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COMMENTS

ATTORNEY AND CLIENT — UNLAWFUL PRACTICE BEFORE INDUSTRIAL COMMISSION IN WORKMEN'S COMPENSATION PROCEEDINGS — In forty-four states of the Union¹ and in Alaska, Porto Rico, Hawaii, and the Philippine Islands there are workmen's compensation acts. A great majority of these acts provide for a board or commission to settle all disputes as to compensation.² Practice before these boards and commissions has become a large share of the business of many lawyers and of many law firms. To them, in particular, and to the legal profession, in general, the question raised in the recent case of *Goodman v. Beall*³ is of considerable interest. In this case, suit was brought by a committee of the Ohio Bar Association seeking to restrain defendants, members of the Industrial Commission of Ohio, from permitting

¹The states of Arkansas, Florida, Mississippi, and South Carolina have no workmen's compensation acts.

²The Alabama, Alaska, Louisiana, New Hampshire, New Mexico, Philippine Islands, Rhode Island and Tennessee workmen's compensation acts provide that disputes may be settled in the courts.

³130 Ohio St. 427, 200 N. E. 470 (1936).

laymen or corporations to appear before the commission in a representative capacity in workmen's compensation hearings. The plaintiffs contended that such appearances, in a representative capacity, of persons not regularly admitted to the bar was the unlawful practice of law. The court held that assisting workmen and arguing for them in submitting their claims to compensation was not the practice of law. However, the court said that if the commission refused to allow the workman's claim to compensation, then any application for rehearing or further proceedings as provided by statute⁴ was the practice of law and required the services of an attorney. The court pointed out that the statute provided for relaxed rules of evidence and procedure and for simple hearings⁵ which were best calculated to speedily ascertain the merits of the workman's claim. This indicated to the court that no services requiring skill and legal knowledge were necessary at an original hearing, and that most of the work was in filling out and filing forms furnished by the commission. On the other hand, when a rehearing was applied for and granted, different rules of evidence and procedure were provided for, and the rehearing record was the only thing on which the workman could base his appeal to the courts.⁶ So the court felt that this record must be prepared by an attorney because he was best fitted by his training and knowledge. This decision indicates that a general discussion of representation of workmen by laymen must be based on the various statutes.

At the outset it should be pointed out that in every case the parties are entitled to appear and plead and argue in their own behalf, as they would be entitled in a court of law. So this comment considers only the situation where a layman or corporation appears in a *representative* capacity. Also, it should be realized that once any claim to compensation is brought before the courts, either on appeal or as an original action, then only duly admitted attorneys may appear and plead and argue in a representative capacity. The workmen's compen-

⁴ Ohio Gen. Code (Page, 1926), § 1465-90. This section says, in part, that if the Industrial Commission finds it has no jurisdiction and so cannot inquire into the right of claimant to receive or continue to receive compensation, then upon receipt of notice of such finding, claimant may within 30 days "file an application with the commission for a rehearing of his claim."

⁵ Ohio Gen. Code (Page, 1926), § 1465-91.

⁶ Ohio Gen. Code (Page, 1926), § 1465-90. The remainder of this section provides that evidence on rehearing is to be taken as in civil actions and objections and rulings on evidence are provided for. If the commission affirms its original ruling then the claimant may appeal to the Common Pleas Court where claimant's right to compensation shall be determined "upon the evidence contained in such record and no other evidence." The record is that of the rehearing and is sent to the Common Pleas Court upon appeal by the claimant.

sation acts of Alaska,⁷ Louisiana,⁸ New Hampshire,⁹ New Mexico,¹⁰ Rhode Island,¹¹ and Tennessee,¹² all provide that disputes shall be settled by the courts as provided in the statutes. Obviously in these jurisdictions only an attorney can represent a claimant to compensation. However, the fees of the attorneys are regulated by the statute or by court rules, and the procedure is made brief and summary, thereby accomplishing the purpose¹³ of the workmen's compensation acts.

In the remainder of the states and territories having workmen's compensation acts, disputes are settled by some sort of a commission, board, department, or committee of arbitration. It is the appearance before these tribunals in a representative capacity which concerns us here.

I.

In some states there are specific statutory regulations. The Alabama¹⁴ and Indiana¹⁵ workmen's compensation acts limit appearance in a representative capacity to attorneys only. The New York¹⁶ act provides a system for licensing persons, firms, or corporations other than attorneys, who shall then be allowed to represent claimants before the Industrial Board. In Porto Rico, section 50 of the workmen's compensation act¹⁷ provides that no member or employee of the commission shall represent anyone in the proceedings before the commission. Considering sections 17 and 49 which regulate the fees

⁷ Alaska Comp. Laws (1933), §§ 2177, 2202.

