

SOME PROBLEMS UNDER WORKMEN'S COMPENSATION LAWS.

Workmen's Compensation Acts have been in force in a majority of American states for periods ranging from seven to three years. They have on the whole worked well and have given satisfaction to both employers and employees, but they have developed certain defects. It is the purpose of this article to suggest some of the more obvious problems that have arisen and to suggest remedies for a few of the more obvious defects. It is a curious fact that in none of the many compensation laws in force in the United States is there any provision made for a situation which early developed in the administration of the Pennsylvania Act. The compensation given in case of death is awarded to the widow if there be one, and the amount of compensation is determined by the number of children left by the deceased workman, not by the number of children of the deceased workman born of the widow who survived him. Where, therefore, a workman is killed leaving a widow and children by a former marriage compensation is paid exclusively to the widow. On the other hand, the amount paid the widow is increased by reason of children born of a former wife, even though the widow's stepchildren are not living with or supported by her, but are being cared for by their mother's family, and no power is given to compel the widow to turn over to the persons caring for her stepchildren that part of the compensation paid on their account. A somewhat similar situation occasionally develops where a widow to whom compensation is being paid on account of herself and her own children deserts such children, who are then cared for by other relatives or by charity. It is obvious that in no case should compensation be paid to a widow on account of the children of her deceased husband, except while she is actually supporting them. Where, as in most states of the union, workmen's compensation acts are administered by a board or a commission it would seem wise to give such commissions or boards the power by special

order to make an original award of the compensation payable on account of children to persons other than the widow and to modify an award to a widow if at any time it was made to appear that such widow was not supporting the children on whose account the compensation was being paid.

A more serious omission in the great majority of acts is the failure to provide some simple and economical means or method of payment of compensation payable to minors whether themselves injured workers or dependent and wholly orphaned children. It should be universally provided, as is done in some acts, that for the purpose of the payment and enforcement of compensation minors at least above the legal working age should be *sui juris* for the purpose of the compensation act so that compensation can be paid directly to them, their receipt shall be a valid discharge and they may be in their own name parties to any proceedings to enforce or defend their interests under the act. This of itself would suffice in the case of injured minor employees. As to dependent children, who in most cases are given compensation only until they attain the age at which they may be legally employed, it is obvious that no such provision can be made. In their case this compensation is generally, if not universally, payable to their guardian, thus requiring the appointment of a testamentary guardian who, in most cases, is necessary only in order to qualify someone to receive compensation or to enforce the right to compensation, since the infant has rarely any other estate. Not only is the cost heavy, but the security is apt to be large, in some cases unduly so, and the filing of a guardian's account is a laborious and expensive proceeding in view of the small amounts involved. The Boards or Commissions should be empowered to direct that the money should be paid to *their guardian or such other person as the Board may direct*. They should be empowered to require the person receiving compensation payable to a minor dependent to file with the Board security satisfactory to it and to submit accounts to the Board of their disbursements.

The various acts in force in the United States differ ma-

terially in respect to the provisions made for permanent but partial disability. In a number of the acts there is an elaborate schedule embracing practically every conceivable mutilation and disfigurement from the loss of both eyes, both legs, arms down to the loss of one phalanx of a finger or toe, and providing that compensation be paid for a period of weeks decreasing in number as the injuries decrease in magnitude. In others as in the Pennsylvania Act compensation for varying periods is provided in the case of the more important mutilations, but no provision is made for any mutilation less serious than the hands or the eye or foot, any less mutilation is regarded as a partial disability and compensation being paid only in so far as such mutilation affects the earning power of the sufferer. In others, as in Illinois, compensation for all mutilations is given in addition to the compensation for partial disability, that is, for the loss, if any, in earning power caused by the mutilation. In theory there is nothing to be said in favor of this last method, for compensation is given to replace a specified percentage of the earning power destroyed by accident; if then only a part of the earning power be lost and be replaced to the specified extent there seems no need or justification for any further payments. However true this may be in theory, there is to the ordinary man something sacred in the integrity of the human body and a mutilation of that body requires satisfaction irrespective of its effect upon the earning power. This feeling is so deeply rooted and universal that it must be reckoned with. There are many minor mutilations which do not affect the earning power of the sufferer. Theoretically he is entitled to nothing more than medical expenses, yet if he be not paid something, he feels that he has a very just grievance, both against his employer and against the act which fails to provide some payment for his injury. No feature of the Pennsylvania Workmen's Compensation Act has led to more constant dissatisfaction on the part of the laboring classes than this. It may be objected to by these employers that the employees are theoretically wrong, and are asking a mere gratuity. In this connection it is well to emphasize a fact which is very often overlooked.

