CHAPTER 102.

WORKMEN'S COMPENSATION.

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

(2) "Act" as used in this chapter means "chapter"; "compensation" means workmen's compensation; "primary compensation and death benefit" mean compensation or indemnity for disability, or death benefit, other than increased, double or treble compensation or death benefit; "injury" is mental or physical harm to an employe caused by accident or disease, and also damage to or destruction of artificial members, dental appliances and teeth; and "municipality" includes county, city, town, village, school district, sewer district, drainage district and other public or quasi public corporations; and "commission" means the industrial commission of Wisconsin. "Time of injury", "occurrence of injury", "date of injury" is the date of the accident which caused the injury or in the case of disease, the last day of work for the last employer whose employment caused disability. [*1931 c. 403 s. 2; 1933 c. 314 s. 2; 1933 c. 402 s. 2; 1943 c. 270; 1945 c. 537*]

Revisor's Note, 1931: The definition of "injury" is from 102.35, Stats. 1929, which is repealed by this bill. This revision of chapter 102 of the statutes is for the purpose of clarifying and simplifying the language, improving the arrangement, omitting unnecessary words, repealing expressly provisions which have been impliedly repealed by later enactments, and facilitating the finding and citing its various provisions. The meaning of the chapter remains the same as before. It is the intention to change the verbiage without changing the law. This definition [of time of injury] as it relates to occupational disease is according to the decision of the supreme court and in the court's language. Zurich G. A. & L. Co. v. Industrial Commission, 203 W 135, 233 NW 772, 776. (Bill No. 380 S, s. 2)

See note to 102.35, Wisconsin Annotations 1930. An employer's insurance carrier is not relieved from liability by the fact that the employe's disability from occupational diseases began prior to the date of the policy. Falk Corp. v. Industrial Commission, 202 W 284, 232 NW 542.

An employe who with his consent is loaned to a special employer becomes the latter's employe for the time being. A boilermaker, the general employe of another, sent to assist the owner of a boiler in repairs was the spe-

cial employe of the latter. Spodick v. Nash M. Co., 203 W 211, 232 NW 870.

Recovery from occupational disease which caused disability before entering upon the last employment and a new onset of that disease after entering upon that employment must occur to render the last employer liable for compensation [Falk Corp. v. Industrial Commission, 202 W 284, 232 NW 542. qualified, and Zurich G. A. & L. Ins. Co. v. Industrial Commission, 203 W 135, 233 NW 772, adhered to.] Outboard M. Co. v. Industrial Commission, 206 W 131, 239 NW 141.

Employe who contracted skin disease while employed by rug corporation, but who suffered no disability until some time after he left corporation's employment is not entitled to compensation. Kimlark R. Corp. v. Industrial Commission, 210 W 319, 246 NW 424.

One selling monuments on commission basis, paying his own expenses and working when and as he pleased, held "independent contractor," not covered by workmen's compensation act. Henry Haertel Service, v. Industrial Commission, 211 W 455, 248 NW 430.

The time of accident in occupational disease cases is the time when disability first occurs, and, as applied to tuberculosis resulting from silica and lime dust, occurred on the date the employe was compelled to cease work because of the disease, thereby suffering a wage loss. The insurance carrier at the time disability from an occupational disease occurred is the one that is liable for the compensation awarded. Michigan Quartz Silica Co. v. Industrial Commission, 214 W 492, 253 NW 167.

Where revision of workmen's compensation act defining time, occurrence and date of injury failed to define term "disability", court assumes that legislature used term in sense in which it was then understood in law. Employe who contracted silicosis which superimposed tuberculosis due to working in silica dust, but who was not disabled from performing usual and customary work at time he was discharged by employer for potential future disability from occupational disease, held not entitled to compensation since liability for compensation was not based on "medical disability". North End F. Co. v. Industrial Commission, 217 W 363, 258 NW 439.

