Workmen's Compensation

OPINIONS

WORKMEN'S COMPENSATION OPINIONS

A SYMPATHETIC ADMINISTRATION.—The compensation statute should be administered in a true spirit of helpfulness.

January 18, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

Complying with your request for a brief statement of my views upon the spirit in which the compensation law should be administered, let me say that I am pleased to see you considering this subject so early in your administration. It is a matter of extreme importance. Experience has demonstrated the need of compensation legislation for the promotion of the public welfare and its provisions have been wisely framed. Unless the real spirit of this new legislation sufficiently pervades its entire administration, its high purpose may be largely defeated and the conditions become so unsatisfactory as to create danger of its abrogation and a return to the distressing situations which give rise to the effort for relief. Such a result in the matter of workmen's compensation would prove a public calamity and, therefore, every one in authority and having to do with determining the precise scope of such legislation, both in letter and spirit, should be alert. They should at all times so apply its provisions that the wisdom embodied in such legislation will be so evident that no considerate person will indulge the thought of even a partial backward step towards the old system characterized by incalculable waste to the detriment of every consumer of the product of human energy; by a distressing and unequal distribution of the misfortunes incident to necessary industrial pursuits, particularly those misfortunes to employes by personal injury losses; by a lowering tendency of moral standards in the making and enforcing of claims for such losses and by the perversion of human perception of individual responsibility in such cases.

The Iowa compensation statute is a long step toward an ideal system requiring every consumer of the product of human industry to pay his ratable proportion of fair money cost of those things which he necessarily destroys in conserving his life and welfare—personal injury losses not intentionally incurred. Losses, whether

through the fault of the employer or employe, or without fault of either, should be considered as legitimately an element of such fair money cost as expenditures for raw material, for machinery, or for wages.

You will soon find in your position as Iowa Industrial Commissioner that it is difficult for those affected by this statute to get into the real spirit of this legislation. Especially is this true of the courts and the lawyers who are so saturated with the idea that there should be no compensation paid by the employer except in those cases where the employer is to some extent at fault.

I respectfully suggest that you and the courts, whenever any matters arising under this statute come before them, should fully appreciate and be imbued with and guided by the manifest intention of the law to eradicate utterly the injustice to employers and employes (and to the public as well), found in the old order, and to substitute in its place an entirely new system based on the highest conception of man's humanity to man and the obligation which industry owes to those upon whom it depends, a new system which recognizes the aggregate of its attending accidents as an element of cost to be liquidated and balanced in money in the course of consumption, a new system dealing with employes, employers and the public as necessarily mutual participants in bearing the burdens of such accidents.

You should have in mind at all times that this new system was enacted to displace an antiquated system which dealt only with that small class of injuries which happen through the fault of the employer and gave no attention to the larger class of injuries due to an inadvertent failure to exercise average human care, even though such accident was without moral turpitude. This old system, as you know, placed employe and employer, whose interests are economically the same, in the false position of adversaries, to the misfortune of both parties and to the public, and thereby increased the opportunities for those concerned as judicial assistant to profit by such misfortunes.

You will agree with me that it will be most lamentable if this proposed solution of the problem of dealing justly with the unfortunate victims of our industrial life should not endure, or that it be not perfected to the best that human wisdom can attain, since the system proposed is freighted with hopes for the minimizing of human burdens and their equitable distribution.

Trusting that from the foregoing you can gather something of the spirit of the statute, which it is your great opportunity to administer, I beg to remain,

HENRY E. SAMPSON, *Assistant Attorney General.*

CONSTITUTIONALITY OF LAW—Iowa statute elective—May be affirmatively rejected by either employer or employe—Applies to all general employers except farmers—Citation of authorities upholding constitutionality.

HON. EDWARD C. TURNER, *Attorney General,* Columbus, Ohio.

Answering your inquiry relative to the matter of the constitutionality of the Iowa workmen's compensation act, will say that the Iowa statute is of the elective type, being optional both as to the employer and the employe; that it applies to all general employers, except farmers, who do not affirmatively reject its provisions; that it has been before the supreme court of our state where its provisions were interpreted and all of its parts held constitutional.

(Hunter v. Colfax Consolidated Coal Co., 154 N. W. 1037).

Its constitutionality was also upheld in a case brought in the United States District Court, which case was afterwards appealed and is now pending in the Supreme Court of the United States *(Hawkins v. Bleakly,* 220 Fed. 378).

I do not have a printed brief containing all of the authorities upon this subject but refer you to the following cases in which similar statutes have been upheld:

CALIFORNIA:

Western Indemnity Co. v. Pillsbury, 151 Pac. (Cal.) 398 (compulsory).

Mass. B. & I. Co. v. Pillsbury, 151 Pac. (Cal.) 419.

ILLINOIS:

People v. McGoorty, 270 Ill. 610;

Deibeikis v. Link Belt Co., 261 Ill. 454, 104 N. E. 211;

Crooks v. Tazewell Coal Co., 263 Ill. 343, 105 N. E. 132;

Dietz v. Big Muddy Coal & Iron Co., 263 Ill. 480, 105 N. E. 289.

IOWA:

Hawkins v. Bleakly, 220 Fed. 378;
Hunter v. Colfax Consolidated Coal Co., 154 N. W. (Ia.) 1037.

KANSAS:

Shade v. Ash Grove L. & P. Co., 144 Pac. (Kans.) 249, 92 Kans. 146.

KENTUCKY:

Ky. State Journal Co. v. Workmen's State Compensation Board, 170 S. W. (Ky.) 1166.

MASSACHUSETTS:

Young v. Duncan, 106 N. E. (Mass.) 1;
Pendar v. H. & B. Am. Mach. Co., 87 Atl. (R. I.) 1;
Opinion of Justices, In re, 209 Mass. 607, 96 N. E. 308.

MINNESOTA:

Mathison v. Minneapolis Street Ry. Co., 148 N. W. (Minn.) 71.

MONTANA:

Cunningham v. N. W. Improvement Co., 44 Mont. 180, 119 Pac. 554.

NEW JERSEY:

Sexton v. Newark Telephone Co., 86 Atl. (N. J.) 451;
O'Connell v. Simms Magneto Co., 85 N. J. L. 64, 89 Atl. 922.

OHIO:

State v. Creamer, 85 Ohio St. 349, 39 L. R. A. (N. S.) 694,
Porter v. Hopkins, 109 N. E. (Ohio) 629;
Zumkehr v. Diamond Portland Cement Co., 23 Ohio Dec. 224;
Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 35 Sup. Ct. Rep. 167.

TEXAS:

Middleton v. Texas Light & Power Co., 178 S. W. (Texas) 956;
Middleton v. Texas Light & Power Co., 185 S. W. (Texas) 556;
Memphis Cotton Oil Co. v. Tolbert, 171 S. W. (Texas) 309.

WASHINGTON:

State v. Clausen, 65 Wash. 156, 37 L. R. A. (N. S.) 466;
State v. Mountain Timber Co., 75 Wash 581;
Stoll v. Pac. S. S. Co., 205 Fed. 169.

WEST VIRGINIA:

De Francesco v. Piney Mining Co., 86 S. E. (W. V.) 777.

WISCONSIN:

Borgnis v. Falk Co., 147 Wis. 327, 37 L. R. A. (N. S.) 489.

UNITED STATES:

Mondou v. N. Y. & N. H. & H. R. Co., 223 U. S. 1.

Trusting that the foregoing will prove sufficient for your purposes, I beg to remain,

Yours very truly,

HENRY E. SAMPSON, *Assistant Attorney General.*

CITIES AND TOWNS AS EMPLOYERS—Laborers engaged in repair of public buildings and doing road and street work are employes—Public officers not employes—Volunteer firemen not employes.

December 3, 1915.

W. C. LOOSBROCK, *Town Clerk*, Dyersville, Iowa.

Replying to your letter of November 26th will say that in my judgment your laborers engaged in the repair of public buildings and in the cleaning of sewers and in the laying of water mains and in the doing of road and street work are employes within the meaning of section 2477-m16(b), supplement to the code, 1913.

It is expressly provided in said section 2477-m16(b) that the term 'employe' within the meaning of the Iowa workmen's compensation act does not include an official elected or appointed by the state, county, school district, municipal corporation or cities under special charter and commission form of government and under such a provision your town clerk and town treasurer and perhaps your weighmaster, your marshal, your night policeman, your special policemen and your street commissioner would be excluded, depending in each instance upon the nature of their appointment or employment.

Since your volunteer fire company is made up of men who receive no compensation and are not in the regular employ of the town it is my judgment that it cannot be said there exists the relationship of master and servant between such firemen and your town and that, therefore, they are not employes within the meaning of the Iowa workmen's compensation act.

HENRY E. SAMPSON, *Assistant Attorney General.*

EMPLOYES OF PUBLIC EMPLOYERS.—Officers of counties, cities and school boards are excluded, while the workmen of such public employers are included within the compensation act.

June 26, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised whether or not the officers and employes of counties, cities and school districts are included as workmen within the meaning of the Iowa workmen's compensation act, and for answer to same permit me to call your attention to the provisions of section 2477-m16(b) which reads as follows:

> "'Workmen' is used synonymously with employe, and means any person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship for an employer, except * * * an official elected or appointed by the state, county, school district, municipal corporation, cities under special charter or commission form of government."

You will observe from the foregoing statutory definition that any officer who is elected or appointed by the county, city or school district is expressly excluded from the provisions of the Iowa compensation law, and in each particular case coming before you for decision you must first ascertain whether or not the injured person is an officer, either elected or appointed, and if so, then you must find that such person is not entitled to compensation under the act. If, on the other hand, such injured person is not an officer within the meaning of the statute, either elected or appointed, but is in fact a workman, as that term is defined by the statute, then compensation should be allowed.

You will at once observe from an application of the rule just stated that the supervisors, treasurer, clerk, sheriff, attorney, recorder, assessor, etc., are officers of the county and therefore excluded; also, that the mayor, councilmen, commissioners, clerk, treasurer, attorney, engineer, etc., are officers of cities and towns and are therefore excluded, and that members of the school board are officers of school districts and therefore excluded.

By applying the same rule you will find that the county engineer, superintendent of the poor farm, road overseers, courthouse janitors, etc., are employes and therefore included; that the superintendent of city water works plant, the superintendent of a public electric light plant, the superintendent of streets, the city hall janitors, etc., are employes of a city and therefore included; that the school house janitors are employes of the school district and therefore included.

HENRY E. SAMPSON, *Assistant Attorney General.*

TOWN MARSHAL—Not employe. Public official. Excluded under compensation act.

November 27, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised as to whether or not a town marshal is an official within the meaning of section 2477-m16(b), supplement to the code, 1913, and whether or not, in case of injury, a town marshal is entitled to compensation under the Iowa workmen's compensation act.

Answering your inquiry will say that, under the only reasonable interpretation which can be made of said section 2477-m16(b), all public officials are excluded from the term "employe" as used in the Iowa workmen's compensation act, and that by reason of such exclusion public officials cannot avail themselves of the privileges of compensation. In at least half of the compensation statutes of this country a clear distinction is expressly provided in the act between "employers" and "officials" among which may be mentioned those from the states of California, Illinois, Louisana, Maine, Michigan, Minnesota, Nebraska, West Virginia, Wisconsin, Wyoming and others. I know of no state which expressly provides that public officials are included within the term "employe."

If, then, a town marshal is a public official under the provisions of the Iowa statutes, he is expressly excluded from the pro-

visions of the Iowa compensation act, and it is my deliberate judgment that, under the statutes of Iowa, a town marshal is a public official within the meaning of said compensation act.

Section 652, supplement to the code, 1913, provides, among other things, that the mayor of each town shall appoint a marshal who shall be ex-officio chief of police. The supreme court held in the case of *Baxter v. Beacon,* 112 Iowa 744, that since the marshal of a town was an appointee of the mayor, a contract between the city council and a person to act as marshal at a stipulated salary was not valid.

Section 657, supplement to the code, 1913, provides for the removal of the town marshal by the mayor.

Section 5099 of the code names town marshals as included within the general term of "peace officers," and the supreme court in the case of *State v. Watson,* 66 Iowa 670, held that the town marshal was in fact a peace officer with authority to arrest persons guilty of vagrancy, and with authority to serve the orders of a justice of the peace committing such person to imprisonment.