⁸ La. Gen. Stat. (Dart, 1932), §§ 4407, 4411.

⁹ N. H. Pub. Laws (1926), c. 178, §§ 25, 37.

¹⁰ N. M. Stat. Ann. (1929), §§ 156-113, 156-122.

¹¹ R. I. Gen. Laws (1923), §§ 1238-1243. In this state the commissioner awards compensation in a summary manner and then any objections or disputes are taken to the Superior Court.

¹² Tenn. Code (1932), §§ 6877, 6885, 6886, 6887.

¹³ Briefly, the purpose of the workmen's compensation acts was to give the workman a speedy and simple means of securing compensation immediately after the injury when the money is needed. The acts aimed to supplant the principles of negligence, which did not protect the workers, with a scheme which spread the burden over all industry and made compensation for injuries one of the costs of production, so to speak. They also aimed to do away with protracted and costly litigation and avaricious lawyers. For further discussion see *infra*, part 4, and the following citations: Levi, "Workmen's Compensation Procedure," Proc. Ky. S. B. Assn. 90 (1931); Rhoads, "The Workmen's Compensation Law," 9 MICH. S. B. J. *129 (1930); Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 148 N. W. 684 (1914); City of Milwaukee v. Miller, 154 Wis. 652, 144 N. W. 188 (1913); 28 R. C. L. 713-714 (1921).

¹⁴ Ala. Code (1928), § 3999.

¹⁵ Ind. Stat. Ann. (Burns, 1933), §§ 40-1801, 40-1802.

¹⁶ N. Y. Consol. Laws (McKinney, Supp. 1935), Book 64, § 24-a; Laws (1928), c. 749.

¹⁷ Porto Rico Laws (1928), no. 85, § 50, p. 686.

and contracts for fees of an attorney, section 50 would indicate that Porto Rico may be classed with Indiana and Alabama.

2.

The acts of several other states also deal directly with the question of representation of claimants, but not so specifically as above. The provisions of the California,¹⁸ Colorado,¹⁹ Connecticut,²⁰ and Wisconsin²¹ acts say, in effect, that a party may be present at a hearing or be represented by an attorney or *any other agent*. This would seem to indicate that a claimant could be represented by his brother, friend, or any layman, and it was so held in *Eagle Indemnity Co. v. Industrial Accident Commission of California*.²² The California court said:

“The statute specially provides that a party litigant before the Commission may be represented by one not admitted to practice Law. When so acting he performs . . . the services of an ‘attorney.’ . . . If he were not permitted under the act to perform such legal services without a license to practice law the result would be different.”

The court also said that the statute was constitutional in this respect and that the layman could enforce a lien “for attorney’s fees” as provided by the statute.

Probably no reasons of sufficient strength can be found to overturn this legislative declaration of public policy.²³ At least we cannot quarrel with the holding of the court because it could not have interpreted the statute in any other way. If the result is not in accordance with our views, the complaint should be made to the legislature and not to the California court. The same result seems inevitable in Colorado, Connecticut, and Wisconsin when the question comes before the highest courts in these states. Thus the right of laymen to represent claimants to workmen’s compensation cannot validly be denied under the existing statutes in these states and in California.

The right of laymen to appear is more doubtful in the District of Columbia. The workmen’s compensation act in this district is probably of the “California” type because it provides that an employee

¹⁸ Cal. Gen. Laws (Deering, 1931), Act 4747, § 15.

¹⁹ Colo. Stat. Ann. (Courtright’s Mills, 1930), § 8174.

²⁰ Conn. Gen. Stat. (1930), § 5250.

²¹ Wis. Stat. (1931), § 102.17.

²² 217 Cal. 244 at 248, 18 P. (2d) 341 (1933).

²³ 22 CAL. L. REV. 121 (1933), discussing *Eagle Indemnity Co. v. Industrial Accident Comm.*, 217 Cal. 244, 18 P. (2d) 341 (1933).

may be represented by any person authorized in writing.²⁴ Only very strong considerations of policy could force a court to interpret this to mean that only attorneys may represent employees who claim compensation. The acts of Illinois and Nevada may also be of the "California" type but they are rather vague and uncertain.²⁵

3.