Assignee for benefit of creditors was not "employee" within compensation act, where assignment vested legal title to corporate assignor's assets in assignee, subject to trust in favor of creditors and assignor, and rider was attached to assignor's liability policy in which assignee was added as insured employer, notwithstanding assignee was to be paid compensation or commission. Fritz v. Industrial Commission, 218 W 176, 260 NW 459.

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A molder, whose services were discontinued because he could not work rapidly enough, and who thereafter was found suffering from silicosis, but whose inability to earn a full wage was because of his being inherently a "slow" worker, and not because of his silicosis, did not sustain a disability resulting in wage loss, and was not entitled to compensation from his last employer under the compensation act (chapter 314, Laws 1933; section 102.01 (2)) making the "time of injury" in case of occupational disease "the last day of work for the last employer whose employment caused disability." Milwaukee M. & G. I. Works v. Industrial Commission, 220 W 244, 263 NW 662, 265 NW 394.

A crane operator, who was exposed to silica dust, but who suffered no compensable disability described in the compensation act as it stood at the time of his discharge on January 31, 1933, was not entitled to compensation from his former employer on account of subsequent disability. Sivyer Steel Casting Co. v. Industrial Commission, 220 W 252, 263 NW 565.

Where the supreme court had defined "disability," as being such an injury, caused by accident or by occupational disease, as results in a wage loss, and the legislature in a 1933 amendment to the act (chapter 314, Laws 1933), adopted the court's definition by using such word without change, the court was bound to interpret the statute, dealing with the word, in accordance with the meaning theretofore ascribed to such word. Schaefer & Co. v. Industrial Commission, 220 W 289, 265 NW 390.

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

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

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

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

Workmen's compensation: Proceedings before commission: Findings of commission as body; Sufficiency in form; Reception of evidence: Report of independent physician; Scope of permissible consideration by commission: Proceedings before commission to review findings of examiner on petition therefor: Time within which commission may make its decision thereon: Judicial review of compensation proceedings: Jurisdictional facts, what are, and conclusiveness of commission findings on court: Nature and scope of review provided: Certiorari: Constitutionality: Due process: Delegation of judicial power: Power of supreme court to reverse award for misconduct before commission. General A. F. & L. Assur. Corp. v. Industrial Commission, 223 W 635, 271 NW 385.

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

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

In order to recover workmen's compensation for an occupational disease, there must be an actual physical inability to work, and not a mere medical disability. Where a workman, although physically able to work, entered a tuberculosis sanatorium on the advice of physicians for observation and examination as to a silicotic condition which he had contracted as a result of his work. he could not be considered as physically disabled from working and as therefore

suffering a wage loss so as to be entitled to workmen's compensation during his stay in the sanatorium. Odanah Iron Co. v. Industrial Comm. 235 W 166, 292 NW 439.

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

(a) Where the employe sustains an injury.

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

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

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

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

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

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

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

(4) The right to compensation and the amount thereof shall in all cases be determined in accordance with the provisions of law in effect as of the date of the injury. [*1931 c. 403 s. 5; 1933 c. 314 s. 1; 1933 c. 402 s. 2; 1943 c. 270; 1945 c. 537; 1947 c. 475*]

Note: A volunteer fireman injured on his way to the fire house with employer's truck in answer to alarm was acting within his duties as fireman, and death from injury was compensable. West Bend v. Industrial Commission, Schloemer et al., 202 W 319, 232 NW 524.

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

Time of accident, as referring to occupational disease, is the time when the disability first occurs; hence the employer and insurer at that time are liable for the total consequences thereof. In determining the rule as to when disability arose, the first concern should be the interest of the workman. Whether the disease was a recurrence or a new attack caused by subsequent exposure, is for the commission to determine. Zurich G. A. & L. Ins. Co. v. Industrial Commission, 203 W 135, 233 NW 772.

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

The death of a salesman from injuries received while bringing his family back in an automobile from a vacation was not compensable, the evidence warranting the conclusion of the commission that the injury did not occur within the scope of employment although the trip included stops to interview the employer's debtors, and that such business errands were incidental to the employe's pleasure trip. Rules for determining whether the trip of an employe is within or is without the scope of his employment are stated. Barragar v. Industrial Commission, 205 W 550, 238 NW 368.