For further authorities bearing upon this subject and tending to support the position here contended for, see: Mechem, Public Officers, pp. 855, 856; *Throop v. Langdon,* 40 Mich. 673; *Blynn v. Pontiac,* 151 N. W. 681; *Woodhull v. N. Y.,* 150 N. Y. 450; *Ex Parte Preston,* 161 S. W. (Tex.) 115; *State v. Schram,* 82 Minn. 420; *Scherl v. Flam,* 136 App. Div. (N. Y.) 753; *Lizano v. City,* 96 Miss. 640; *Sibley v. Connecticut,* 89 Conn. 682.

In view of the foregoing, it is my judgment that a town marshal is a public officer under the statutes of Iowa, and that as such he is excluded from the provisions of the Iowa workmen's compensation act.

I am aware of some language in my letter to W. A. Templeton, under date of April 24, 1914, which would justify one in thinking that at that time I held to a contrary view, but it should have been explained in that letter that the particular injury to which I was there referring was to one received by the manager of the city water works, and who performed the duty of street commissioner for the town while at the same time acting as town marshal. The injury in that case arose while the party was engaged in the performance of some manual labor in connection with the water works.

HENRY E. SAMPSON, *Assistant Attorney General.*

FIREMAN AN EMPLOYE.—Member of paid fire department of city is an employee within meaning of compensation act.

November 23, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised whether or not a member of the paid fire department of a city is an employe within the meaning of the Iowa workmen's compensation act, and in answer to same will say that, in my judgment, such a fireman is an "employe" within the meaning of the definition set forth in section 2477-m16(b), supplement to the code, 1913.

This position is consistent with that taken by the Massachusetts Industrial Accident Board in the case of *Nelson v. City of New Bedford,* case no. 1209, Nov. 20, 1914, wherein it was held that a member of the fire department of the City of New Bedford was included within the provisions of the Massachusetts workmen's compensation act, which, by its express terms (section 6, ch. 807, Acts 1913), is made to apply to all laborers, workmen and mechanics in the service of the commonwealth or of a county, city or town or district having the power of taxation, under any employment or contract of hire, express or implied, oral or written, including those employed in work done in performance of governmental duties as well as those employed in municipal entrprises conducted for gain or profit.

HENRY E. SAMPSON, *Assistant Attorney General.*

APPRENTICES—Apprentice an employe. Compensation due depends upon terms of articles of apprenticeship and circumstances of case.

November 27, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised whether or not an apprentice who earns no wages is an employe within the meaning of the Iowa workmen's compensation act.

Answering your inquiry will say that the courts have generally held apprentices to come within the term "employe," even though such apprentice received no direct wages and depended for remun-

eration upon the knowledge obtained. Such was the holding of the supreme court of Georgia in the case of *Smith v. W. & A. R. R. Co.*, 134 Ga. 216, the court saying:

> "If a person under due authority from a railroad company goes upon one of its engines hauling a train, for the purpose of learning the duties of a fireman, and performs services for the company in order to gain such experience and knowledge of the work as will render him competent to act as a regular fireman and to receive pay as such, thus becoming what is called 'a learner fireman' or 'an apprentice fireman,' he is, while thus acting, a servant of the company, although he receives no pay during the time of such preparatory service, and as such servant he is a fellow servant with the regular servants employed in the operation of the train on which he is engaged. *Weisser v. Southern Pacific Ry. Co.*, 148 Cal. 426 (7 Am. & Eng. Ann. Cas. 636, 83 Pac. 439).

I have found two English cases which are consistent with the view just expressed. The first is that of *Emerson v. Donkin Co.*, decided November, 1910, and found on page 74, Vol. 4, Butterworth's Workmen's Compensation Cases; the second being the case of *Turner v. Steamship Haulwen*, decided February, 1915, and reported at page 242, Vol. 8, Butterworth's Workmen's Compensation Cases.

In view of the authorities it is my judgment that an apprentice would be an employe within the meaning of the Iowa workmen's compensation act and that, as such, he would be entitled to compensation. As to the amount of compensation, this would depend upon the terms of the articles of apprenticeship under which such apprentice was employed and upon the particular circumstances of each case.

HENRY E. SAMPSON, *Assistant Attorney General.*

CASUAL EMPLOYMENT.—No employes excluded from Iowa compensation act unless employment is casual or not for the purpose of employer's trade or business.

July 25, 1916.

HOMER S. STEVENS, *City Solicitor*, Clarinda, Iowa.

Your letter of July 19th, addressed to the Hon. A. B. Funk, has been handed to me for attention.

The statement of facts, as set forth in your letter, is as follows:

> "The employer is a municipal corporation. One of the pumps used in the Water Works Station of the City became out of repair and it was necessary to secure the services of a man or two to assist in repairing the same. The injured party was employed to assist the Water Commissioner in installing repairs for the pump and they expected to complete the same in a few hours. While he was unscrewing a pipe with a pair of chain tongs, the injured party struck, with a hammer, the end of the tongs which grip the pipe for the purpose of loosening the chain tongs, and a small piece of metal flew off of the chain tongs and hit him in the eye. The attending physician says he has lost the sight of his eye. The injured party was to be paid at the rate of Two Dollars ($2.00) per day and had only worked a few hours when the accident happened. He was not an employe of the city previous to this time and he is a day laborer. It was the intention of the city to retain him in its employ only during this particular job of work."

The legal question involved in your inquiry is whether or not the injured employe of the town of Clarinda is an employe of such municipal corporation within the meaning of the statute, or is he excluded under the provisions of section 2477-m16(b), reading: "Except a person whose employment is purely casual and not for the purpose of the employer's trade or business." The statutes of most of the other states use the word "or" in place of the word "and." By reason of this peculiar language of the Iowa statute this department has been holding that no employes are excluded from the provisions of the Iowa workmen's compensation act, unless there are two essential elements present, first, that the employment is purely casual, that is indefinite, uncertain and temporary; and second, that such employment is not for the purpose of the employer's trade or business. In other words, if the employment is not of a casual character, it is not necessary that the employment be for the purpose of the employer's trade or business or, on the other hand, if the employment is for the employer's trade or business, it is not necessary that such employment be of a casual character.

For authorities bearing upon this subject see, 4 N. & C. cases, 502, footnote; 6 N. & C. cases, 958, footnote; *In re McAuliffe*, Ohio Ind. Com., Oct. 9, 1914; *Clements v. Columbus Saw Mill Co.*, Ohio Ind. Com., Oct. 21, 1914; *Mueller v. Oelkers Mfg. Co.*, 36 N. J. L. 117;

Grogan v. Frankfort Gen. Ins. Co., Mass. Workmen's Comp. Rep. (1913) 231; *In re Howard,* 5 N. C. C. A. 449; *Schaeffer v. De Grottola,* 4 N. C. C. A. 582; *Brown v. City of Mauston;* 3 N. C. C. A. 693-n; *In re Michaels,* Ohio Ind. Com., Oct. 24, 1914.

In the case of *Sabella v. Brazileiro,* 31 Atl. (N. J.) 1032, the court said:

> "The evidence shows that deceased was justified in the expectation that the employment would continue at least until the ship was loaded or so long as his services were required for the purpose. While this class of work was not constant defendant depends upon there being a ship of the prosecutor in port. It appears that the deceased was frequently called upon by the prosecutor to serve them in this particular class of work, being one of a class of stevedores ready to be called upon when required. We think this supports the finding that the employment was not casual within the meaning of the word as expressed in the statute. The ordinary meaning of the word "casual" is "something which happens by chance," and an employment is not casual—that is, arising from accident or chance—where one is employed to do a particular part of a service requiring someone regularly with the fair expectation of its continuing for a reasonable period."

In the case of *King v. Boston Brick Co.,* National Compensation Journal (October 1914), page 21, the Massachusetts Industrial Accident Board held that the employment of the person for one day as a driver for the delivery of brick, not for one particular job, but for the day, is not a casual employment even though the employment is for one day only.

In the case of *Mueller v. Oelkers Mfg. Co., supra,* the court held that the mere fact that the workman undertakes the work without any express agreement as to the amount which he shall be paid is not sufficient to constitute him a casual employe.

In view of the foregoing authorities, it is my judgment that an employe, working under the conditions set forth in the above statement of facts, would be included within the provisions of the Iowa workmen's compensation act.

HENRY E. SAMPSON, *Assistant Attorney General.*

CARPENTER WORK ON FARM—A carpenter engaged in building a barn upon a farm is not engaged in an agricultural pursuit.

March 27, 1915.

J. G. ZIEGLER, Lone Tree, Iowa.

Replying to your letter of March 19, addressed to Attorney General Cosson, and having reference to the Iowa workmen's compensation act, will say that if your son is a carpenter by trade, and if he was employed by Mr. Cummins to assist in the construction of a barn, and if your son was in no way connected with the doing of farm labor except in the building of such barn, and if he was in fact employed by the said Cummins as a carpenter and for no other purpose, and if he received personal injuries which arose out of and in the course of his employment, it would seem that your son would be entitled to compensation in accordance with the provisions of the law as set forth in chapter 147, acts of the thirty-fifth general assembly, provided the employer, Mr. Cummins, was carrying compensation insurance as required by section 42 of said chapter 147. If, on the other hand, Mr. Cummins had failed to provide such insurance or had rejected the compensation features of the act, then he would be liable to you not for compensation but for damages in accordance with the rules governing employer's liability.

HENRY E. SAMPSON, *Assistant Attorney General.*

COMMISSION MEN—Those following an independent calling are general contractors and not employes.

July 26, 1916.

MANHATTAN OIL COMPANY, Des Moines, Iowa.

Your letter of July 17th addressed to the Iowa industrial commissioner relative to whether or not your commission men are employes within the meaning of the workmen's compensation act has been handed to me for attention, and in reply to same will say that from your letter I understand that the arrangement which you have with your commission men provides that they may or may not devote all of their time to the sale of oil; that they do not remain entirely under the control and direction of your company; that they are paid a commission upon the quantity of oil which they sell; that they are responsible to the company for all oil delivered to them; that in the

sale of such oil they are responsible for the prompt payment for all oil sold by them, and that their work is more in the nature of a pursuit of an independent calling than it is of rendering a personal service to your company as employer.

Under such an arrangement, it is my judgment that your commission men are not employes within the meaning of the Iowa workmen's compensation act and that you would not be required, under the provisions of this statute, to carry compensation insurance for them.

I am sending you under separate cover copy of pamphlet entitled "Workmen's Compensation" and call your attention to the opinion found at pages 18 and 20 which bears upon the general subject.

HENRY E. SAMPSON, *Assistant Attorney General.*

INTERSTATE RAILROAD EMPLOYES—Whether or not an interstate railroad employe, injured through no negligence of the employer, can recover compensation under the Iowa compensation act, *quaere.*—Authorities.

November 14, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

Replying further to your inquiry relative to the extent to which the Iowa workmen's compensation act is limited in its application by the federal employers' liability act which affords a remedy to an employe of an interstate carrier by rail who has been injured by the negligence of the carrier will say that there is a sharp conflict of authorities between the courts upon the question of whether or not the state compensation act applies to injuries of interstate carriers by rail where the injuries were received while the employe was himself engaged in furthering interstate commerce. There has been no authoritative ruling by the United States supreme court upon your particular question although I understand there are two or three such cases now pending before that high court.

The New York Court of Appeals has held that the New York compensation act was applicable to injuries to employes of interstate carriers by rail, although such employes were themselves engaged in furthering interstate commerce, if the injuries were not received because of the negligence of the carrier. The court in its decision

pointed out that the federal act was based solely upon negligence and that, under the state act, the negligence of the employer was immaterial. During the course of its opinion the court said:

> "We think it is evident, also, that Congress has recognized the difference between these two kinds of statutes. In enacting the Federal employers' liability act it intended to occupy and exclusively pre-empt the field in which the liability of certain employers engaged in interstate commerce to their employes is prescribed when the latter were injured as the result of negligence. It did not intend to enter upon the filed of compensation for industrial accidents which were not the result of negligence, but left that field open for occupancy by the state until such time as it should assume to legislate upon this subject. The view that Congress intended to observe the distinction between the two kinds of statutes referred to is fortified by the fact that it has passed a workmen's compensation law exclusively applicable to Federal employes, in which liability is not made to depend either upon fault or contract (35 Stat. at L. 556-558, chap. 236, Comp. Stat. 1913, sections 8923-8929), whereas, as to certain private employments, it has regulated the subject only in those cases where the employe is injured as the result of negligence (35 Stat. at L. 65, chap. 149). The workmen's compensation statute of this state was not in any way designed to conflict with the authority of Congress over interstate commerce. As was said by this court in *Jensen v. Southern P. Co.* 'Its obvious purpose was to guard against a construction violative of the Constitution of the United States.' "
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> *Winfield v. New York C. & H. R. R. Co.,* (1915) 216 N. Y. 284, affirming 168 App. Div. 351.