Under the workmen's compensation acts of several states the attorneys and bar associations will probably never fight for the exclusive right to represent claimants. Thus in New Jersey the statutes say that counsel may be assigned if the claimant is unable to pay,²⁶ and that the Workmen's Compensation Bureau is to furnish free assistance to the claimant in preparing his claim.²⁷ Also attorney's fees are allowed by the bureau only if they believe an attorney was necessary to present the claim.²⁸ In the Philippine Islands it is provided that the Bureau of Labor shall require a provincial fiscal (county attorney) to represent the employee or else appoint an attorney to represent him free of charge.²⁹ The act of South Dakota provides that State's Attorney must serve for the claimant if requested.³⁰ Likewise, the act of Wyoming provides that county or prosecuting attorneys, or other attorney appointed, must conduct hearings on behalf of the employee free of charge.³¹ It seems evident that in these jurisdictions practice before the workmen's compensation tribunals will not be lucrative enough nor large enough to attract many attorneys or laymen. Therefore, a dispute as to the right of a layman to represent claimants is unlikely under the present laws.

4.

Because of the provisions in the various workmen's compensation acts thus far considered, it has been unnecessary to discuss in detail the policy behind these acts. In discussing the acts of the fourth or "Ohio" type, our principal query is, does policy indicate that attorneys should be preferred to laymen as representatives of the claimants? Thus, as far as the various workmen's compensation acts of these juris-

²⁴ D. C. Code (1929), tit. 19, § 11, 45 Stat. L. 600, enacting as to District of Columbia, 44 Stat. L. 1435, 33 U. S. C., § 921 (d) (1927).

²⁵ For discussion of these acts, see *infra*, part 5.

²⁶ N. J. Comp. Stat. (Cum. Supp. 1911-1924), § 236-60.

²⁷ N. J. Comp. Stat. (Cum. Supp. 1911-1924), § 236-46.

²⁸ N. J. Comp. Stat. (Cum. Supp. 1911-1924), § 236-58.

²⁹ 24 P. I. Pub. Laws (1927), act 3428, § 31.

³⁰ S. D. Comp. Laws (1929), § 9477. In Minnesota a fund is maintained to be used in paying a staff of attorneys to represent claimants.

³¹ Wyo. Rev. Stat. (1931), § 124-113.

dictions are concerned, who may represent claimants is an open question. There is, however, one decision to aid us in deciding this question. This is the case of *Goodman v. Beall*,³² the facts and holding of which have been previously set out. As was then pointed out, the Supreme Court of Ohio decided that representation of claimants at the original hearing before the Industrial Commission was not the practice of law, but when there is a rehearing, then only attorneys may appear as representatives of claimants. At first blush this appears to be a distinction without a difference, and the decision seems to be an attempt at a compromise or a Solomon-like disposal of the case. However, when we recall the purpose of and reasons for the workmen's compensation acts, the result reached by the court does not seem so groundless.

Prior to the passage of workmen's compensation acts, there were three defects in the system whereby workmen were compensated for injuries received in their line of employment.³³ The first of these was that the negligence doctrines of assumed risk, fellow servant, and contributory negligence made recovery by the workmen very difficult.³⁴ The second defect was that the delay in following existing court remedies often meant that a workman could not receive his compensation until several years after the accident, although the money was most needed, generally immediately after the accident when the man was laid up and had no income to support his family. The third defect was that injured workmen were the prey of ambulance-chasing lawyers who exacted exorbitant fees and often left the workman with very little to compensate him for his injuries. The workmen's compensation acts were designed to remedy these defects in particular.

The remedy for the second defect was provision for a simple and speedy hearing before a board or commission. Here technicalities and pleading were cut to a minimum in order to get at and settle each claim on the merits only. It was the opinion of the court in the *Goodman* case that this simplicity meant that the expert services of an attorney were not necessary. Therefore the court decided that laymen could represent claimants in the original hearings.

The remedy provided in some of the states for the third defect

³² 130 Ohio St. 427, 200 N. E. 470 (1936).

³³ *Supra*, note 13. Also, 22 CAL. L. REV. 121 (1933); and *Goodman v. Beall*, 130 Ohio St. 427, 200 N. E. 470 (1936).