The death of the president of an employer in an automobile accident while taking two employes home after work, as through courtesy he frequently did, was not compensable. Western F. Co. v. Industrial Commission, 206 W 125, 238 NW 854.

A night watchman for two companies, hired by one in pursuance of an agreement of both but paid by both, was in the employ of both. In view of the purpose of the compensation act to burden the particular industry in which the injury to the employe occurs with the damages resulting therefrom, the employer in whose place of business the night watchman was injured was alone liable for compensation for such injuries. Murphy S. Co. v. Industrial Commission, 206 W 210, 239 NW 420.

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

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

To require determination whether disability through occupational disease was recur-

rence of former attack, record must disclose prior attack resulting in compensable disability. Whether the employe suffering from occupational disease had former attack is material only on consideration of which employer shall pay compensation. Nordberg Mfg. Co. v. Industrial Commission, 210 W 398, 245 NW 680.

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

Employe who contracted skin disease while employed by rug corporation, but who suffered no disability until some time after he left corporation's employment is not entitled to compensation. Kimlark R. Corp. v. Industrial Commission, 210 W 319, 246 NW 424.

Pneumonia contracted by taxicab company's employe, due to exposure while changing tire and attending to loading and unloading taxicabs, was "accidental injury." Yellow Cab Co. v. Industrial Commission, 210 W 460, 246 NW 689.

Where sandblaster was suffering from occupational silicosis, but evidence established that no compensable disability existed at time of termination of employment, award of compensation was error. Massachusetts B. & I. Co. v. Industrial Commission, 211 W 52, 247 NW 343.

Employe using employer's car at employer's request to hurry home to get noonday lunch held not performing "services growing out of and incidental to employment," so as to make injuries compensable. Ohrmund v. Industrial Commission, 211 W 153, 246 NW 589.

Slight deviation from direct line of employment would not remove employe from "performance of service growing out of and incidental to employment." Simmons Co. v. Industrial Commission, 211 W 445, 248 NW 443.

Disability held not compensable, where final result was not caused or contributed to by any exposure to which claimant employe was subject after new act containing compulsory feature became applicable. Montello G. Co. v. Industrial Commission, 212 W 243, 248 NW 427, 249 NW 516.

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

The effect of a disease or infirmity existing before an accident occurs is to be separated from the effect of the later injury, in so far as possible, in administering the workmen's compensation law. Where the preexisting condition is so thoroughly established and so serious that what happens thereafter cannot reasonably be held to be the result of the subsequent accident and the preexisting condition is the cause of the disability, compensation cannot be awarded. Employers' M. L. Ins. Co. v. Industrial Commission, 212 W 669, 250 NW 870.

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

The disability referred to under the compensation statute in occupational disease cases is a disability which results in wage loss to the employe. Michigan Quartz Silica Co. v. Industrial Commission, 214 W 492, 253 NW 167.

The word "accident" as used in workmen's compensation cases includes ruptures resulting from lifting heavy objects. Malleable I. R. Co. v. Industrial Commission, 215 W 560, 255 NW 123.

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

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

City ash carrier, required to report to foreman at yard before time for starting work, entered into "course of employment" immediately on entering yard, and was entitled to compensation for injuries sustained during interval between his arrival and time for beginning work, though foreman had not arrived. Milwaukee v. Industrial Commission, 218 W 499, 261 NW 206.

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

Mere medical disability from silicosis, existing at the time an employe was discharged, was not compensable under the compensation act (1931); no resulting disability to do the work or wage loss during the period of employment being involved. Chain Belt Co. v. Industrial Commission, 220 W 116, 264 NW 502.

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

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

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

An employe who did outside inspection work and in connection therewith used his automobile, the expense of operating which for such purpose was paid by his employer, but who had completed such outside work for the day and had gone to his home for supper, was not performing services growing out of and incidental to his employment while driving his car after supper to his employer's office, where the injury was not sustained on the employer's premises. Githens v. Industrial Commission, 220 W 658, 265 NW 662.