The supreme court of New Jersey has held that the federal employers' liability act does not prevent the applicability of the New Jersey workmen's compensation act in the case of an injury to a brakeman on an interstate train since the two acts deal with entirely different matters.

Rounsaville v. Central R. Co. (1915), 94 Atl. (N. J.) 392.

In the case of *West Jersey Trust Co. v. Philadelphia & R. R. Co.* (1915), 95 Atl. (N. J.) 753, the supreme court of New Jersey held that the fact that the deceased workman was engaged in furthering interstate commerce at the time of his death did not prevent his dependents from recovering compensation under the New Jersey act.

The supreme court of New Jersey, in the case of *Hammill v. Pennsylvania R. Co.*, 94 Atl. (N. J.) 313, held that the federal employers' liability act did not prevent the operation of a state compensation act in a case in which no claim for negligence on the part of the employers could be made. The court said:

> "The federal and state acts are not in pari materia. The one is an act creating a liability to the employe as in tort, based upon common-law negligence, or the failure to comply with some statutory provision for the safety of the employe; the other, so far as its section two is concerned, is a compensation act purely contractual in character, and requiring compensation for injury or death to be made as an incident of the mere relation, and quite irrespective of any question of negligence on the part of the employer. It was manifestly intended, among other things, to give relief in just such cases as the present one, where no claim of negligence on the part of the employer could reasonably be made. As to this class of cases, at least, we deem the federal act not to be exclusive. The authorities cited by prosecutor will be found to involve in each case a conflict between the federal act and a state act imposing a liability as in tort for a breach of a statutory or common-law duty."

The courts have uniformly held that the state compensation acts apply to those engaged in furthering intrastate commerce as distinguished from interstate commerce since the federal employers' liability act only applies to those who are injured while furthering interstate commerce. The supreme court of New York in the case of *Okrzsezs v. Lehigh Valley R. C.* (1915), 155 N. Y. Supp. 919, held that an employe of a railroad company located and operating within the state who was at work on the repair of a car is under the protection of the state compensation act and not under the federal employers' liability act since he was not engaged in furthering interstate commerce at the time of the injury, although the car had been used in both interstate and intrastate commerce.

On the other hand, the Illinois court has held that the state acts cannot in any case apply to injury to employes of interstate carriers by rail where the employe, when injured, was himself furthering interstate commerce. See the case of *Staley v. Illinois C. R. Co.* (1914), 186 Ill. App. 593.

Several decisions of the California court are to the same effect. See

Smith v. Industrial Accdt. Commission (1915), 26 Cal. App. 560; and

Southern P. Co. v. Pillsbury (1915), 151 Pac. (Cal.) 277.

In the case of *Young v. Duncan* (1914), 218 Mass. 346, the court of that state said that the Massachusetts act probably did not embrace employes subject to the federal employers' liability act.

If you desire to further investigate this important subject I would suggest that you examine the following additional authorities:

Michigan C. R. Co. v. Vreeland (1913), 227 U. S. 59;
Jensen v. Southern P. Co., 215 N. Y. 514;
Stoll v. Pac. S. S. Co. (1913), 205 Fed. 169;
Connole v. Norfolk & W. R. Co. (1914), 216 Fed. 823;
Kennerson v. Thames Towboat Co., 89 Conn. 367;
Grybowski v. Erie R. Co., 95 Atl. (N. J.) 764;
Berton v. Tietjen & L. Dry Dock Co., 219 Fed. 763;
Moore v. Lehigh Valley Co., 100 N. Y. Supp. 620.

You will observe from the foregoing that the supreme courts of New York and New Jersey and Connecticut have held that the state compensation act applies to injuries of employes of interstate carriers by rail where the employe, when injured, was himself furthering interstate commerce, if the injury was not caused by the negligence of the employer, while the supreme courts of Illinois and California take a different view. Until the United States supreme court passes upon this question it will not be known which of these two conflicting views will be adopted and, since there is high authority for both of these positions, your arbitration committee could find reasonable grounds for deciding this question in whichever way appeals to it as just and as intended by the legislature of Iowa.

HENRY E. SAMPSON, *Assistant Attorney General.*

SPHERE OF EMPLOYMENT.—Injury arising within or without sphere of employment depends upon facts in each particular case—without, no compensation; within, compensation should be allowed. Courts hold wide distinction between prohibitions limiting sphere of employment and prohibition dealing with conduct within sphere of employment.

November 15, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

I have for consideration your question involving the distinction between those prohibitions which limit the sphere of employment and those prohibitions which deal with the conduct of the employe within the sphere of employment and, especially, as such distinction affects the rights to compensation under the Iowa workmen's compensation act.

Answering your inquiry will say that the courts have uniformly held that there is a wide distinction between those prohibitions limiting the sphere of employment and those prohibitions dealing with conduct within the sphere of employment.

One of the earliest cases is that of *Plumb v. Cobden Flour Company* (1914), A. C. 62, wherein the rule was stated as follows:

> "There are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of the prohibition of the latter class leaves the sphere of employment where it was and, consequently, will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere."

Lord Dunedin, who prepared the opinion, after discussing the tests which govern the right to compensation in accidents arising from prohibited acts, pointed out that there are prohibitions which limit the sphere of employment and prohibitions which only deal with conduct within the sphere of employment, and cited a number of cases.

In the case of *Chilton v. Blair & Co.*, 20 T. L. R. 623, the rule governing the question of "sphere of employment" was stated as follows:

> "It is well established that a workman who is seriously and permanently disabled by an accident may recover compensation if he was doing the work he was employed to do, though doing it negligently and contrary to rules laid down. On the other hand, a workman cannot recover compensation, if he was not doing the work he was employed to do, but was doing something substantially different although intending to produce the same result."

In the case of *Whitehead v. Reader*, 2 K. B. 48, it was said by Collins, L. J., that:

> "I agree in what has already been pointed out, that it is not every breach of a master's orders that would have the effect of terminating the servant's employment, so as to excuse the master from the consequences of the breach of his orders. We have to get back to the orders emanating from the master to see what is the sphere of employment of the workman, *and it must be competent to the master to limit that sphere.* If the servant acting within the sphere of his employment violated the order of his master, the latter is responsible. It is, however, obvious that a workman cannot travel out of a sphere of his employment without the order of his employer to do so; and if he does travel out of the sphere of his employment without such an order, his acts do not make the master liable either to the workman under the workman's compensation act 1897, or to third persons in common law."

It was held in the case of *Parker v. Hambrook*, 107 L. T. R. 249, that a workman employed to dig flints for road making, who went into a trench where he had been forbidden to go for the purpose of digging flints which were more plentiful there, and who sustained an injury by falling earth, could not recover compensation because said injury did not arise out of and in the course of his employment. During the course of the opinion the following illustration of the rule to be adopted in such cases was given:

> "If I tell a workman to mend a certain window from the inside, the fact that he did it from the outside and not from the inside would not disentitle him or his dependents to compensation if he met an accident. But if I told him to mend one particular window and he goes and mends another window *where I have told him not to go*, that would disentitle him to compensation."

Illustrations of facts and circumstances where compensation is denied on the ground that the injury did not arise out of the employment may be found in the following cases:

Jenkinson v. Harrison, 4 B. W. C. C. 194;
Edwards v. International Coal Co., 5 W. C. C. 21;
Losh v. Evans, 19 T. L. R. 142;
Marriott v. Brett, 5 B. W. C. C. 145;
Naylor v. Musgrave Spinning Co., 4 B. W. C. C. 286;
Mulholland v. Hazelton, 36 Ir. L. T. 217;
Buchanan v. Baird, 4 B. W. C. C. 397.

And it might also be suggestive to read the case of

Byram v. Ill. Cent. R. R. Co., 154 N. W. (Ia.) 1006.

For illustrations of cases where the facts and circumstances were such as permitted the recovery of compensation see:

Sponatiski case, 108 N. E. 466;
Clem v. Chalmers Motor Co., 154 N. W. (Ia.) 848;
Milwaukee, C. G. Co. v. Ind. Coms., 151 N. W. (Wis.) 247;
State v. Brewing Co., 151 N. W. (Minn.) 912;
Terlechi v. Strauss, 89 Atl. (N. J.) 584;
Seller v. Boston R. D. C., 7 B. W. C. C. (Eng.) 99;
Goslan v. Gillies (1906), S. C. Scot. 68;
Ferguson v. Brick & Supplies Co., 7 B. W. C. C. 1054;
Spooner v. Detroit Co., 153 N. W. (Mich.) 657;
Miner v. Franklin Co., 26 L. R. A. (N. S.) (Vt.) 1195;
Malting Co. v. District Ct., 151 N. W. (Minn.) 912.

It may be suggestive to outline this subject as follows:

I.

Prohibitions dealing with conduct within sphere of employment:

(a) Deviations from specific duties, such as:
1. Machinist assisting in expediting repairs;
2. Substituting for foreman in feeding machine;
3. Employe assisting in loading and unloading wagons; greasing wagon wheel;
4. Foreman of excavation work tracing electric wire;
5. Emergency service to locate electric line trouble;
6. Employe taking refreshments from employer near machine.

(b) Disobedience of rules, directions or regulations, such as:
1. Railway porter jumping on footboard of baggage van;
2. Employe operating machine when sitting instead of standing;
3. Miner working in dangerous place;
4. Laborer riding on material hoist against implied prohibition;
5. Employe crossing railroad yard tracks.

II.

Prohibitions limiting sphere of employment, such as:
(a) Foreman utilizing shafting for hand work.
(b) Employe doing work expressly forbidden.

You will, therefore, observe that whether or not an injury arises within or without the sphere of employment depends entirely upon the facts of each particular case and, therefore, I can say no more to you than that, if the injury arose outside the sphere of employment, then no compensation should be allowed, but, if the injury arises within the sphere of employment, compensation should be allowed even though the injury is sustained because the work is being done negligently or contrary to rules.

HENRY E. SAMPSON, *Assistant Attorney General.*

IN COURSE OF EMPLOYMENT.—Injury to an employe, who, while returning from work, ran after passing wagon to secure ride home and broke his leg, did not arise out of employment.

December 16, 1915.

HON. WARREN GARST, *Iowa Industrial Commissioner.*

From your oral statement of the case which you now have up for consideration I understand that the employe was injured by breaking his leg while returning from work at the close of the day; that at the moment of the injury he was running after a wagon which was then passing by in order that he might secure a ride home; that it had been the custom of the employer to provide the employe with transportation from the place of work to the home of the employe, but that on this particular night no such conveyance was provided; that you desire advice upon the question of the legal liability of the employer in such a case.

It may be conceded for the purpose of this case that the injury arose during the course of the employment of the employe, but I cannot rid myself of the belief that the injury did not arise out of the employment and I call your particular attention to an opinion from the supreme court of Massachusetts in which it says:

> "It is not easy nor necessary to the determination of the case at bar to give a comprehensive definition of these words (personal injury arising out of and in the course of his employment), which shall accurately include all cases embraced within the act and with precision exclude those outside its terms. It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment when there is apparent to the rational mind upon consideration of all the circumstances a casual connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not to have been foreseen or expected, but after the event it must appear to have had its origin in the risk connected with the employment and to have flowed from that source as a rational consequence." *(McNicol v. Employers' Liability Assurance Corp.,* 215 Mass. 497.)

Trusting that the foregoing will aid you in arriving at a correct adjustment of the case, I beg to remain,

HENRY E. SAMPSON, *Assistant Attorney General.*

INJURY SUSTAINED AFTER CUSTOMARY QUITTING HOUR.—Compensation not allowed for injuries sustained after working hours.

November 24, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

As bearing upon your inquiry relative to whether or not compensation should be paid under the Iowa workmen's compensation act for an injury sustained by an employe who remained to work after the customary quitting hour, permit me to call your attention to the case of *Gordon v. Eby* (Case No. 10, California Comp. Act, March 20, 1914), in which Gordon was allowed compensation by the California commission for an injury due to an accident which happened a few minutes after five P. M., where five o'clock was the regular quitting time. In awarding compensation the commission held that sufficient evidence had been introduced to show that the contentions of the defendant to the effect that the accident did not arise out of or in the course of employment could not be sustained. It declared that the quitting time varied as the requirements of the work necessitated, that no instructions had been given to the employe as to the time for starting or leaving work, and that, whether rightfully or wrongfully, the employe filled an empty bucket when it was lowered from the roof by the employer because he thought his employer wanted it filled. The general rule was stated as follows:

> "The general rule in construing compensation laws is that the responsibility of the employer begins when his employe enters his premises to perform the services required of him, and terminates when the employe leaves such premises, provided that he does not loiter needlessly or arrive at an unreasonable hour in advance of the beginning of his duties. Gordon's injury was sustained while he was still on the premises of his employer and performing a service which he believed to be required of him by his employer, and this we think distinctly brings him within the provisions of the Workmen's Compensation, Insurance and Safety Act, although he may have remained overtime a few minutes in order to perform such service."