³⁴ How the workmen's compensation acts remedied this defect is not in the scope of this comment. The general result was to place absolute liability on the employer, however, limiting the liability to a small sum and providing for forms of insurance, state funds, etc. See Levi, "Workmen's Compensation Procedure," PROC. KY. S. B. ASSN. 90 (1931); Rhoads, "The Workmen's Compensation Law," 9 MICH. S. B. J. *129 (1930).

is the specific provisions as to representation which have already been pointed out. The remainder of the jurisdictions have provisions as to amount of fees, and as to the method of collecting fees, and as to contingent fee contracts.³⁵ Of course, the effectiveness of these latter provisions depends a good deal on the vigor and efficiency of the boards or commissions administering the acts, but they seem to be adequate to remedy the grossest evils prevailing before the passage of the workmen's compensation acts. The presence of these provisions would seem to indicate that the legislators expected attorneys to appear in representative capacities at the hearings. Also, these provisions would seem to indicate that since the cost is no greater, a claimant might as well have the advantages of legal training and knowledge. So these provisions tend to undermine the result reached in the *Goodman* case.

To sum up, then, the provisions as to simplicity of presentation, coupled with provisions for forms and blanks to be used in place of pleadings,³⁶ support the decision of the Supreme Court of Ohio in regard to original hearings. An additional bolstering factor, not mentioned by the court, is a provision³⁷ in the workmen's compensation act of Ohio fixing fees of *agents*, attorneys, and others. Thus is indicated the expectation of the legislature to have persons other than attorneys appear at the hearings. On the other hand, the fact that attorney's fees are closely regulated removes the excessive fee danger. Also, since an attorney must handle the claim if the rehearing is asked for or when the claim gets into the courts on appeal, it would seem that an attorney might as well start the action. It is clear that the average attorney could render much more satisfactory service than the average layman. Therefore, representation of claimants for a fee should be limited to attorneys, if only to give the claimant his money's worth.

The acts of Oregon,³⁸ Utah,³⁹ and Washington,⁴⁰ provide that appeal to the courts may only be on the issues raised in the application for rehearing, and the court is to consider the case on the record of the rehearing only. The courts in these states will have to consider whether the distinction made in the acts between hearing and rehearing justifies the distinction made in the *Goodman* case as to representation

³⁵ The Arizona, Colorado, Maine and Nevada workmen's compensation acts have no provisions on attorney's fees.

³⁶ Often appearing in rules published by the commission rather than in the act itself. For example, see NAT. LAW PRINTING CORP., MICHIGAN WORKMEN'S COMPENSATION LAW, "Rules of Practice and Procedure of the Department of Labor and Industry" (1932).

³⁷ Ohio Gen. Code (Page perm. supp., 1926-1935), §§ 1465-III, 1465-II2.

³⁸ Ore. Code (1930), §§ 49-1842, 49-1843.

³⁹ Utah Rev. Stat. (1933), §§ 42-1-55 to 56, 42-1-77 to 81.

⁴⁰ Wash. Comp. Stat. (Rem. 1922), §§ 7686, 7697, 7703.

of claimants. They may feel that the safeguards in the acts and general considerations of policy do away with the necessity for any distinction at all. These courts may say that it is admitted that an attorney must prepare and conduct the rehearing, and that the reasons for allowing laymen to appear at original hearings do not exclude or disqualify attorneys, and that the reasons against requiring attorneys are largely changed by the acts. Therefore, why not provide for attorneys exclusively throughout the proceedings? Such a decision is at least as justifiable as the decision set out by the Supreme Court of Ohio in the *Goodman* case.

5.

There is a fifth, which we may call the "Michigan," type of workmen's compensation act. This category contains the largest group of statutes. They are similar mainly because of their lack of any provision regarding the question of representation by any specific class of persons. Also, they are similar in that no distinction is made in any of the acts justifying the distinction made in the *Goodman* case. Therefore, we must decide whether the appearance before the commissions or boards is the "practice of law." There is one case on this question under this type of act. It is the case of *Michigan State Bar Association v. McGregor*,⁴¹ which is a decision by the Circuit Court for Dickinson County, Michigan. There the court held that appearance before the Department of Labor and Industry in a representative capacity is the "practice of law" and so limited to attorneys only. Unfortunately, this case was never taken up to the Supreme Court of Michigan.

There are seventeen states⁴² and one territory⁴³ whose workmen's compensation acts are in this general class. These acts are characterized by provision for:

1. Disputes settled by a board or commission.
2. Appeal to the courts from award of the board or commission.⁴⁴

⁴¹ Reported in 14 MICH. S. B. J. *145 (1934).

⁴² Arizona, Delaware, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Montana, Nebraska, North Dakota, Oklahoma, Pennsylvania, Texas, Vermont, Virginia and West Virginia.