Moving picture theater manager, injured while transporting films in his automobile from theater to film service agency in his

home city for his employer after day's work, pursuant to agreement with employer, was "performing services for employer incidental to employment" within workmen's compensation act. Car & General Ins. Corp. v. Industrial Commission, 224 W 543, 272 NW 351.

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

An employe who out of idle curiosity attempted to stop a motor by grasping an exposed shaft was barred from recovering for his injury because his act amounted to a departure from his employment. Peterman v. Industrial Commission, 228 W 352, 280 NW 379.

After a very detailed statement of the evidence the court concluded that the commission findings that the plaintiff "was not injured in the course of her employment" was a conclusion of law rather than a finding of fact. Voswinkel v. Industrial Commission, 229 W 589, 282 NW 62.

Where an employer, engaged exclusively in the business of carrying on logging operations in Michigan for a Michigan timber company, hired an employe to work exclusively in Michigan, the workmen's compensation act did not apply so as to allow recovery thereunder for the employe's death from injuries sustained in the course of his employment in Michigan, although both he and his employer were residents of Wisconsin and the contract of employment had been made in Wisconsin. (Wandersee v. Industrial Comm. 198 W 345, applied; other cases distinguished.) Schooley v. Industrial Comm. 233 W 631, 290 NW 127.

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

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

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

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

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

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

The employe's voluntary, wilful act of suicide, resulting from a moderately intelligent power of choice, constituted an "independent, intervening cause" that precluded the recovery of compensation for his death. Barber v. Industrial Comm. 241 W 462, 6 NW (2d) 199; Jung v. Industrial Commission, 242 W 179, 7 NW (2d) 416.

A saleslady at a store, instructed to call on a customer and make a collection before coming to work at the store, and injured by slipping on the sidewalk while on the trip to the customer's home, was performing services at the time of injury, so that the injury was compensable, although the accident occurred before the employe arrived at a point in such trip where the route to the customer's home deviated from that to the store. Bitker Cloak & Suit Co. v. Industrial Comm., 241 W 653, 6 NW (2d) 664.

A carpenter working on a building being constructed by his employer for a manufacturing company, was not on the "premises of his employer," within the workmen's compensation act, when injured outside such building while going from work, although he was still on the premises of the company, the employe's work being only in the building, and the premises of the employer-contractor including only the new building over which the contractor, while constructing it had some right of control. Hunzinger Construction Co. v. Industrial Comm., 242 W 174, 7 NW (2d) 578.

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

"Liability" exists only where the listed conditions concur. The rule, that "liability" contemplates one person on the "right" side and a different person on the "duty" side of the relationship, is so well established that it ought to require the clearest sort of language in the act to conclude that liability of an insurance carrier to a dependent of a deceased employe was contemplated where the dependent claiming the death benefit against the insurance carrier is also the insured employer and where, therefore, the

same person occupies both the "right" and the "duty" position and the duty is owed by the person who claims the right. Thomas v. Industrial Comm., 243 W 231, 10 NW (2d) 206.

A traveling salesman, whose work required him to travel, and whose traveling expenses were paid by his employer, but who was given a free choice in the selection of his sleeping accommodations in a territory where usual and ordinary accommodations of the sort that he would enjoy at home were available, was not in the course of his employment while taking a bath in a room rented by him at a tourist camp for the night, and an injury sustained by him by slipping on a bath mat, there being no claim that the accommodations were in any way unsafe, did not arise out of any hazard created by, and did not arise out of, his employment, hence was not compensable. (Stats. 1941) Gibbs Steel Co. v. Industrial Comm., 243 W 375, 10 NW (2d) 130.

A codriver of a truck, who fell from the moving truck, while standing on the running board (a probable violation of 85.39) intending to answer a call of nature, was nevertheless entitled to compensation for his injuries as being within the course of his employment and performing services growing out of and incidental to his employment at the time of injury. (Stats. 1941) Karlslyst v. Industrial Comm., 243 W 612, 11 NW (2d) 179.

