported to the commissioner of insurance upon blanks furnished for such purpose, no further contributions to said fund shall be required to be made; provided, however, that whenever thereafter the amount of said fund shall be reduced below five per centum of such loss reserves as of said date by reason of payments from and known liabilities of said reciprocal fund, then such contributions to said fund shall be resumed forthwith, and shall continue until said fund, over and above its known liabilities, shall be equal to at least five per centum of such reserves. Payments to the reciprocal fund shall not be discontinued, however, unless said fund consists of at least twenty-five thousand dollars over and above its known liabilities.

(8) NEW CARRIERS. The provisions of subsections (3), (5) and (7) concerning discontinuance of payments to the respective funds when certain amounts have been paid shall not apply to carriers licensed to write workmen's compensation insurance in Wisconsin after other carriers have made payments to such funds. Such new carriers shall continue to make annual payments as prescribed to the appropriate fund until as many such payments are made as were made, or will be made, by other carriers before discontinuance of payments to the respective fund because the aggregate amount of payments by such other carriers has become equal to five per centum of the loss reserve of such carriers.

(9) ADMINISTRATION OF THE FUNDS. The commissioner of insurance and the industrial commission may adopt, amend and enforce all reasonable rules and regulations necessary for the proper administration of said funds. In the event any carrier shall fail to file any return or make any payment required by this section, or in case the commissioner of insurance shall have cause to believe that any return or other statement filed is false or inaccurate in any particular, or that any payment made is incorrect, he shall have full authority to examine all the books and records of the carrier for the purpose of ascertaining the facts and shall determine the correct amount to be paid and proceed in any court of competent jurisdiction to recover for the benefit of the funds any sums shown to be due upon such examination and determination. Any carrier which fails to make any statement as required by this section, or to pay any payment to the funds when due, shall thereby forfeit to the proper fund a penalty of five per centum of the amount of unpaid payment determined to be due as provided by this section plus one per centum of such amount for each month of delay, or fraction thereof, after the expiration of the first month of such delay, but the commissioner of insurance, if satisfied that the delay was excusable, may remit all or any part of such penalty. The commissioner of insurance, in his discretion, may revoke the certificate of authority to do business in this state of any carrier which shall fail to comply with this section or to pay any penalty imposed in accordance with this section.

(10) CUSTODY AND INVESTMENT OF FUNDS. The funds created by this section shall be kept separate and apart from all other state moneys, and the faith and credit of the state of Wisconsin is pledged for their safekeeping. The state treasurer shall be custodian of said funds; and all disbursements from said funds shall be made by the state treasurer upon vouchers signed by the commissioner of insurance, or his deputy, as hereinafter provided, except that the moneys of said funds may be invested by the state of Wisconsin investment board pursuant to section 25.17. Interest income from such investments shall be credited to the proper fund. All purchases and sales of investments shall be based upon statements of fund balances and requirements to be furnished periodically by the commissioner of insurance and the industrial commission.

(11) PAYMENTS FROM FUNDS. A valid claim for compensation or death benefits, or instalments thereof, heretofore or hereafter made pursuant to the workmen's compensation act, which has remained or shall remain due and unpaid for a period of sixty days, by reason of default by an insolvent carrier, shall be paid from the proper fund in the manner provided. The industrial commission shall certify to the commissioner of insurance the amount due and payable under this chapter. If there has been an award, final or otherwise a certified copy thereof shall be filed with the commissioner of insurance. The commissioner of insurance shall keep a record of all payments to be made and file certification thereof with the state treasurer. The state treasurer as custodian of the funds shall proceed to recover the sum of all liabilities of such carrier assumed by such funds from such carrier, its receiver, liquidator, rehabilitator or trustee in bankruptcy, employers and all others liable, and may prosecute an action or other proceedings therefor. All moneys recovered in any such action or proceeding shall forthwith be placed to the credit of the proper fund by the state treasurer to reimburse said fund to the extent of the moneys so recovered and paid.

(12) LIQUIDATION OF LIABILITIES AND WITHDRAWALS FROM THE STATE. (a) If and when all liabilities of stock carriers, mutual carriers or reciprocal carriers shall have been fully liquidated, distribution shall be made to all contributing carriers to each respective fund of the remaining balance of such fund in the proportion in which each carrier made contributions to such respective fund, provided, however, that an insolvent carrier shall be entitled to share in the said distribution of the fund only to the extent that its distributive share of said fund is in excess of any losses paid out of said fund for its account in accordance with the terms of this section.

(b) No carrier shall be entitled to any refund from the respective fund to which it contributed because of its discontinuance to write workmen's compensation insurance in the state of Wisconsin unless such fund is distributed as hereinbefore provided.

(13) NOTIFICATION OF INSOLVENCY; DUTIES OF INDUSTRIAL COMMISSION. Forthwith upon any stock carrier becoming an insolvent stock carrier, upon any mutual carrier becoming an insolvent mutual carrier, or a reciprocal carrier becoming an insolvent reciprocal carrier, the commissioner of insurance shall so notify the industrial commission, which shall immediately advise the commissioner of insurance (a) of all claims for compensation and other benefits pending or thereafter made against an employer insured by such insolvent carrier or against such insolvent carrier; (b) of all unpaid or continuing awards made upon claims prior to or after the date of such notice from the commissioner of insurance; and (c) of all appeals from or applications for modification or rescission or review of such awards.

(14) DUTIES OF COMMISSIONER OF INSURANCE. The commissioner of insurance may designate or appoint a duly authorized representative or representatives to appear and defend before the industrial commission any or all claims for benefits under this chapter against an employer insured by an insolvent carrier or against such insolvent carrier. The commissioner of insurance shall have as of the date of insolvency, of any stock, mutual or reciprocal carrier, only all rights and duties which the insurance carrier would have had with respect to awards made on claims for compensation filed or pending, if it had not become insolvent. For the purpose of this section the commissioner of insurance shall have power to employ such counsel, clerks and assistants as may be deemed necessary, and to give each of such persons such powers to assist him as he may consider wise.

(15) EXPENSES OF ADMINISTRATION. The expense of administering the stock fund shall be paid out of the stock fund, the expense of administering the mutual fund shall be paid out of the mutual fund, and the expense of administering the reciprocal fund shall be paid out of the reciprocal fund. In the case of domestic carriers, the expenses as fixed by the commissioner of insurance shall be subject to the approval of the court as provided for in subsection (5) of section 200.08. The commissioner of insurance and the industrial commissioners as co-administrators of the funds shall serve without additional compensation, but may be allowed and paid from any fund expenses incurred in the performance of their duties in connection with such fund. The compensation of those persons employed by the commissioner of insurance shall be deemed administration expenses payable from the funds. The commissioner of insurance shall include in his annual report to the governor a statement of the annual receipts and disbursements and the condition of each fund.

History: 1951 c. 511.

102.66 Waiver of payments. Any person entitled to death benefits, burial expenses, and medical and incidental compensation payments under this chapter who may otherwise be entitled to payments under s. 66.191 (2) may file with the commission a written election to waive the death and burial expense payments due under this chapter and accept in lieu thereof such death benefit payments as may be due under s. 66.191 (2) plus such medical and incidental compensation payments as may be due under s. 102.42. No person shall receive death and burial expense payments under both s. 66.191 (2) and ch. 102.

History: 1955 c. 283.