⁴³ Territory of Hawaii.

⁴⁴ In Arizona and Iowa it is decided on appeal whether the commission exceeded its power and whether the facts support the award, and nothing else. In Delaware and Maryland the appeal is based on the record of the original hearing or on stipulated facts, and questions of law properly presented are decided. In Arizona and Texas the appeal is in the form of an action to vacate or collaterally attack the award. In Hawaii, Kansas, Montana, Nebraska, and Vermont the appeal is similar to that ordinarily used between upper and lower courts where questions of law and fact may be decided. Kentucky, Maine, Michigan, Pennsylvania, Vermont (to Supreme Court), Virginia, West Virginia and Oklahoma provide for appeal on questions of law only. In North

3. Regulating amount and enforcement of attorney's fees.⁴⁵
4. Relaxing the rules of evidence and procedure and authorizing the use of forms and blanks.⁴⁶

All of the acts stress the merits of the claim and subordinate technicalities of evidence and procedure.

The unauthorized "practice of law" is frowned on in all jurisdictions.⁴⁷ In the words of the Michigan statute:⁴⁸

"It shall be unlawful for any person who is not a regularly licensed attorney and counselor of this state . . . to practice law or engage in the law business. . . ."

There are many definitions⁴⁹ of the "practice of law," most of which have been formulated in cases involving the corporate practice of law. The cases and annotations show a changing attitude in the courts as to what is included in the "practice of law." In *Porter v. Bronson*,⁵⁰ decided in 1865, the court says that attorneys at law, as such, belong only to the courts strictly of record, except when otherwise expressly provided by statute. An early annotation⁵¹ reviews cases which seem to limit the "practice of law" to conducting cases in court. Contrasted to these views is the definition approved by the American Bar Association, which is:

"The practice of law is any service, involving legal knowledge, whether of representation, counsel or advocacy, in or out of court, rendered in respect of the rights, duties, obligations, liabilities, or business relations of the one requesting the service."⁵²

Dakota there may be an appeal to the courts only when compensation is denied by the commission.

⁴⁵ Of the "Michigan" type acts, those in Arizona and Maine have no provisions as to attorney's fees.

⁴⁶ In Maine there is no provision on this. In Oklahoma the commission is to make rules on evidence. The commission in West Virginia must adopt formal rules of procedure but is not bound by common law or statutory rules of evidence.

⁴⁷ 2 R. C. L. 940 (1914).

⁴⁸ Mich. Comp. Laws (1929), § 13587.

⁴⁹ *Boykin v. Hopkins*, 174 Ga. 511, 162 S. E. 796 (1932); *Barr v. Cardell*, 173 Iowa 18, 155 N. W. 312 (1915); *People v. People's Trust Co.*, 180 App. Div. 494, 167 N. Y. S. 767 (1917); *People ex rel. v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N. E. 901 (1931); *In re Eastern Idaho Loan & Trust Co.*, 49 Idaho 280, 288 P. 157 (1930); *Cohn v. Thompson*, 128 Cal. App. 783, 16 P. (2d) 364 (1932); *Ferris v. Snively*, 172 Wash. 167, 19 P. (2d) 942 (1933); *Fitchette v. Taylor*, 191 Minn. 582, 254 N. W. 910 (1934); *In re Duncan*, 83 S. C. 186, 65 S. E. 210 (1909); 49 C. J. 1313 (1930); 73 A. L. R. 1327 (1931); 84 A. L. R. 749 (1933); 18 Ann. Cas. 658 (1911); 2 R. C. L. 938 (1914).

⁵⁰ 29 How. Prac. 292, 19 Abb. Prac. 236 (1865).

⁵¹ 18 Ann. Cas. 658 (1911).

⁵² AMERICAN BAR ASSOCIATION, ANNOTATED CANONS OF ETHICS 15 (1926).

Thus the tendency is to broaden and make more inclusive the definition of the "practice of law."

As a practical matter the hearings on workmen's claims to compensation are much like a trial in court. Facts must be proved and questions of law arise. Precedents are often used and most of the hearings involve the interpretation of the workmen's compensation act and perhaps other statutes. These are the sort of things which an attorney is trained to handle and to which he is accustomed. Even though the hearings are simplified, there are yet rules adopted by the commission or board in many states which must be followed. So, in spite of the simplification of procedure, the questions which do arise are at least quasi-legal in nature.⁵³ Therefore, it would seem that appearance at these hearings comes well within the modern definition of the "practice of law." But there is more to the problem than satisfying definitions.