Trusting that the foregoing will prove helpful, I beg to remain,

HENRY E. SAMPSON, *Assistant Attorney General.*

NOTICE OF INJURY.—Must give notice to employer within ninety days of date of injury.—Failure cuts off right to compensation.—Good cause must be shown if not given until after fifteen days.—If employer can show he has been prejudiced by such delay he can be relieved to extent prejudiced thereby.

October 3, 1914.

HON. WARREN GARST, *Iowa Industrial Commissioner.*

For answer to the question submitted to you by the Globe Indemnity Co., permit me to refer you to section 9, chapter 147, acts of the thirty-fifth general assembly.

Under the law as therein provided, notice of an injury must reach the employer within ninety days from the date of the injury or the injured employe is forever cut off from any right to compensation under the act. If the employe fails to give notice to his employer until after the fifteenth day following the injury and prior to the thirtieth day following such injury, he can recover provided, however, the employer is unable to show that he has been prejudiced by reason of such want of knowledge, in which latter event the employer is relieved from paying compensation to the extent to which he has been prejudiced. If the employe notifies his employer within fifteen days following the injury, he is entitled to full compensation although in justice he should give immediate notice. A failure on his part to notify the employer immediately following the injury does not affect his right to recover compensation.

It would follow, of course, that if the employer or his representative had actual knowledge of the occurrence of an injury, notice by the employe would be unnecessary and his failure to give same would not prejudice his right to compensation.

The law further provides that if the employe can show that his failure to give the required notice was due to mistake, inadvertence, ignorance of the fact or law, or inability to fraud, misrepresentation or deceit of another, or to any other reasonable cause or excuse, then compensation may be allowed if notice is in fact given prior to ninety days following the injury, but the employer may show that he has been prejudiced by such delay of notification and be relieved to the extent that he has been prejudiced thereby.

For the benefit of the employer the employe should be encouraged to give prompt notice of injury, and for the security and protection of the employe he should be advised of the serious consequences of his failure to give such required notice within the ninety-day period following the date of his injury.

HENRY E. SAMPSON, *Assistant Attorney General.*

REPORTS.—Employer to report all accidents to employes, including accidents to employes who come within federal employers' liability act, to commissioner.—Statutory requirement largely for statistical purposes.

July 5, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised whether or not under the Iowa workmen's compensation act an employer, it being a railroad company, is required to report all accidents to its employes, including accidents to its employes who come within the provisions of the federal employers' liability act.

For answer to your inquiry permit me to call your attention to the provisions of section 2477-m36, supplement to the code, 1913, which reads as follows:

> "Every employer shall hereafter keep a record of *all* injuries, fatal or otherwise, sustained by his employes in the course of their employment. Within forty-eight hours, not counting Sundays and legal holidays, after the employer has knowledge of the occurrence of an accident resulting in personal injury, a report shall be made in writing by the employer to the industrial commissioner on blanks to be procured from the commissioner for that purpose."

You will observe from the remainder of the section that the said report shall contain the name and nature of the business of the employer; the location of the establishment; the name, age and sex of the injured employe, and shall state the date and hour of the accident, the nature and cause of the injury, and such other information as may be required by the commissioner.

It, therefore, appears that the purpose of this statutory requirement is largely for statistical purposes and the report should therefore be made, even though the injured employe may not be entitled to compensation under the Iowa workmen's compensation act.

The statute might also be for the purpose of submitting all cases to the attention of the Iowa industrial commissioner so that the

question of liability would not be left entirely to the discretion of the employer. I would, therefore, suggest that these reports be required.

HENRY E. SAMPSON, *Assistant Attorney General.*

STATUTE OF LIMITATION.—Right of dependents to maintain proceedings.—Jurisdiction of arbitration committee.—Statute of limitation not applicable to special proceedings.—Facts not such as would estop pleading and relying upon statute of limitation.

November 6, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

Pursuant to your request, I have examined the records in the cause of *Lykas v. Northwestern States Portland Cement Company*, now pending before your arbitration committee, and have considered the several questions raised by the pleadings therein.

Under the admitted facts of this case, as shown by said record, the Consul General of the Kingdom of Greece has the right and authority to maintain this proceeding on behalf of the dependents of deceased; that Theodore Lykas, deceased employe, was in the employ of the Northwestern States Portland Cement Company on or before July 20, 1914; that both the employer and employe, at the time of the injury, were within and operating under the compensation law of Iowa; that, on the 20th day of July, 19, 1914, the said Lykas sustained a personal injury resulting in immediate death, which injury arose out of and in the course of his employment; that the employer had actual notice of the injury at the time of its occurrence, and that the Consul General of Greece had knowledge of the death of deceased and the rights of dependents during the early part of the year 1915; that the average weekly wage of the injured employe at the time of his injury was $11.54; that this proceeding was commenced on the 7th of September, 1916, or two years and six weeks after the date of injury (July 20, 1914).

The following questions are still undecided and should have your careful consideration:

1. Are the persons who are maintaining this proceeding such dependents of deceased as to entitle them to compensation?

2. Inasmuch as there is no dispute between the parties as to the amount of compensation due does your arbitration committee have jurisdiction to arbitrate the issues in this case?

3. Is this proceeding barred by the general statutes of Iowa limiting the time for bringing *actions?*

4. If the general statute limiting the time for bringing *actions* is applicable to this special proceeding, when does the cause of action accrue and what action stops the running of said statute?

5. If the statute of limitation applies to this special proceeding, does it come within the third or some other division of said section 3447, supplement to the code, 1913?

6. If this special proceeding comes within the provisions of the statute of limitation and if the period for maintaining said action has expired, are the facts in this case such as would estop the defendants from pleading the statute of limitation in this particular matter?

Answering the first inquiry will say that there is some evidence in the record to show that the deceased left as dependents a wife and two minor children, and that these dependents are the persons in whose behalf the proceeding is brought. There are some errors in the spelling of the name of deceased and the name of the town in Greece where deceased lived before coming to this country, but these differences in spelling appear to be errors due to the unfamiliarity of those preparing the petition with Greek spelling. The answer of defendants does not deny that deceased left dependents, or that those bringing this proceeding are such dependents, and offers no evidence to disprove the allegation in the petition to the effect that this is a proceeding on behalf of the widow and minor sons of the injured person. There is, in my judgment, sufficient evidence to make out a *prima-facie* showing and to warrant your arbitration committee in finding in favor of the applicants in this cause, if you so desire, the matter being entirely within the sound discretion of your committee.

Answering the second inquiry will say that in my judgment your arbitration committee has jurisdiction to arbitrate the issues in this case, even though there is no dispute as to the actual amount of compensation to be paid, if any. The defendants quote that part of section 2477-m26, supplement to the code, 1913, which provides, "If the employer and the injured employe or representative or the dependents fail to reach an agreement *in regard to compensation,*" the industrial commissioner, upon the application of either

party, shall thereupon call for the formation of a committee of arbitration, and contends that, unless there is a dispute between the parties *in regard to compensation*, then the arbitration committee does not have jurisdiction. A reasonable interpretation of the statutory language relied upon by defendants does not, in my judgment, give it the very limited interpretation asked for by the defendants. This limiting language does not refer only to the amount of compensation, but rather as to whether or not the claimants are entitled to any compensation whatever, taking into consideration the law and the facts. See *Fischer v. W. F. Priebe & Co.*, 160 N. W. (Ia.) 48. There is no doubt in my mind but what your committee has jurisdiction to consider this cause, and that such an arbitration committee has jurisdiction in all cases where there is a dispute between the parties as to any question of fact upon which compensation depends.

The third and most important inquiry is whether or not the statute of limitation applies to the proceedings of an arbitration committee convened under the provisions of the compensation act.

Answering this inquiry, will say that the general statute of limitation is found in section 3447, supplement to the code, 1913, and provides in part as follows:

"Actions may be brought within the times herein limited * * * and not afterwards * * *"

Thus it will be seen that by the express language of this statute it is limited to "actions," and that it does not apply to special proceedings.

The supreme court of Iowa has held that the provisions of this statute are not applicable to special proceedings, as, for instance, proceedings to assess damages for the taking of land for a right of way for a railroad. *(Hartley v. K. & N. W. Ry. Co.*, 85 Iowa 455.)

The supreme court of Kansas, in the case of *Thomas v. Williams*, 25 L. R. A. (N. S.) 1304, held that the statutes of limitation did not apply to special proceedings, but were limited to actions, and cited the Iowa case of *Hartley v. K. & N. W. Ry. Co., supra.*

The supreme court of North Dakota, in the case of *Burleigh County v. Kidder County*, 125 N. W. 1063, held that the statute of limitation did not apply to the obligation created by statute requiring one county to pay part of the public debt of another county of which it was formerly a part, saying at page 1066 that this obligation was created solely by statute and as such was a special proceeding and not within the general statute of limitation.

In the case of *Fisk v. City of Keokuk*, 144 Iowa, 187, the supreme court also held that this statute did not apply to those civil proceedings which are not actions at law or proceedings in equity.

Other Iowa authorities *(Cuthbertson v. Locke*, 70 Iowa 49) might be mentioned holding to the same effect since they are uniform in this regard. This, then, leaves for our consideration the further question of whether or not the proceeding of an arbitration committee on a compensation matter is an action within the meaning of said section 3447.

The code of civil practice of Iowa (Title XVIII., secs. 3424, 3425) provides as follows:

> "Every proceeding in court is an action, and is civil, special or criminal."
>
> "A civil action is a proceeding in a court of justice in which one party, known as the plaintiff, demands against another party, known as the defendant, the enforcement or protection of a private right, or the prevention or redress of a private wrong. It may also be brought for the recovery of a penalty or forfeiture.
>
> "Every other proceeding in a civil case is a special action."

Section 3514 of the code provides that an

> "Action in a court of record shall be commenced by serving the defendant with a notice signed by the plaintiff or his attorney * * *"

The word "action" as used in said section 3447 has a technical meaning as was said by Judge Ladd in the case of *Morris v. Lowry*, 113 Iowa 544, where he said:

> "Every proceeding in court is an action (section 3424, code); and the word 'action,' as employed in the code has a technical meaning (section 3425), which is also in accord with the approved use of the language. We may not then, attribute to the legislature an understanding or use of it in any other sense."

The distinction between actions and special proceedings is fully discussed in paragraph 134, page 1010, Vol. I of Corpus Juris, wherein it is said:

> "Under the codes remedies are ordinarily expressly divided into actions and special proceedings, and even where this is not done in express terms these two classes of proceedings and the distinctions between them are recognized. * * * The codes and statutes usually define an action in express terms,

and then provide merely that every other remedy is a special proceeding without in express terms either defining a special proceeding or otherwise distinguishing it from an action; so that the question as to whether a particular proceeding is an action or a special proceeding depends primarily upon whether or not it comes within the definition of an action. The definitions of an action usually speak of it as an 'ordinary' proceeding, and it is upon the meaning and application of this term that the distinction between actions and special proceedings is ordinarily based. It may accordingly be stated generally that actions include proceedings which are instituted and prosecuted according to the ordinary rules and provisions relating to actions at law and suits in equity, and that special proceedings include those proceedings which are not ordinary in this sense but are instituted and prosecuted according to some special mode. * * * In other words, if a proceeding is a remedy and is not an ordinary action, it must be a special proceeding." (See numerous cases cited.)

It will be observed from an examination of sections 3424 and 3425 that the term "action" is limited to proceedings in *court* or to proceedings in a *court of justice.*

The supreme court of Iowa in the case of *Box v. C. R. I. & P. Ry. Co.,* 107 Iowa 660, had occasion to describe the words "cause of action" and did so in the following language: "An action is a proceeding in *court.*" (Code, sec. 3424.)

In paragraph 1, page 927, Vol. I, Corpus Juris it is said:

> "The term 'action' is, however, restricted to proceedings in a court of justice and does not include nonjudicial proceedings, although they are before a court, as in cases where a court does not act in a judicial capacity." (See citations.)