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

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

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

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

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

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

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

(3) Every person, firm and private corporation (including any public service corporation) to whom subsection (2) is not applicable, who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the injury to the employe for which compensation may be claimed, shall, in the manner provided in section 102.05, have elected to become subject to the provisions of this chapter, and who shall not, prior to such accident, have effected a withdrawal of such election, in the manner provided in subsection (1) of section 102.05.

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

provements thereof and the exchange of labor, services or the exchange of use of equipment with other farmers in pursuing such activities. Operation of such premises shall be deemed to include also any other activities commonly considered to be farming whether conducted on or off such premises by the farm operator. [*1931 c. 87 s. 2; 1931 c. 403 s. 6; 1931 c. 469 s. 1; 1943 c. 270; 1947 c. 456*]

Note: In order to transfer liability from the general employer of a loaned employe to the borrowing employer, there must be some consensual arrangement sufficient to create a new employer-employe relationship. Rhinelander P. Co. v. Industrial Commission, 206 W 215, 239 NW 412.

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

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

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

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

One who engages in raising foxes or raising ginseng and engages in no other agricultural pursuits is not engaged in "farming" as that term is understood in the workmen's compensation act [Stats. 1939]. Eberlein v. Industrial Comm. 237 W 555, 297 NW 429.

The workmen's compensation act does not contemplate that an employer who had elected to accept the act by taking out compensation insurance, but who absolutely abandoned his business, as distinguished from a temporary suspension with intention of resumption, canceled his insurance, and ceased to be an employer for 9 years, should be considered as still subject to the act, merely because of not filing a statutory notice of withdrawal, where he reentered business after the lapse of 9 years and then became an employer of only the one employe who was injured. [102.04, 102.05, Stats. 1939] Hansen v. Industrial Comm., 242 W 293, 7 NW (2d) 881.

Where a miner, employed by the G. B. mine, was requested by one of the owners of the C. mine to assist in rescuing employes of the C. mine buried in a cave-in at the C. mine, and was killed while assisting in the attempted rescue, he was at the time of his accident an employe of the owners of the C. mine, so that they were liable for death benefits awarded under the workmen's compensation act to the deceased's surviving mother. [Conveyors Corp. v. Industrial Comm., 200 W 512, applied; Rhinelander Paper Co. v. Industrial Comm., 206 W 215, distinguished.] Cherry v. Industrial Comm., 246 W 279, 16 NW (2d) 800.

The employes of a partnership but not of a partner as the operator of a separate business, are not his employes in determining whether he is an "employer" subject to the workmen's compensation act in respect to such separate business under the definition of "employer" in (2). Kalson v. Industrial Comm. 248 W 393, 21 NW (2d) 644.

The only purpose of (3) is to permit an employer who has less than 3 employes, or who otherwise does not come under the workmen's compensation act, to elect to come under the act. Stapleton v. Industrial Comm. 249 W 133, 23 NW (2d) 514, 26 NW (2d) 677.

102.045 Saving provision. If the supreme court shall hold unconstitutional the provisions of subsection (2) of section 102.04, created by section 2 of chapter 87, laws of 1931, then section 1 of said act shall also be void and all elections and withdrawals of elections by employers made prior to the passage of said act shall be construed as being in full force and effect, to the same extent as though the act had not been passed. [*1931 c. 87 s. 4; 1939 c. 513 s. 29*]

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

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

(3) Any employer who shall enter into a contract for the insurance of compensation, or against liability therefor, shall be deemed thereby to have elected to accept the provisions of this chapter, and such election shall include farm laborers, domestic servants and employes not in the course of a trade, business, profession or occupation of the employer if such intent is shown by the terms of the policy. Such election shall remain in force until withdrawn in the manner provided in subsection (1). [*1931 c. 403 s. 7; 1933 c. 36; 1943 c. 270; 1947 c. 456*]

Note: Where the employer, after abandoning his business, had received from the commission an inquiry as to why he had canceled his compensation insurance, and he had filled out and returned a form, the nature of which he did not recall, and the commission's records, although no longer containing the correspondence, contained a notation "No employes since November, 1930," the written information furnished to the commission by such employer is considered to have informed it that he had abandoned his business and to have been the equivalent of a formal filing with it of a written withdrawal of his acceptance of the act previously effectuated by his taking out of insurance. [102.05, Stats. 1939] Hansen v. Industrial Comm., 242 W 293, 7 NW (2d) 881.