It has already been pointed out that a desire to prevent protracted litigation, and a desire to get the workman out of the power of grasping attorneys, were some of the reasons for the passage of workmen's compensation acts. This may be said to indicate that the legislatures wished to create a method of determining compensation which would not require the use of attorneys and which, therefore, was not the "practice of law." Of course, this contention may be answered by saying that the provisions for regulation and enforcement of attorney's fees were deemed sufficient to curb the attorneys and that, therefore, no attempt was made to create something new which was not the "practice of law." Such an answer seems quite sufficient and is the only reasonable explanation of the presence, in the acts, of provisions regulating attorney's fees.

A more serious obstacle is the fact that the workmen's compensation acts have been held to create an administrative body only, and not a judicial body.⁵⁴ In the *McGregor* case this point was raised by the

⁵³ One writer says, "While this legislation is remedial and should receive a reasonable liberal construction, yet it can be easily seen that the administration of this law and the practice before the Commission and the Court, in view of the mass of judicial decisions crossing practically the whole threshold of the law, calls for expert knowledge. It has become a highly specialized subject in the practice of law, and covers the field of medical jurisprudence." Rhoads, "The Workmen's Compensation Law," 9 MICH. S. B. J. *129 at *152 (1930).

⁵⁴ *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209 (1911); *Mackin v. Detroit Timken-Axle Co.*, 187 Mich. 8, 153 N. W. 49 (1915); *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 A. 372 (1915); *Hawkins v. Bleakly*, 243 U. S. 210, 37 S. Ct. 255 (1917); *Hunter v. Colfax Consolidated Coal Co.*, 175 Iowa 245, 154 N. W. 1037, 157 N. W. 145 (1915); *Fassig v. State*, 95 Ohio St. 232, 116 N. E. 104 (1917); *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349, 97 N. E. 602 (1912); *Adams v. Iten Biscuit Co.*, 63 Okla. 52, 162 P. 938 (1917); *Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S. W. 556 (1916); *L. R. A. 1917D 51* at 55; *L. R. A. 1916A 409* at 425.

defendant. The court admitted that the Department of Labor and Industry is not a court, but pointed out that,

“the doctrine of *res adjudicata* applies to its proceedings and its decisions are binding upon all parties if not appealed from.”⁵⁵

This, coupled with the use of rules and the presence of legal questions in all proceedings, convinced the court that appearance before the department was the “practice of law.” Perhaps we should go a bit deeper than did the court into the problem of administrative or judicial powers, because several courts have held that one appearing before an administrative body cannot be said to be practicing law.⁵⁶ For example, although reports of its decisions are published, and although legal questions are often involved, the Interstate Commerce Commission is an administrative body,⁵⁷ and laymen may appear before it.⁵⁸ By analogy it would seem that laymen may appear before the workmen’s compensation commissions and boards.

On the other hand, there are some courts which say that the workmen’s compensation commissions exercise judicial functions,⁵⁹ or that their functions are judicial in nature.⁶⁰ Several of the courts are content merely to say that workmen’s compensation acts are not an unconstitutional delegation of judicial power.⁶¹ The modern tendency

⁵⁵ Michigan State Bar Assn. v. McGregor, 14 MICH. S. B. J. *145 at 147 (1934). The court cites, *Besonon v. Campbell*, 243 Mich. 209, 220 N. W. 301 (1928); *Valisano v. C. & N. W. Ry.*, 247 Mich. 301, 225 N. W. 607 (1929). See also 14 MICH. S. B. J. *143 (1934).

⁵⁶ *Tannenbaum v. Higgins*, 190 App. Div. 861, 180 N. Y. S. 738 (1920), appearance by a corporation before tax commission; *Crocker Nat. Fire Prevention Engineering Co. v. Harlem French Cleaning & Dyeing Works*, 132 Misc. 687, 230 N. Y. S. 670 (1927), appearance by a corporation before board of standards and appeals in regard to fire hazards.

⁵⁷ *Louisville & N. R. R. v. Sloss-Sheffield Steel & Iron Co.*, (C. C. A. 5th, 1923) 295 F. 52, *affd.* 269 U. S. 217, 46 S. Ct. 73 (1925).