The term "civil action" has a limited meaning and is a narrower term than "civil case," as will appear from an examination of the following authorities: Corpus Juris, Vol. I, p. 934, par. 25; *College of Phys. & Surg. of Keokuk v. Guilbert,* 100 Iowa 213, 219; *Herkimer v. Keeler,* 109 Iowa 681; *Morris v. Lowry,* 113 Iowa 544.

From this examination of the authorities as to the limited meaning of the term "action," we find that it differs widely from the term "special proceedings;" and the same wide difference is also found when we come to examine the authorities as to the meaning of the term "special proceedings."

Estee in his Pleading (1st ed.) 5, par. 21, defines "special actions" to be remedies pursued by a party which do not result directly in a judgment but only in establishing a right or some particular fact.

Justice Deemer, in Iowa Pleading and Practice, Vol. I, par. 3, points out that the following remedies are special proceedings:

Condemnation of property for a work of internal improvement, *Forney v. Ralls,* 30 Iowa 559; disbarment proceedings, *State v. Clark,* 46 Iowa 155; probating of a will, *Sisters of Vis. v. Glass,* 45 Iowa 154; rate hearing before railroad commissioners, *B. C. R. & N. Ry. Co. v. Dey,* 82 Iowa 312; appeal from action of the board of supervisors in selecting public newspapers, *Star v. Ingham,* 84 Iowa 580; appointment of a guardian, *Lawrence v. Thomas,* 84 Iowa 362; forcible entry and detainer, *Herkimer v. Keeler,* 109 Iowa 680; compelling an accounting by an attorney, *Union Bldg. & Svgs. Assn. v. Soderquist,* 115 Iowa 695; proceedings under the drainage act, section 1989-a1, Sup'l Code, 1913; establishment, relocation and vacation of highways, *Hatch v. Barnes,* 124 Iowa 251; proceedings before township trustees as fence viewers, *De Mur v. Rohan,* 126 Iowa 488; removal from office, *State v. Meek,* 148 Iowa 671.

Other instances are cited by this authority but the foregoing are sufficient to show the large number of remedies which are known as "special proceedings" as distinguished from "actions."

Under the classification which has been made by the authorities of "actions" and "special proceedings," it seems clear that the proceedings of an arbitration committee in a compensation matter are not actions and do not come within the provisions of said section 3447.

The supreme court of Iowa, speaking through Justice Salinger, in the case of *Hunter v. Colfax Consolidated Coal Co.,* 154 N. W. 1037, after discussing fully the nature of the proceeding before the arbitration committee, said:

> "The utmost it (arbitration committee) does is to provide administrative machinery for applying rates of compensation fixed by the legislature as between parties who have agreed to have the amounts of compensation, merely, thus determined."

The supreme court of Ohio in the case of *State v. Creamer,* 85 Ohio St., 349, held that the Ohio workmen's compensation act which provided for the creation of a state liability board of awards to establish the fund for premiums paid by employers and employes was not invalid as a delegation of judicial power to the board of awards.

An examination of the decisions in which the several compensation cases have been held constitutional will show that the courts have never considered that the arbitration committee was a court or that it was ousting the court of its judicial authority; but, on the other hand, they have held that the function of the arbitration committee was administrative in character, giving no judgments and entering no decrees, these committees being entirely without the power to enforce any decision which they might make.

The supreme court of Vermont, in the case of *Blood v. Bates*, 31 Vt. 147, was called upon to determine whether or not a board of arbitration was a court or a judicial tribunal, and decided that it was not, saying:

> "A board of arbitrators is not a court or a judicial tribunal in any proper sense of those terms; it has none of the powers that appertain to courts to regulate their proceedings or to enforce their decisions.
>
> "An award, when made, is more in the nature of a contract than of a judgment; it is but the consummation of the contract of submission, its appropriate and legitimate result. And that it is in the nature of a contract is fully established by the fact that when made, if found to be defective and void, it may still be ratified by the parties."

The supreme court of Louisiana, in the case of *Thompson v. Moulton*, 20 La. Ann. 535, distinguished an "action" from "arbitration" by saying that in the latter the dispute is submitted to one or more persons as arbitrators, while in the former the *suit* is instituted in a court of *justice* in order that some matter in controversy may, by a *judicial decree*, be definitely settled.

In view of the foregoing authorities, and others which might be mentioned, it is my conclusion that the proceeding of the arbitration committee in passing upon a compensation claim is not an *action* within the meaning of said section 3447 but is a special proceeding, and that it does not come within the provisions of the general statutes of limitation, and that the plea of defendants that this action is barred is not a valid defense.

It was held in the case of *State v. District Court*, 152 N. W. (Minn.) 838, that "proceedings under this act (Minnesota compensation act) are governed by the provisions contained in the act itself and not by the general provisions cited by the relator."

In answer to the suggestion that there must be some limit upon the time when proceedings for compensation may be instituted, it may be said that, under the Iowa compensation statute, either the employer or employe may at any time apply to the industrial commissioner for the convening of an arbitration committee to pass upon and determine the rights of the parties.

Your fourth and fifth questions do not require any attention for the reason that they arise under section 3447, supplement to the code, 1913, and I have just decided that said section 3447 does not apply to special proceedings before an arbitration committee convened under the Iowa workmen's compensation act. Had I arrived at a different conclusion and held that said section 3447 did regulate the time within which a committee of arbitration under the compensation act could be convened, I would have been compelled to give special attention to these questions.

Answering the sixth question will say that while it is true that under the authorities (*Holman v. Omaha & C. B. Ry. & Bridge Co.*, 117 Iowa 268) one might be estopped by his previous actions from setting up and relying on the statute of limitation, yet the facts in this proceeding are not such as would, in my judgment, come within the ruling, and, therefore, the defendants in this case would not be estopped from pleading and relying upon the statute of limitation, if said statute limits the time for bringing proceedings of this character. Since, as I have previously held, the statute of limitation does not so limit the time for bringing special proceedings of this character, this particular question is not in issue.

In view of the foregoing, it is my judgment that this proceeding, now pending before your committee, is not barred by the statute of limitation, and that there is sufficient evidence in the record to warrant you in finding that the dependents, who are making the application for compensation in this cause, are entitled to compensation according to the provisions of the Iowa workmen's compensation act.

HENRY E. SAMPSON, *Assistant Attorney General.*

PARTIAL DISABILITY.—Employe entitled to compensation for total disability—Duty to accept employment when only partially disabled.

January 14, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised as to the rights of the employe and liabilities of the employer under the Iowa workmen's compensation

act where an employe has so far recovered from an injury that his disability is only partial.

Answering your inquiry will say that under the provisions of section 2477-m9, supplement to the code, 1913, compensation is to be paid for those injuries which incapacitate the employe from earning full wages. Under the provisions of the statute an injured employe is entitled to compensation during the period of incapacity not to exceed a maximum number of weeks, and so long as his disability is total there can be no question as to his right to such compensation. When the employe has sufficiently recovered that his disability is only partial and when he is in such physical condition that he can perform certain light labor without impeding his recovery and without endangering a recurrence of his initial injury, it is his duty to accept such work as he can do, thereby reducing the amount of compensation to which he is entitled from his employer. If the employer has work suitable for him to perform in his partially disabled condition and offers to give him such work, then it is the duty of such employe to accept the work tendered, or, if such light labor can be found by the employe by making an honest effort to find same, then it is the duty of such employe to look for and accept such labor, thereby reducing the amount of compensation due from the employer.

An English case (*Taff Vale R. Co. v. Lane*, 3 B. W. C. C. 297) has decided that where the work is furnished at another place so that the workman must pay something for transportation, the adjustment of the compensation should include these added expenses.

In my opinion it would be an unreasonable and unwarranted interpretation of this provision of the statute to hold that an employe partially recovered from an injury should lose his right to full compensation under the Iowa workmen's compensation act where his employer or no one else in the vicinity where he lived had suitable work which he could do in his partially recovered condition, or where he was unable to find, after making a thorough and honest effort so to do, light labor such as he was able to perform without impeding his recovery or endangering a recurrence of total incapacity.

HENRY E. SAMPSON, *Assistant Attorney General.*

LOSS OF HEARING.—Not included within schedule—Compensation, if any, must be determined by board of arbitration, based on valuation fixed by legislature for specific injuries.

November 24, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

I have for consideration your question as to the amount of compensation due for loss of hearing, and in answer to same will say that the Iowa statute does not include the loss of hearing within the schedule found in section 2477-m9 (j), and that the amount of compensation due, if any, must be determined under the provisions of section 2477-m9 (j18), supplement to the code, 1913.

As an aid in arriving at the proper valuation to be placed upon such a loss, permit me to say that the Connecticut statute places the value of total hearing in both ears at 156 weeks and that of total hearing in one ear at 52 weeks. (Sec. 12, Pt. B. Ch., 288, Conn. Laws 1915.)

In the Indiana schedule for specific injuries, the period is fixed at 75 weeks for permanent and complete loss of hearing. (Sec. 31, Pt. 2, Ch., 106, Ind. Laws 1915.)

In the Oregon schedule for specific injuries, the period for permanent and complete loss of hearing in both ears is fixed at 96 months, while that of permanent and complete loss of hearing in one ear is fixed at 48 months. (Sec. 21, Ch., 122, Oregon Laws 1913.)

The Wisconsin statute is less liberal and provides in its schedule that total deafness in both ears should be compensated for a period of 160 weeks, while total deafness in one ear should be compensated for a period of 40 weeks. (Par. 5, Sec. 2394, Ch., 599, Wisconsin Laws of 1913.)

From the foregoing you will observe that the legislatures of the several states have adopted a rather wide range in their valuation. Under the statutes of Iowa the valuation is to be determined by a board of arbitration, which board is to take into account the valuation fixed by the legislature for specific injuries.

HENRY E. SAMPSON, *Assistant Attorney General.*

INJURY TO TEETH.—An injury causing a broken tooth is not compensable unless it results in total incapacity for more than the waiting period—Medical and surgical work should be furnished by the employer.

November 4, 1914.

HON. WARREN GARST, *Iowa Industrial Commissioner.*

Your question briefly stated is, what compensation if any should be paid to an employe whose tooth was broken in the course of, and as a result of his employment.

Section 2477-m9(j), supplement to the code, 1913, provides for a schedule of compensation to be paid for the loss of certain members of the body named therein but nowhere does it expressly provide that compensation shall be paid for the loss of teeth or for the loss of a tooth. In this respect the Iowa statute is different than some of the other state statutes which expressly include in such schedule a stipulated compensation for the loss of teeth.

The Iowa statute does provide for disability which is permanent, although partial, but this provision only applies to such disability as interferes with a man's ability to earn and receive his customary wages in the occupation in which he was engaged at the time of his injury. Inasmuch as the breaking of a tooth would not amount to the disability contemplated by this provision of the statute, the employe would not be entitled to compensation under section 2477-m9(j).

Section 2477-m9(h) of the Iowa statute provides, however, for the payment of compensation for an injury producing temporary disability and if the injury received by the employe not only resulted in a broken tooth but in wholly incapacitating him from work for a period in excess of the waiting period then such injured employe might recover compensation under said section 2477-m9(h) for the time he was incapacitated for work after the fifteenth day following the injury, but it is difficult to imagine any case where an injured employe would be incapacitated from labor by reason of a broken tooth.

Section 2477-m9(b) of the Iowa statute requires that the employer shall furnish reasonable surgical, medical and hospital services and supplies, not exceeding $100.00, and under this provision the injured employe would be entitled to such surgical, medical and hospital attention as his injury required and this, no doubt, would include such dental services as his injury made necessary.

Believing that the foregoing sufficiently answers your inquiry, I beg to remain

HENRY E. SAMPSON, *Assistant Attorney General.*

RULE IN HERNIA CASES.—Traumatic hernia covered by compensation act—All other kinds of hernia to be determined in each individual case.

January 14, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

Relative to the matter of a rule which should be made by your department relative to hernia cases, will say that under the Iowa workmen's compensation act the employe is only entitled to recover compensation for injuries which arise out of and in the course of his employment, and that therefore the burden is always upon the injured employe to prove that the injury on account of which he is attempting to collect compensation actually occurred during the course of his employment and that his incapacity is actually due to such injury and to no other intervening cause. It would therefore seem that as a general proposition the only cases of hernia which it can establish beyond question as arising out of and in the course of the employment are what are known to the profession as traumatic hernia. I think you would be safe in laying down the general rule that traumatic hernia is covered by the compensation act. In your ruling upon this matter you might also hold that all other kinds of hernia will have to be determined in each individual case and only after having the advice of skilled physicians or surgeons.