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

The word "employer," as used in 102.05 (2), is construed as referring specifically to the employer described in 102.04 (2), Stats. 1943, as the person who usually employs 3 or more employes, so that an employer does not become subject to the act merely by having 3 or more employes at any time. Stapleton v. Industrial Comm. 249 W 133, 23 NW (2d) 514, 26 NW (2d) 677.

102.06 Joint liability of employer and contractor. An employer shall be liable for compensation to an employe of a contractor or subcontractor under him who is not subject to this chapter, or who has not complied with the conditions of section 102.28 (2) in any case where such employer would have been liable for compensation if such employe had been working directly for him, including also work in the erection, alteration, repair or demolition of improvements or of fixtures upon premises of such employer which are used or to be used in the operations of such employer. The contractor or subcontractor (if he is subject to the workmen's compensation act) shall also be liable for such compensation, but the employe shall not recover compensation for the same injury from more than one party. In the same manner, under the same conditions, and with like right of recovery, as in the case of an employe of a contractor or subcontractor, described above, an employer shall also be liable for compensation to an employe who has been loaned by him to another employer. The employer who becomes liable for and pays such compensation may recover the same from such contractor, subcontractor or other employer for whom the employe was working at the time of the injury if such contractor, subcontractor or other employer was an employer as defined in section 102.04. [*1931 c. 403 s. 8; 1943 c. 270; 1947 c. 143*]

Note: The plaintiff was subject to the workmen's compensation act. A truck owner employed by the plaintiff was not subject to the act. The plaintiff was therefore liable under the act for the death of the employe of the truck owner. The provision of the act which so extends liability is constitutional. Great A. & P. T. Co. v Industrial Commission, 205 W 7, 236 NW 575.

Corporation promoting entertainments to exploit facilities of baseball field held not liable for payment of compensation to injured player employed by owner of team using field under contract with corporation giving team owner stipulated guaranty; team owner not being "contractor." Madison E. Corp. v. Kleinheinz, 211 W 459, 248 NW 415.

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

Lumber company which did none of its own logging held not liable for compensation to employe of farmer, to whom lumber company lent money to purchase tract and equipment and from whom lumber company bought logs, on theory that farmer was "contractor" within statute making employer liable for compensation to employe of "contractor," though statute was intended to prevent employers from relieving themselves of liability by doing through so-called independent contractors what they would otherwise do through direct employes, since farmer and lumber company were in relation of seller and buyer. Employers M. L. Ins. Co. v. Industrial Commission, 224 W 527, 272 NW 481.

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

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

Both the employer who loaned an employe, and the employer to whom the employe was loaned and in whose service he was injured, were made liable for compensation to the injured employe, but as be-

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

Where it appeared from the undisputed evidence that the work of cleaning by sandblasting and of making certain repairs, performed by a contractor on a toll bridge operated by a city, was a specialized work not ordinarily and customarily performed by the city for itself although it did maintain a crew to make some repairs, the contractor was not a "contractor under" the city, within 102.06, Stats. 1939, so as to render the city liable for compensation to an employe of the contractor. Hudson v. Industrial Comm., 241 W 476, 6 NW (2d) 217.