⁵⁸ *Public Service Traffic Bureau v. Haworth Marble Co.*, 40 Ohio App. 255, 178 N. E. 703 (1932). This Ohio court says that appearance before the following commissions is not confined to attorneys at law: Commissioner of Patents [32 Stat. L. 830, 35 U. S. C., § 11 (1903)], United States Treasury Department [23 Stat. L. 258, 5 U. S. C., § 261 (1884)], United States Board of Tax Appeals. It should be noticed, however, that the rules of the Interstate Commerce Commission and the statutes cited above *specifically* authorize the appearance of laymen.

⁵⁹ *Yosemite Lumber Co. v. Industrial Accident Comm.*, 187 Cal. 774, 204 P. 226 (1922); *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 P. 491 (1916); L. R. A. 1917D 51 at 55; L. R. A. 1916A 409 at 425; 11 CAN. BAR REV. 510 (1933).

⁶⁰ *Nega v. Chicago Rys.*, 317 Ill. 482, 148 N. E. 250 (1925); *Pigeon’s Case*, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A 737 at 741 (1913); *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247 (1914); 28 R. C. L. 824 (1921).

⁶¹ *Washington v. Mountain Timber Co.*, 75 Wash. 581, 135 P. 645, L. R. A.

seems to be toward the holding that proceedings before the commissions and boards are at least judicial in nature, even though the courts cannot actually say that the commissions and boards are judicial bodies. Under such a ruling a court may justifiably follow the *McGregor* case and find that representing a claimant to compensation is the "practice of law."

In the brief filed for the petitioner in the *McGregor* case it was pointed out that when the courts labeled the workmen's compensation commissions as administrative, this was done in cases in which the constitutionality of the act was in question. Thus, unless the commissions and boards were labeled administrative, the workmen's compensation acts would be unconstitutional. In several states there are constitutional amendments which provide for workmen's compensation acts.⁶² In these states, California for instance, the commissions and boards are labeled judicial with impunity.⁶³ Also, the workmen's compensation acts in some states are of the optional type,⁶⁴ and in such states the commissions and boards can be called judicial in nature, or at least not unconstitutional recipients of judicial powers. This is because the employer or employee is not compelled to resort to them. Thus, we see that where the courts are free to choose, they hold that the workmen's compensation acts delegate judicial powers. But when the necessity of preserving the acts is before them, the courts will label the commissions and boards as administrative bodies. Therefore, we had best look behind the labels used by the courts and decide for ourselves.

In the majority of the states the hearings before the commissions and boards are conducted in accordance with a set of rules drawn up by the commission or board.⁶⁵ Precedents are used and argued. A statute is under interpretation. Legal terminology and concepts are constantly in use. The commission or board does not have unfettered discretion but is limited by the statute and by its own rules.⁶⁶ The award is like a damage judgment and can only be a sum of money as set by the statute. These and many other attributes indicate that the proceedings are judicial in nature and that the commissions and

1917D 10 (1913); *Hunter v. Colfax Consolidated Coal Co.*, 175 Iowa 245, 154 N. W. 1037, 157 N. W. 145 (1916); L. R. A. 1917D 51 at 55; L. R. A. 1916A 409 at 425.

⁶² L. R. A. 1916A 409.

⁶³ *Supra*, note 59. In *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 P. 491 (1916), the court specifically points out that the Industrial Accident Commission is a judicial body and thus differs from the Interstate Commerce Commission and from medical and dental boards.

⁶⁴ L. R. A. 1916A 409; L. R. A. 1917D 51.

⁶⁵ *Supra*, note 36.

⁶⁶ 11 CAN. BAR REV. 510 (1933).

boards are exercising judicial powers. This seems to be the only reasonable decision, at least when the constitutionality of the act is not in question. Thus, in what it does and in the methods and concepts it employs, the workmen's compensation commission or board is as much like a court as it is possible to be. It is said,

"The distinction between administrative and judicial tribunals, therefore, does not rest in the *nature* of the judicial function, but in the *manner* in which that function is applied."⁶⁷

We must conclude, therefore, that to deny to attorneys the exclusive right of representation solely on the basis that the commissions and boards are purely administrative tribunals would not be sound. The circuit court in the *McGregor* case reached the correct result when they decided that appearance before the Michigan Department of Labor and Industry in a representative capacity should be limited to regularly admitted attorneys. The same result should be reached under other workmen's compensation acts of the "Michigan" type.

6.