The foregoing will suggest to you the nature of the general rule which I think your department could properly make.

HENRY E. SAMPSON, *Assistant Attorney General.*

DOUBLE INJURY IN SINGLE ACCIDENT.—Where an employe in a single accident loses a member and also receives other injuries causing disability, he can recover compensation for entire period of disability.

February 4, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

Complying with your oral request for an opinion upon the question of liability of an employer to an injured employe who, as a re-

sult of a single accident, loses a foot and sustains other incidental injuries which cause disability, I am calling to your attention a recent case by the supreme court of Michigan, in which the court said:

> "The act provides that when, as the result of an industrial accident, the incapacity for work is total, the employer shall pay a weekly compensation equal to one-half the average weekly wages for a period not exceeding 500 weeks. This is the longest period of compensatory payments. A period of disability is in certain cases deemed to exist. For the loss of a foot, the period is 125 weeks. For the loss of any two members, as hands, arms, eyes, feet, legs, the period of total disability is deemed to be 500 weeks unless the weekly payments amount to $4,000 in a shorter period. If one of the results of the accident is the loss of a foot, the period of total disability is 125 weeks, although it may be in fact only six weeks. The period is not extended because as a result of the accident the employe was, in fact, totally disabled for a period of 125 weeks, or for any shorter period. If he is, in fact, disabled by the loss of a foot, or otherwise, for a greater period than 125 weeks, compensation continues until disability is removed, or the maximum of compensation is paid. The statute speaks in terms of disability. All of its provisions being considered, it does not mean that compensation must be paid during a period of actual disability and also, if a member is lost, during a period equal to the one during which total disability is deemed to continue. It does not provide a specific indemnity for the loss of a member in addition to compensation for disability. The aim of the statute is to afford compensation if the employe is disabled. When the period of disability ends, compensation ceases." *Limron v. Blair*, 181 Mich. 76.

In view of the foregoing opinion, which is consistent with the holdings of other courts upon the same subject, it is my judgment that an employe who, in a single accident, loses a member and at the same time sustains other injuries, is entitled to compensation for the period fixed in the statute for the loss of that member, and if his disability is for a period longer than that fixed for the loss of such member, his compensation shall continue for the total period of disability, not to exceed 400 weeks.

HENRY E. SAMPSON, *Assistant Attorney General.*

INJURY DUE TO FREEZING.—Injury due to an exposure peculiar to the employment is such an injury as would be compensable.

February 5, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask whether or not an employe of an ice company engaged in harvesting ice and having an opportunity whenever necessary to visit a shanty within easy access of his work, where he can warm himself, can recover compensation for injuries due to frost-bitten fingers resulting in incapacity.

For answer to your injury permit me to call your attention to the case of *Canady Cement Co. v. Pazuk*, 22 Que. K. B. 432, in which the court held that the loss of a portion of an employe's foot as the result of its freezing where he was exposed to intense cold for ten hours in the discharge of his duty "is an accident" within the meaning of the Quebec workmen's compensation act. By way of cross reference see the cases of *Warner v. Couchman*, L. R. (1911), 1 K. B. 351; *Young v. Northern Tel. Power Co.*, Calif. Ind. Acd. Comm. (June 2, 1913); the Opinion of Minn. Labor Dept. Bulletin 9, page 28 (June, 1914); *Dorrance v. N. Eng. Pine Co.* (Conn.) Super. Ct., 1 Natl. Compensation Journal 23 (July, 1914).

It would appear from the foregoing that an injury due to freezing can be considered an "accident" and, if so, it certainly would be included within the provisions of the Iowa workmen's compensation act which includes all "personal injuries."

HENRY E. SAMPSON, *Assistant Attorney General.*

LIGHTNING.—Injury due to lightning, under ordinary circumstances, not such an injury as arises out of employment.

November 15, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

Replying to your inquiry as to whether or not lightning stroke is a personal injury arising out of and in the course of the employment within the meaning of the Iowa workmen's compensation act will say that by express provision of the statute (section 2477-m, supplement to the code, 1913) the compensation act applies only to those personal injuries sustained by the employe which arise out of and in the course of the employment. Such has been the

interpretation placed upon similar language in the several state compensation acts and I refer you particularly to the cases of

M. St. P. & S. S. M. R. Co. v. Ind. Com. of Wisc., 153 Wisc. 552;
City of Milwaukee v. Miller, 154 Wisc. 652;
Rayner v. Sligh Co., 180 Mich. 168;
In re Employers' Liability Assur. Corp., 215 Mass. 497;
Bryant v. Fissell, 84 N. J. L. 72;
Kelly v. Kerry Co. Council, 42 Ir. L. T. 23.

In the case of *Hoenig v. Industrial Commission of Wisconsin*, 150 N. W. (Wisc.) 996, it was held that a workman who was killed by lightning while at work was not entitled to compensation for the reason that he was not exposed to a hazard from lightning stroke peculiar to the employment and that, therefore, the injury did not arise out of the employment. There was some evidence in the case of an expert nature for the purpose of showing that the employment of deceased at the water's edge was peculiarly dangerous from exposure to lightning, but this evidence did not convince the arbitration commission that the employment was extra hazardous in this regard. Judge Kerwin in speaking for the court said:

> "The question, therefore, arises whether the injuries received by Hoenig were incident to and grew out of the employment. This proposition turns upon the nature of the hazard to which deceased was exposed at the time and place of injury. Was he exposed to a hazard from lightning stroke peculiar to the industry?"

The Commission answered in the negative holding that there was no hazard incident to or growing out of the employment substantially different from that of ordinary out-of-door work during a thunderstorm accompanied by rain.

The same position was taken in the case of *Kelly v. Kerry Council*, 42 Ir. L. T. 23, where a workman, who was engaged on the road during a storm in clearing out gulleys to prevent the road from being flooded, was struck by lightning and killed, and it was held that his death was not caused by an accident arising out of the employment and compensation was, therefore, denied. The court said:

> "I am unable to find any special or peculiar danger from lightning to which these men were exposed from working on the road. No expert or other evidence was offered to me that their position on the road exposed them to any greater risk of being struck by lightning than if they had been working in a field or a garden or a factory. The antecedent probability that they would be struck by lightning was no greater in their case than it was in the case of any other person who was within the region over which the thunderstorm passed. * * * * * It is only under very special circumstances, when the employment of the workman exposes him to peculiar risk from lightning not shared by men in other employments, that an accident by lightning can be said to arise out of his employment."

It is true that the English case of *Andrew v. Failsworth Industrial Society*, 92 K. B. 32, awarded compensation for the death of a bricklayer who was killed by lightning, but that was a very peculiar circumstance and an examination of the facts in that case shows that it differs very materially in its facts from the ordinary case. In the English case, the position of the injured person, as shown by the evidence, was much more hazardous because of the employment than ordinarily. At the time he was struck he was working on a scaffold which was at a height of twenty-three feet above the level of the ground. Expert evidence was given which showed that the position of a man on a scaffold of that height was one of special danger from lightning. The court, in affirming the decision of the arbitration committee, said:

> "If I come to the conclusion that, as a matter of fact, the position in which the man was working was dangerous, and that in consequence of the dangerous position the accident occurred, I could fairly hold that the accident arose out of the employment. Now, was it a dangerous position? Was the man exposed to something more than the normal risk which everybody, so to speak, incurs at any time and in any place during a thunderstorm? We know that lightning is erratic, and possibly no position and circumstances can afford absolute safety. But, if there is under particular circumstances in a particular vocation something appreciably and substantially beyond the ordinary normal risk, which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that that extra danger to which the man is exposed is something arising out of his employment."

The court in deciding this case of *Roger v. School Board*, 1912 S. C. 584, said:

> "To be struck by lightning is a risk common to all and independent of employment, yet the circumstances of a particular employment might make the risk not the general risk, but a risk sufficiently exceptional to justify its being held that accident from such risk was an accident arising out of the employment."

It is, therefore, my conclusion that under the ordinary circumstances an injury due to lightning is not such an injury as arises out of the employment and entitling one to compensation.

For a discussion of a similar matter see the note at page 708, Vol. 6 of Negligence and Compensation Cases entitled, "Frostbite, freezing and heat prostration as accidents arising out of the employment within the meaning of compensation acts."

HENRY E. SAMPSON, *Assistant Attorney General.*

NERVOUS SHOCK—Incapacity due to a nervous shock received in the course of his employment is compensable.

November 24, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised whether or not incapacity through nervousness caused by accident without accompanying physical impact is a personal injury within the meaning of the Iowa workmen's compensation act, and in answer to same will say that the authorities are not in harmony upon this question. The English courts have held that mental, nervous or hysterical effects of an accident are included within the term "personal injury" in the English workmen's compensation act of 1916.

In the case of *Eaves v. Blaenclydach Colliery Co.*, (1909) 2 K. B. 73, the workman had recovered from muscular injury to his leg but suffered from traumatic neurasthenia and anaesthesia of the leg as a consequence of such accident, and it was held that his right to compensation did not cease when the muscular injury was ended, but continued as long as the nervous effects remained and caused total or partial incapacity for work.

A year later this doctrine was extended to a remarkable degree in the case of *Yates v. South Kirkby*, 2 K. B. 538, in which it was held that a nervous shock sustained by a workman engaged in coal

mining caused by excitement and alarm, resulting from a fatal accident to a fellow workman engaged in the same employment, was (a) "personal injury by accident arising out of and in the course of the employment" within the meaning of the act.

Of course there are English cases holding that to entitle a workman to a continuation of the compensation the neurasthenia must be genuine and there must be no suspicion of malingering. (*Turner v. Brooks*, 3 B. W. C. C. 22; *Holt v. Yates*, 3 B. W. C. C. 75.)

In the case of *Reich v. City of Imperial*, 1 Calif. Ind. Accdt. Com. Dec. (1914) 337, it was held that compensation should be paid where an employe becomes insane following great excitement and mental shock incident to the peril and attempted rescue of fellow workmen in the course of his employment, and where such excitement is shown to be an effective cause of the mental breakdown and no intervening cause for insanity or insane condition or predisposition thereto prior to the accident.

In the case of *Paolo v. Frankford Ins. Co.*, 1 Mass. Workmen's Comp. Cases (1913) 31, compensation was allowed where an employe while digging a trench was covered by an earth fill which caved in on him but which did not cause any broken bones or disclose any other objective symptoms, but on account of which accident the patient received a nervous shock from scare or some slight injury to the central nervous system due to the pressure of the dirt or congestion from pressure and partial asphyxiation. In that case there was no evidence of physical marks of injury.

In the case of *Coslett v. Shoemaker*, 38 N. J. L. J. 116, compensation was allowed on account of a nervous condition producing temporary disability. The employe was a carpenter, and while at work fell from a temporary scaffold, resulting in some slight injury from which he afterwards recovered, but even after his recovery he could not work steadily because of his unnerved condition which medical witnesses characterized as traumatic neurasthenia.

The Massachusetts board allowed compensation in the case of *Lata v. American Mutual Liability Insurance Co.*, 1 Mass Comp. Cases (1913) 283, where an employe claimed further compensation on acount of dizziness and a highly nervous condition which followed an injury and incapacitated her for work, there being evidence to prove that the incapacity would continue as a result of a highly nervous state and delusion from which she was suffering.

I might mention two cases in which the court held that the evidence was insufficient to prove that the mental condition was

caused by accident arising out of the employment, and that since the claimant had failed to meet the burden of proof, compensation could not be allowed. (See *Keck v. Moorehouse,* 2 Calif. Ind. Accdt. Com. Dec. (1915) 264; *Wilson v. Lake Co.,* 38 N. J. L. J. 172.)

It would seem from the foregoing that the weight of authority is in favor of holding that a nervous shock, due wholly to an accident occurring in the course of his employment, is compensable even though unaccompanied by any specific physical injury.

HENRY E. SAMPSON, *Assistant Attorney General.*

MEDICAL SERVICES—Employer to furnish reasonable medical, surgical or hospital services—May be required by order of court or by industrial commissioner—Employe's right to secure same—Penalty not specified but implied—Employer may select physician except in unusual cases.

April 27, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

Replying to your inquiry relating to the statutory provision requiring medical attention under the requirements of the workmen's compensation act will say that in 1913 the general assembly of Iowa, through its paternal interests in the welfare of the workmen of the commonwealth, enacted what is known as the workmen's compensation law by which it is sought to place at least a part of the cost of industrial injuries upon the industry which produced the loss. Among the various provisions found therein is one providing for the payment of compensation, and another providing that at any time after the injury and until the expiration of two weeks of incapacity, the employer, if so requested by the workman or anyone for him, or if so ordered by the court or Iowa industrial commissioner, shall furnish reasonable medical, surgical and hospital services and supplies under section 2477-m9, sub-section b, supplement to the code, 1913.