Workmen's Compensation Acts are often recorded as a sort of charity, a gratuity forced from the employers by legislative action. As a matter of fact, the employee has bought his right to compensation at a price. He has abandoned his right of suit at common law. It is true that the bargain on the whole is a good one looked at from the standpoint of the probabilities when he enters the employment. The chances are that any injury which he may receive will be due to some cause for which the employer would not at common law be responsible rather than that his injury will be one for which he could recover damages. Therefore, a bargain whereby he agrees to accept a moderate compensation in lieu of his common law right to claim heavy damages if he can prove negligence on the part of his employer is at that time a good one. But, if he be injured under circumstances which would give him a right of action for damages, the bargain has turned out to be less favorable, and if he sustains through his employer's negligence a mutilation which did not affect his earning power, his bargain would prove an altogether bad one, since he would have given up his right of action in which his pain and suffering and the violation of the integrity of his body would have been elements of damage, and in return he obtains nothing, since the compensation law does not provide for the payment of any sum as compensation for such a mutilation. In such a case it is hard to convince the claimant that the bargain imposed by the legislature is not unfair to him. It would seem, therefore, that some provision ought to be made for minor mutilations and disfigurements irrespective of the loss of earning power that they may or may not entail. Of the two methods—the Illinois method seems preferable to that adopted in Massachusetts. The periods fixed as those during which compensation is to be paid for various mutilations are at best an attempt to strike a rough average between two extremes and in the case of serious mutilations the periods fixed probably do represent a reasonably fair estimate of probable effect of such mutilations. The loss of a finger presents a different case. While in almost all trades the loss of a hand, arm or eye is a serious injury to earning power,

in many employments the loss of a finger has no effect at all upon the earning power, except in so far as it requires absence from work during the period of treatment, usually not more than two weeks. In other trades, to give an instance that of an engraver, the loss of a finger may degrade the sufferer at once from his position of skilled artisan and destroy all the value of years of training and experience. To give such a man four weeks' compensation as his exclusive remedy would be almost an insult, while to give a teamster for the loss of a finger an amount which would be fair to give to an engraver for a similar loss would be to overpay him to a ridiculous extent. It would seem, therefore, that the fairest method would be to make a provision for serious mutilations such as is found in the Pennsylvania Act and to add thereto additional compensation to be paid during a comparatively short period in addition to the payments on account of lost earning power to compensate those who suffer from minor disabilities and disfigurements.

The right of parents to compensation presents a somewhat similar problem. Since the right of the parents is derivative in character they are deprived of their right of action under these acts, in force in practically every state of the union which give, as Lord Campbell's Act in England gave, a right of action to members of the family of one killed by negligence or fault to compensate them for the loss of their interest in the earning power of the deceased. As the compensation act deprives them of the common law remedy it seems only fair that compensation should be secured to all members of the family who, but for the compensation acts, could have maintained suit under such death acts. In most of the compensation laws the parents are given the right to such compensation, if, but only if, they are dependent on the deceased employee for support. This has been considered and in all probability rightly considered as excluding parents though they had received money contribution prior to the death of their child and had every reason to expect them to continue, unless such contributions were necessary for their support. Thus there are many parents who are denied compensation who, but for the act, might have maintained an action

under the death statutes. To remedy this, it would seem proper to either amend the act by striking out the words "for support" or to provide specifically that the receipt of contributions within a fixed period prior to the death of the deceased should be conclusive of the fact of dependency. One further question remains and it is, perhaps, the most important. Practically all American compensation laws place the jurisdiction of compensation claims in the common law courts of the state or provide for an appeal to such courts from the Board or Commission which administers the act. In some states, as in Pennsylvania, the appeal operates as a certiorari, the only matter brought up on appeal being the propriety of the Board's action on the face of the record. In others the appeal is a full appeal taking up not only the record but the testimony. While the former method has the advantage of saving cost it prevents the courts from reviewing the propriety of the Board's findings upon questions, not so much of fact, as of the sufficiency of the evidence to support their finding of fact. It is perhaps too much to trust to any Commission to make findings of fact which are incapable of review in any shape or form by appellate courts. It would seem, therefore, that an appeal, at least whenever there is allegation that the evidence does not support the findings of the Board, should take up not only the record but the evidence. Yet this involves a serious cost. If the cost of appeal be high, there is no question that it militates against claimants. The great majority of claims are made against employers covered by insurance. The companies which carry the insurance are possessed of ample funds and are fully able to meet the cost of appeal. The claimants, on the other hand, are generally in poor circumstances. The very accident out of which the claim arises has destroyed or diminished the earning power of the employee, if he is himself the claimant or if it has removed the breadwinner if the claimant is a dependent. The provision which often occurs in such acts, subjecting to the scrutiny of the Board the charge of attorneys for professional services, practically prohibits contingent fees of a size which would make it a good speculation for an attorney to take an appeal at his

own cost. Indeed, the fact that the charges in each case are considered on the basis of the services rendered therein practically makes such contingent fees impossible, since the business of taking claims on such a basis is profitable only by reason of the fact that the amount realized from successful suits makes up for the expenses of those which fail. Thus even when the amount involved is large there will be many cases where the cost will prevent appeals, which if taken, would in all probability be successful. And where the amount in a particular case is small, but where the decision would decide a principle controlling a number of cases which in the aggregate involve a large sum, it can hardly be expected that an individual claimant whose stake in the matter is minute, will go to the expense of appeal to try out the principle, while on the other hand an insurance company which covers perhaps tens of thousands of employees will undoubtedly appeal a case of this sort, since its aggregate interest is more than sufficient to justify the expenditure.

Exactly what solution can be found for this difficulty it is hard to say. To make the state responsible for the cost of the claimant's appeal while leaving the defendant to bear their own cost would seem partisan and might stimulate frivolous appeals, while to make the state responsible for all costs, whether that of the defendant or claimant, would entail a heavy burden, and would lay the legislature open to the just criticism of treating compensation cases as a matter of state charity. Yet some solution of this problem must be found, if complete justice is to be done to both parties.

Francis H. Bohlen.

*Law School
University of Pennsylvania.*