The workmen's compensation acts of eight states have not yet been discussed. Six⁶⁸ of these states have acts which are possibly of the "Ohio" type. However, the distinction between hearing and rehearing is not so clearly made as in the real "Ohio" type statute. The courts in these states may decide to follow the *Goodman* case, or they may not recognize any such distinction. If the latter alternative is chosen, then the above discussion of the "Michigan" type act would be applicable. Two⁶⁹ of the acts are perhaps of the "California" type. If these acts are not interpreted as authorizing the appearance of anyone in a representative capacity before the commission or board, then the discussion of the "Michigan" type act is applicable to these acts also.

We have now seen that the workmen's compensation acts under which there is any doubt as to who may represent claimants fall into three main divisions. The California case of *Eagle Indemnity Co. v. Industrial Accident Commission*⁷⁰ is probably unimpeachable as a correct interpretation of the legislative intent in that type of workmen's compensation act.

The Ohio and Michigan cases go more to the root of the problem and the important factors on each side may best be summed up. On the side of the layman as a representative are:

⁶⁷ 24 CAL. L. REV. 328 at 330 (1936).

⁶⁸ Georgia, Idaho, Massachusetts, Minnesota, Missouri, North Carolina.

⁶⁹ Illinois and Nevada.

⁷⁰ 217 Cal. 244, 18 P. (2d) 341 (1933).

1. The policy of the acts requiring a simple, speedy, non-technical hearing.
2. Further policy of the acts directed toward the elimination of "ambulance chasing" and unfair contingent fee contracts with attorneys.
3. Provision in the acts for forms and simplified hearings so that technical training is not an absolute requisite.
4. The fact that awards are generally small, and therefore fees also, so that the best and most skilled attorneys may not be attracted to this field.
5. Laymen may not deserve as much or charge as much for services as will attorneys, yet representation, even of the cheaper sort, may be most helpful and necessary to an ignorant claimant.⁷¹

Each of these factors is important and worthy of consideration but no one of them seems unanswerable.

Such answers on the side of the attorney as *exclusive* representative are:

1. A skilled attorney may actually speed up hearings whereas an unskilled layman would sometimes hinder them. Also, contrary to popular belief, attorneys can handle questions of a non-technical nature and without resorting to technicalities.
2. The provisions in the workmen's compensation acts and the more militant stand taken by bar associations in regard to conduct and fees of attorneys seem adequate to prevent "ambulance chasing" and exorbitant fees under the workmen's compensation acts.
3. Even though technical training is not necessary under the acts, the possession of it will certainly aid rather than hinder a representative.
4. Awards and fees may be small under the workmen's compensation acts, yet a great many firms devote a large part of their time and energy to this type of practice. The fact that it is so simple means that a great many more cases can be handled and thus the attorneys are satisfied with a smaller fee per case. Also, the average attorney is certainly more skillful in these matters than the average layman.
5. Generally the layman who represents for a fee will demand as much as the attorney is allowed to charge, so, unless the workman can find a friend, he must pay the price or else not have a representative.

⁷¹ 22 CAL. L. REV. 121 at 123 (1933).

In addition to these answers to the contentions made on behalf of the layman representative, it is significant that so few cases on this question have arisen, thus indicating that most of the representation of claimants is done by attorneys. Also it is significant that apparently no case has arisen involving a dispute over fees to be paid a layman, except the California case, while there are a great many cases on the fees to be paid attorneys,⁷² which also means that most of the representation of claimants must be done by attorneys.

Thus we see that the reasons of policy which are said to indicate the desirability of lay representation of claimants are not unanswerable, and that equally strong or stronger reasons of policy may be found in favor of representation by attorneys only. Also, we see that the legal reasons behind restricting representation to attorneys are strongest because practice before the workmen's compensation commissions and boards is within the modern definition of the "practice of law," and because, as precedents and rules pile up under the influence of attorneys, these commissions and boards exercise their powers more in the manner of courts each day. Therefore, where the question of representation is not closed because of provisions in the act, it is submitted that practice before workmen's compensation commissions and boards should be reserved exclusively to attorneys or to the parties themselves. Thus, the case of *Michigan State Bar Association v. McGregor*⁷³ is good law. The case of *Goodman v. Beall*⁷⁴ is perhaps justified as a strict construction of the Workmen's Compensation Act of Ohio. But the distinction made in the decision of the court is perhaps impolitic and impractical in the long run.

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⁷² Third Dec. Digest, "Master and Servant," Key 420; 569 A. L. R. 1317 (1930).

⁷³ 14 MICH. S. B. J. *145 (1934).

⁷⁴ 130 Ohio St. 427, 200 N. E. 470 (1936).