Under the provisions of this section just quoted the employer is required to furnish reasonable medical, surgical and hospital services and supplies under the following conditions, to-wit:

1. Where the relationship of master and servant exists;
2. Where the injury to the employe arises out of and in the course of his employment;

3. Where the necessity for such surgical, medical and hospital services and supplies are required within the first two weeks of incapacity; and
4. When the request for such medical, surgical and hospital services and supplies are requested by
   a. The workman or employe.
   b. Someone for the workman or employe.
   c. By order of the court.
   d. By order of the Iowa industrial commissioner.

It will be observed that the statute uses the word "furnish" and this would seem to place the burden of supplying such medical services upon the employer. The word "furnish" has no legal or technical definition different from its ordinary use in commercial parlance which is "to supply with anything necessary or needful." As ordinarily understood it means "to supply or to provide." It therefore seems evident that the legislature intended that the employer should act in the furnishing of reasonable medical, surgical or hospital services. Such an interpretation is also evident from an examination of similar statutes from other states, and I call particular attention to the statutes of New Jersey, Michigan, Illinois, Rhode Island, Maryland and Nebraska.

In discussing this subject Justice Marshall in the case of *Milwaukee v. Miller,* 144 N. W. (Wis.) 188, said:

> "Thus, the burden for all reasonable medical aid and surgical treatment, medicine, etc., is cast on the employer, limited as to time, with the very wise and necessary safeguard against imposition that the choice of the medical or surgical attendant shall be left with him and that, if the injured person unnecessarily chooses his own physician, he will do so at the peril of having to bear the burden of the expense. That is a very valuable protection to injured persons as well as to employers. The natural effect of a firm enforcement of it will be to expedite the return of honest claimants to the walks of industry and prevent them from having their misfortunes exploited for other's benefit. If the advantage to be gained by a firm administration of such provision would be greater on one side than on the other, it is the side of the employees. Therefore in case of a personal injury to an employe in the line of his duty, the law should be construed and applied so as to secure to his employer reasonable opportunity to conserve the mutual inter-

ests of the two parties to the misfortune by supplying the medical and surgical needs of the injured."

It also appears from an examination of the statute that such medical services may be required by an order either of the court or the Iowa industrial commissioner, and the inference is also clear that if such reasonable medical and surgical services are not furnished by the employer then such employe has the right to secure same. The logic of the foregoing statutory provision relating to the requirement of such services is that the duty of the injured employe who needs or who supposes he needs medical and surgical treatment to give his employer reasonable notice thereof. The right of the employer to have such notice necessarily implies the right to reasonable opportunity to exercise it. The penalty for refusing or neglecting to furnish such services or of disobeying the order of the court or commissioner is not specified in the Iowa law as it is in most of the similar laws but by implication it must be said that he must then bear the expense incurred by others in supplying the services. If the employer furnishes such services and they are refused by the employe then the employer can go no further and cannot be liable for services secured elsewhere. The statute requires that such services be reasonable, but as to what is reasonable is a question of fact which must be determined in each case, and if there are any peculiar circumstances which make the medical services furnished by the employer unreasonable, then the employer should either provide such reasonable services promptly when so advised or permit the employe to secure such services at the expense of the employer. Circumstances may require that the employe select his own physician in unusual cases, but except in such unusual cases the employer may select the physician which he furnishes, provided, of course, that such services are, under all of the circumstances, reasonable.

HENRY E. SAMPSON, *Assistant Attorney General.*

PERIOD FOR MEDICAL SERVICE—Employer required to furnish medical service from date of injury until expiration of two weeks of incapacity.

November 14, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

In your letter of inquiry you refer to a case where the injured employe was first thought to be but slightly injured and requiring but slight medical attention immediately following the injury, but that a week later the injury became so much worse that it incapacitated the employe from labor and required the best medical and hospital service, and you now ask to be advised for what period of time the employer should furnish the hospital and medical attention required by this injured employe.

Answering your inquiry will say that the law governing this matter is found in section 2477-m9(b), supplement to the code, 1913, which provides in part as follows:

> "At any time after the injury and until the expiration of two weeks of incapacity, the employer, * * * shall furnish reasonable surgical, medical and hospital services and supplies, not exceeding one hundred dollars."

It will, therefore, be observed that the statute fixes the time when the service should commence and the time when his duty to furnish such service may end, but does not limit this service to any specified number of weeks. The statute says that the service shall be furnished "at any time after the injury," so that this statute, as I interpret it, requires the employer to furnish medical attention as soon after the injury to one of his employes as such service is needed, and this, then, fixes the time when the medical service should first be provided. The statute then proceeds to fix the time when such service may be discontinued by the employer and does so by saying that it shall continue "until the expiration of two weeks of incapacity." If, then, the employe was able to work for a period of one week following the injury, his incapacity did not begin until the eighth day following the injury, and if the employer is required to furnish medical attention "until the expiration of two weeks of incapacity" then such service should, under the statute, be furnished until the twenty-third day following the injury.

It is, therefore, my judgment that a reasonable interpretation of the statute quoted above, and, in fact, the only interpretation of which it is capable, is that the employer is required to furnish his injured employe medical attention as soon after the injury as such services are required, and that he shall continue to furnish such services until the expiration of two weeks of incapacity, whether such incapacity date from the time of the injury or not. Of course all such services required of the employer are limited to a total expenditure of one hundred dollars since the statute provides that it shall not "exceed one hundred dollars."

HENRY E. SAMPSON, *Assistant Attorney General.*

DOCTOR'S BILLS AND BURIAL EXPENSES.—Employer should pay reasonable medical, surgical and hospital services and supplies, not exceeding $100; reasonable expenses of last sickness and burial; and compensation required to be paid dependents of injured employe.

January 14, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask for an interpretation of section 2477-m9, supplement to the code, 1913, and particularly to sub-divisions (b) and (c) thereof, having reference to the liability of an employer for doctor's bills and burial expense where such injured employe is killed as a result of an injury arising out of and in the course of his employment.

Answering your inquiry will say that said sub-division (b) provides that "any time after an injury and until the expiration of two weeks of incapacity the employer * * * shall furnish reasonable surgical, medical and hospital services and supplies not exceeding $100.00." Said sub-division (c) provides "that where the injury causes death, the compensation under this act shall be as follows: The employer shall, in addition to any other compensation, pay the reasonable expense of the employe's last sickness and burial, not to exceed $100.00." Sub-division (d) provides that "if death results from the injury, the employer shall pay the dependents of the employe wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to 50 per cent of his average weekly wage, but not more than $10.00 nor less than $5.00 for a period of not more than three hundred weeks."

An answer to your inquiry first requires a determination of whether said sub-division (b) is applicable to cases where death results from the injury, or whether the sole liability of the employer for the expense of said employe's last sickness and burial is controlled by said sub-division (c). Answering this question will say that in my judgment the provisions of sub-divisions (b) and (c) are applicable to cases resulting in death and that sub-division (c) does not fix the entire liability of the employer for expenses of medical services and burial in such cases. The purpose of the foregoing provisions of the statute was in my judgment to provide for the payment by the employer of the customary expenses incurred in such cases of injury so that the dependents of the employe would not be required to pay out of the compensation intended for their keeping the heavy expenses incurred in doctor's bills and burial expenses. If the total liability of the employer for the last sickness

and burial was limited to $100.00, then in most cases where the death of the employe occurred sometime after the injury the entire $100.00 would be used up in providing him with reasonable surgical, medical and hospital services and supplies and there would be nothing left to take care of the burial expenses which burden would then fall upon the dependents of the employe.

Reading the foregoing sections together, and giving them a reasonable interpretation the employer is required to furnish reasonable surgical, medical and hospital services and supplies not exceeding $100.00 in all cases where there is an injury, and said services are needed during the first two weeks following such injury and such is true even though death may finally result from such injury. Of course, if the injury results in instant death there would be no expense of this character.

The employer is also required in death cases to pay the reasonable expense of the employe's last sickness and burial not to exceed $100.00. If the employe died within two weeks following the injury and there were no expenses connected with his last sickness which were not included under sub-division (b) then the employer would only be liable for the reasonable burial expenses of the employe not to exceed $100.00. If, however, the death did not occur until after the expiration of the two weeks' period following incapacity and there were expenses connected with the employe's last sickness which could not be paid under said sub-division (b), then all such expenses, together with the expense of burial, not to exceed $100.00, should be paid by the employer. Such an expense would include the reasonable surgical, medical and hospital services and supplies after the expiration of the two week period of incapacity or any other legitimate expense which might properly be considered as a reasonable expense of the employe's last sickness.

In addition to the foregoing the employer is also required to pay the dependents of the employe wholly dependent upon his earnings for support at the time of the injury the compensation provided for under sub-division (d), and in this connection it should perhaps be pointed out that the language "in addition to any other compensation" found in sub-division (c) refers not only to the compensation to be paid the dependents under sub-division (d) but also to the expenses required to be paid under sub-division (b).

Summing up the foregoing, then, it is my judgment that in death cases the employer should not only pay the reasonable surgical, medical and hospital services and supplies, not to exceed $100.00,

but also the reasonable expenses of the last sickness and burial, and also the compensation required to be paid the dependents of the injured employe.

HENRY E. SAMPSON, *Assistant Attorney General.*

EMPLOYES HIRED OUT.—Employe injured while being hired out by his employer is entitled to compensation from his original employer and not from the man hiring his services.

January 14, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised whether under the circumstances hereinafter set forth the injured party would be considered the employe of Longerbone Bros. or Frank Cram & Sons.

You say that Longerbone Bros. are excavating contractors and that they employ men with their teams at so much per day, that whenever the said Longerbone Bros. have more teams than they can use on their own work they hire these teams out to Frank Cram & Sons at so much per day; that Longerbone Bros. pay the teamsters whether they are working for them or for Frank Cram & Sons; that Frank Cram & Sons pay Longerbone Bros. for the services rendered by the teamsters employed by Longerbone Bros.; that the teamsters have no direct arrangement with Frank Cram & Sons and do not receive their compensation from them; that one of these teamsters employed by Longerbone Bros. was injured while doing teaming work for Frank Cram & Sons; and that the question has now arisen as to whether or not compensation should be paid by Longerbone Bros. or by Frank Cram & Sons.

Under the foregoing statement of facts it is my judgment that the teamster was an employe of Longerbone Bros. since he was employed by and paid by said Longerbone Bros.; that there exists the relationship of master and servant, and that Longerbone Bros. were liable for compensation due such injured employe; that the contract between Longerbone Bros. and Frank Cram & Sons was a contract for service as distinguished from a contract of service which existed between the injured employe and Longerbone Bros. There is no relationship of master and servant existing between the injured employe and Frank Cram & Sons. There is no compensation due except in those cases where there exists the relationship of master and servant and where the injured employe is working under a contract of service.

Support for the above opinion is found in the case of *Pigeon v. Employers'* L. A. C., 216 Mass. 51, in which the original employer was held liable for compensation in a case in which the employe, a driver in the employment of a general employer, was sent by his employer to work for a city in removing street sweepings, receiving his general instructions as to the place and kind of work from the city superintendent. It was there held that the evidence warranted a finding that the decedent was not loaned absolutely to the service of the city, but that his general employer retained general direction of his conduct.

See also the recent case of *Rongo v. Waddington & Sons,* 94 Atl. (N. J.) 408, in which the supreme court of New Jersey held that a teamster who was regularly employed by a teaming company which hired out its teams with drivers to another (the teamster being paid by the company, but being directed in his work by the other) is an employe of the company, the court going on to say:

> "Vanderbilt had no direct dealing with the petitioner; he had nothing to say about how much wages the petitioner should be paid; the only contract he made was a contract with Waddington for the supply of a team consisting of a wagon, horses and driver, for which he paid as a team."

HENRY E. SAMPSON, *Assistant Attorney General.*

LOSS OF FIRST AND SECOND FINGERS—Method of payment where one injury causes the loss of two members.

October 3, 1914.

HON. WARREN GARST, *Iowa Industrial Commissioner.*

I have before me the letter of the Gurties Sash and Door Co. addressed to you in which they inquire as to the amount of compensation which should be paid for the loss of the first and second fingers and the method by which same should be paid.