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

Where a canning company arranged, on behalf of farmers who were under contract to raise peas to sell to the company, to have an airport operator dust the crops, the expense to be charged to the farmers by the company, the airport operator was not a "contractor under" the canning company, within 102.06, Stats. 1943, and hence the company was not liable in workmen's compensation for the death of the airport operator's employe, killed while dusting pea fields from an airplane of his uninsured employer. [Madison Entertainment Corp. v. Industrial Comm. 211 W 459, and applied.] Britton v. Industrial Comm. 248 W 549, 22 NW (2d) 525.

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

(1) Every person, including all officials, in the service of the state, or of any municipality therein whether elected or under any appointment, or contract of hire, express or implied. The state and any municipality may require a bond from a contractor to protect it against compensation to employes of such contractor or employes of a subcontractor under him.

(2) Any policeman or fireman claiming compensation shall have deducted from such compensation any sum which such policeman or fireman may receive from any pension or other benefit fund to which the municipality may contribute; provided further that any other peace officer shall be considered an employe while engaged in the enforcement of peace or in the pursuit and capture of those charged with crime.

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

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

(5) Any person on a golf course for the purpose of caddying for or while caddying for a person permitted to play golf on such course shall be deemed an employe of the golf club or other person, partnership, association, corporation, including the state and any municipal corporation or other political subdivision thereof, operating such golf course.

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

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

(8) Every independent contractor who does not maintain a separate business and who does not hold himself out to and render service to the public, provided he is not himself an employer subject to this chapter or has not complied with the conditions of subsection (2) of section 102.28, shall for the purpose of this chapter be an employe of any

employer under this chapter for whom he is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury.

(9) Members of the national and state guards, when in state service. [*1931 c. 87 s. 1, 3; 1931 c. 403 s. 9; 1933 c. 402 s. 1, 2; 1935 c. 465; 1937 c. 162; Spl. S. 1937 c. 6; 1939 c. 261; 1943 c. 270; 1945 c. 537*]

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

The casual employment of four workmen to repair five houses did not constitute "employment in course of trade, business, profession or occupation" of the employer by one operating a soft drink parlor. His bartender who was injured while doing such repair work was not entitled to compensation. Sturman v. Industrial Commission, 203 W 190, 232 NW 864.

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

Business of the employer means habitual occupation or employment for gain and not occasional or isolated activities. One assisting farmers to move a house for a farmer was not employed "in the course of a trade, business, profession or occupation of his employer." Vandervort v. Industrial Commission, 203 W 362, 234 NW 492.

The relationship of employer and employe is indispensable to recovery under the workmen's compensation act. A corporation may be an employe and hence the employe of a corporate employe is entitled to the protection of the act. Milwaukee T. Co. v. Industrial Commission, 203 W 493, 234 NW 748.

The relation of employer and employe exists between a special employer and a borrowed employe when the latter consents to and enters upon work for the former, and the special employer has power to control the details, manner and duration of the work. The finding that the loaned employe was the lender's employe when injured was not a finding of fact but a conclusion of law. Seaman B. Corp. v. Industrial Commission, 204 W 157, 235 NW 433.

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

A writing is important evidence but not controlling in determining whether the person is an independent contractor or an employe. Tests to be applied to determine that matter are discussed. Nestle's F. Co. v. Industrial Commission, 205 W 467, 237 NW 117.

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

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

Town supervisor was not "employe," since he was public officer and could not have interest in contract of hire with municipality of which he was officer. Werner v. Industrial Commission. 212 W 76 248 NW 793.

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

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

Employes of a subsidiary corporation who at times did work for the holding corporation under the direction of their employer did not thereby become employes of the holding corporation for the purpose of determining whether it was subject to the compensation act, where they did not even know they were working for any one other than the subsidiary corporation. Wisconsin Holding Corp. v. Industrial Commission, 215 W 67, 254 NW 115.

A caddy was not an employe of the club within (4) where the club maintained no staff of caddies, but boys in the neighborhood were permitted to come upon the grounds to await players who desired to employ a caddy, and the terms of the employment were fixed by the player and the compensation for the service was paid to the caddy directly. Rice Lake Golf Club, Inc. v. Industrial Commission, 215 W 284, 254 NW 530.