For answer to the questions therein submitted I refer you to section 10-(j-1), and 10-(j-2) of chapter 147, acts of the thirty-fifth general assembly wherein it is expressly provided that for the loss of the first finger the compensation should be 50 per cent of the daily wages for a period of thirty weeks; and for the loss of the second finger 50 per cent of the daily wages for a period of twenty-five weeks.

As to the manner of payment in such a case will say that the injured employe lost the index finger which entitled him to thirty weeks and the second finger which entitled him to twenty-five weeks and that, therefore, he was entitled to compensation for a period of fifty-five weeks. It would not be in accordance with the spirit of the law to permit the employer to make payments for each of those two fingers at the same time and you should not approve a settlement which contemplates the paying of 100 per cent of the wages of the injured employe for the first twenty-five weeks following the second week of the injury and 50 per cent for an additional five weeks. There is no provision in the above named statute by which more than $10.00 per week could be paid (see, section 10-(j-19)). This fact would make improbable and unworkable the theory that weekly payment for each finger lost should be made each week continuing until the claim of the less valuable fingers dropped out of the account and until the one most valuable is fully paid.

Believing that this method of payment is the one contemplated by the statute and the one best suited to serve the injured employe, I am,

HENRY E. SAMPSON, *Assistant Attorney General.*

AVERAGE WEEKLY WAGE.—Compensation based on wages at time of injury even though injured employe had been but recently advanced in wages.

November 27, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

I have before me the file in the case of *George Winburn v. Des Moines Saw Mill Company* and have not only examined the record but have made some personal investigation of the facts surrounding this case. If I am correctly informed, George Winburn has been in the employ of the Des Moines Saw Mill Company for several weeks; that during the most of said period of employment he was doing common labor work in the log yard; that shortly prior to the date of his injury he was promoted to the position of operating a cut-off saw; that while acting as a common laborer he was paid at the rate of between $1.75 and $2.00 per day; that in his new position of operating a cut-off saw he was paid $2.50 per day.

Since the loss sustained by Employe Winburn was that of an index finger, which loss is scheduled at thirty weeks, the only question left open for determination is the average weekly wage of Employe Winburn at the time of his injury.

Answering this inquiry will say that under the facts as I understand them the average weekly wage should be determined under and in accordance with the provisions of section 2477-m(d) and that when so computed it would make the average daily wage of Employe Winburn at the time of his injury, and in the grade in which the employe was employed at the time of the accident, at $2.50, and that his average annual earnings when so computed would be $750 and that his average weekly earnings, when so computed, would be $14.42 and that the amount of compensation due, when so computed, would be $216.30.

Trusting that the foregoing will be sufficient to enable you to properly determine the compensation due George Winburn in the above case, I am, etc.,

HENRY E. SAMPSON, *Assistant Attorney General.*

ADDITIONAL COMPENSATION.—Average weekly compensation based on different sources of wages paid.—Insurance premium paid based on wages received from all sources.

March 28, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask whether or not in figuring compensation due injured employes under the Iowa workmen's compensation act account should be taken of all the different sources of compensation including rent, board, washing, etc.

In answer to your inquiry will say that it is expressly provided by the provisions of section 2477-m9, supplement to the code, 1913, that the amount of compensation due injured employes should be based on the average weekly wage but not more than $10.00 nor less than $5.00 per week. The courts have repeatedly held that if in addition to the fixed wage other compensation is paid, then the additional items of compensation should be included when arriving at the average weekly wage of such injured employe. For cases bearing upon this subject see *Brandy v. Owners S. S., Raphael,* 4 B. W. C. C. 6; *Shailes v. Blue Anchor Line,* 4 B. W. C. C. 16; *Great Northern Ry. Co. v. Dawson,* 92 Lt. 145.

As instances of where such additional compensation has been included, I may mention the cases where the actual cost of food and

lodging was included, and when tips received as a part of the earnings were included, etc. The provisions of section 2477-m15 (g), supplement to the code, 1913, should be kept in mind in all cases of this character.

If, however, the average weekly compensation is based upon the different sources of wages paid, then it would seem but right and proper that the premium paid for workmen's compensation insurance should be based on the total wages received from all such sources.

HENRY E. SAMPSON, *Assistant Attorney General.*

WAGES PARTLY IN CASH, PARTLY IN PROPERTY.—Weekly wage paid in part cash and part property ought not to change rule.

April 8, 1915.

MR. E. E. MEYER, Wyoming, Iowa.

I have for attention your letter of April 7th in which you state that you have an employe whom you are paying at the rate of $17.50 per week, $15.00 of said wages being paid in cash and the balance in meat and lard which you estimate averages $2.50 per week. You now ask to be advised whether or not under such circumstances the basis upon which to figure compensation for this employe would be $15.00 per week or $17.50 per week, and in answer to same will say that, in my judgment, your said employe is entitled to compensation upon the basis of $17.50 per week. The mere fact that a portion of the weekly wage is paid in property instead of cash ought not to change the rule.

The arrangement which you have is more in the nature of an agreement between yourself and employe, whereby the employe agrees to give you credit on his wage account for $2.50 per week, for which sum you agree to furnish him with meat and lard for his family.

HENRY E. SAMPSON, *Assistant Attorney General.*

LUMP SUM SETTLEMENT.—When and how such settlements may be made.

December 3, 1915.

MR. H. B. LEWIS, S. & L. Bldg., Des Moines.

Your letter of September 28th addressed to the industrial commissioner has been referred to me for attention and in reply to

same will say that in my judgment there is no authority under the statutes of Iowa under which a judge of the district court can legally enter an order in his court commuting future payments to a lump sum settlement case except in those cases where the period of compensation can be *definitely determined.* If the period of compensation is possible of definite determination and if the employer and employe have reached an agreement in regard to the compensation due and have filed a memoranda thereof with the Iowa industrial commissioner and if such memoranda of agreement is approved by the Iowa industrial commissioner, all as provided for in section 2477-m25, supplement to the code, 1913, then commutation can be made as provided for in section 2477-m14, supplement to the code, 1913.

In view of the foregoing answer, it is unnecessary at this time for me to answer the other inquiries submitted in your letter. As soon as I can find time I will give the matter further attention.

HENRY E. SAMPSON, *Assistant Attorney General.*

PARTIAL RECOVERY.—Compensation statutes do not guarantee employment at old occupation.—Compensate for total disability.

December 1, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised as to whether or not, under the Iowa workmen's compensation act, an injured employe is entitled to compensation until he is able to return to the employment at which he was engaged at the time of his injury, and in answer to same will say that I do not so understand the law.

In a recent issue of the Weekly Underwriter I noticed a reference to a case similar to yours just handed down by the compensation commissioner of Connecticut in which the employe, injured November 18, 1915, was discharged from the hospital December 19, 1915, and on the 12th of January, 1916, was pronounced able to resume light work, which light work was offered him, but since his father did not wish him to do such light work he refused same and the commissioner held that his total incapacity ceased on the day when he was discharged from the hospital and that the employer, by offering and keeping open for him suitable employment at a wage equal to what he was first receiving, had satisfied the requirement of the compensation act.

The California industrial accident commission recently passed upon a case somewhat similar. The injured employe was a bricklayer's foreman. After he had sufficiently recovered to resume his work as a foreman he was unable to find such employment but was offered work as a bricklayer which he felt physically unable to do. The commission held that the California statute does not contemplate compensation for mere pain and inconvenience but only for disability to labor. The statute does not say disability to labor at the kind of labor which the injured employe was doing at the time of the accident. Compensation was denied.

I find from an examination of the statutes from other states and from decisions rendered by other commissioners that the compensation statutes do not guarantee employment at the old occupation, but do undertake to compensate for disability to earn wages. If the injured employe can earn wages at some occupation, then to that extent the person has not suffered total permanent disability.

HENRY E. SAMPSON, *Assistant Attorney General.*

PARENT OF MINOR IS DEPENDENT.—Parent of minor entitled to earnings unless minor is legally emancipated.—Statute conclusively presumes parent is dependent.

April 11, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask me to be advised whether or not the parent of a minor is entitled to the earnings of the employe at the time of the injury and in answer to same will say that by the express provisions of section 2477-m16-c it is provided that "the following shall be conclusively presumed to be wholly dependent upon the deceased employe: (3) a parent of a minor entitled to earnings of employe at the time the injury occurred subject to the provisions of sub-division f, section 2477-m9, supplement to the code, 1913."

Under the statutes of Iowa the parent of a minor is legally entitled to the earnings of such minor employe unless he has been legally emancipated by some one of the several legal forms of emancipation. The statute provides that the parent shall be conclusively presumed to be wholly dependent and therefore the question is not open to a determination of whether or not such parent is in fact dependent. In this respect the statute of Iowa is different

from those of several other states and hence the decisions from states where the statute is different are not applicable.

HENRY E. SAMPSON, *Assistant Attorney General.*

SURVIVING SPOUSE.—Compensation is payable to the surviving spouse.—Remarriage does not terminate.

April 1, 1916.

CHAS. D. HAYNES, Omaha, Nebr.

Replying to your letter of March 28th having reference to the Iowa workmen's compensation act, will say that the Iowa statute governing the matter of compensation to surviving spouses is found in section 2477-m16-c-1, supplement to the code, 1913, and reads as follows:

> "The surviving spouse, unless it be shown that the survivor wilfully deserted deceased without fault upon the part of the deceased, and if it be shown that the survivor deserted deceased without fault upon the part of deceased, the survivor shall not be regarded as a dependent in any degree. No surviving spouse shall be entitled to the benefits of this act unless she shall have been married to the deceased at the time of the injury."

Section 2477-m16-c-4 reads as follows:

> "If the deceased employe leaves dependent surviving spouse, the full compensation shall be paid to such spouse; but if the dependent surviving spouse dies before payment is made in full, the balance remaining shall be paid to the person or persons wholly dependent, if any, share and share alike. If there be no person or persons wholly dependent, then payment shall be made to partial dependents."

I find no express provision in our statute terminating payment of compensation in case of the remarriage of the surviving spouse.

HENRY E. SAMPSON, *Assistant Attorney General.*

REMARRIAGE OF SURVIVING SPOUSE.—Subsequent marriage of surviving spouse does not forfeit right to compensation.

December 15, 1915.

HON. WARREN GARST, *Iowa Industrial Commissioner.*

You ask to be advised as to whether or not the surviving spouse, who is entitled to compensation under the Iowa workmen's compensation act, forfeits such right to compensation by remarriage.

Answering your inquiry will say that in my judgment the words "surviving spouse" as used in section 2477-m16-c1, supplement to the code, 1913, indicate the person, not the state, and is used synonymously with wife. Hence, the subsequent marriage of the surviving spouse does not take away her right given by the statute as the widow of the deceased.

This view is supported by the case of *Ga. R. & B. Co. v. G. A. R.* 57 Ga. 277. See also the cases of *Commonwealth v. Powell,* 51 Pac. 438; *Brady v. Banta,* 46 Kans. 131; *In re Ray's Estate,* 35 N. Y. Supp. 481.

This view is entirely consistent with the purposes of the act when we note that under the Iowa statute the surviving spouse takes not only for herself but also for other dependents.

The compensation statutes of some states expressly provide that compensation shall cease upon the remarriage of the surviving spouse and of course in those jurisdictions the above rule would not obtain, but there is no provision in the Iowa statute for terminating the right of the surviving spouse to compensation upon her remarriage.

HENRY E. SAMPSON, *Assistant Attorney General.*

COMPENSATION INSURANCE REQUIRED.—An employer failing to provide compensation insurance is in same position as though he rejected the act.

June 26, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised as to the status of an employer who has not affirmatively rejected the compensation features of the act but who has neglected to provide the compensation insurance required under section 2477-m41, supplement to the code, 1913, or been relieved from complying with said section by proceeding under

the provisions of section 2477-m49, and in answer to same will say that, in my judgment, the employer is in exactly the same situation as though he had affirmatively rejected the compensation features of the act. Of course I am assuming that the employes of such employer have not rejected the act as by law provided. In this connection see Bradbury's Workmen's Compensation (2 Ed.) Vol. I., p. 311.

I must admit that the language of said section 2477-m41 is not entirely clear and that my opinion is based upon a consideration of the entire statute made after an examination of the history of this legislation. We will not know for a certainty whether or not the supreme court will arrive at the same conclusion until they have had the matter before them and rendered their decision, and until that time I think that the statutes should be interpreted in the manner comtemplated by the legislature, and as above stated.

HENRY E. SAMPSON, *Assistant Attorney General.*

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