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

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

To be an "employe," within compensation act, one must have a superior under whose direction work involved in employment is to be done. Fritz v. Industrial Commission, 218 W 176, 260 NW 459.

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

Physician employed by medical association who was hired to perform other duties than those of physician and surgeon, such as hospital superintendent and manager of hospital pharmacy, and who was required to testify at compensation hearings, was "employe" and not "independent contractor," and his estate was entitled to compensation for his death from injury received while on way to attend hearing before commission. Gomber v. Industrial Commission, 219 W 91, 261 NW 409.

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

A partnership agreement, entered into between former employes of a monument company, providing that the former business should be continued in the same shop by the partnership which leased the shop and equipment of the monument company on terms providing, among other things, that the business should be conducted only on the leased premises and that no articles should be manufactured except those ordered by the monument company, was a "partnership" under which the partners were "independent contractors" and not "employes" of the monument company, and therefore not subject to the compensation act, even though the partnership was formed for the express purpose of enabling the monument company to avoid liability under the compensation act. The fact that the lease contained the privilege of termination, and provided for rent determined by the amount of business done by the lessor monument company and for limitation of work by the lessee partners to work for the company, did not operate to render the partners "employes" of the monument company. York v. Industrial Commission, 223 W 140, 269 NW 726.

One under contract of employment with newspaper company who was to receive weekly salary and operate his own truck at own expense held "employe" rather than "independent contractor" so as not to relieve the company from compensation liability for injuries sustained by employe's helper while riding in truck, where the company retained and exercised full control and supervision of work which employe did for it. (Stats. 1931). Milwaukee News Co. v. Industrial Commission, 224 W 130, 271 NW 78.

The principal test to be applied in determining whether one rendering services for another is an employe, or an independent contractor, is whether the employer had the right to control the details of the work, though the place of work, the time of employment, the method of payment, and the right of summary discharge are also to be considered. Employers M. L. Ins. Co. v. Brower, 224 W 485, 272 NW 359.

A minor, injured while working for his father under a contract for wages, is entitled to the benefits of the workmen's compensation act. Curt v. Industrial Commission, 226 W 16, 275 NW 447.

Where former employes of a company, which had closed its quarry because of the prohibitive cost of compensation insurance, entered into an agreement to lease the quarry and divide the profits, and did lease the quarry from the company, but under the agreement and under the practice pursued, the employes were paid according to the same wage scale as before and could never receive anything more than wages, and the entire output of the quarry was disposed of to the company at cost (i.e., for wages only) and the relationship with the company as to control, supervision, etc., was the same as before, the agreement did not create a partnership nor the relationship of independent contractor; and the partners (so-called) were employes of the company and subject to the compensation act. Montello Granite Co. v. Industrial Commission, 227 W 170, 278 NW 391.

A man who was engaged to cut wood for the county and who was paid a wage which he could spend where and as he saw fit, so long as he paid for his necessities, was not a relief recipient, but was an employe of the county. Lincoln County v. Industrial Commission, 228 W 126, 279 NW 632.

The presumption, in proceedings for workmen's compensation, that one injured while performing services for another was an employe of such other is rebuttable, and ceases to have force or effect when evidence to the contrary is adduced. Huebner v. Industrial Comm. 234 W 239, 290 NW 145.

The decedent, engaged at the time of his death merely in the work of soliciting subscriptions for a newspaper, was not engaged in "selling or distributing" newspapers so as to be deemed an "employe" for purposes of workmen's compensation. Huebner v. Industrial Comm. 234 W 239, 290 NW 145.

The provision in (4) defining "employe" as including "all helpers and assistants of employes, whether paid by the employer or employe, if employed with the knowledge, actual or constructive, of the employer," in effect making the employe's employer liable to such helpers for workmen's compensation in case of injury, was merely to bring within the protection of the act certain classes of persons not theretofore included, such as helpers engaged under circumstances such that the employe soliciting their services could not be said to be an employer liable for compensation under the act, but such amendment was not intended to apply where the employe soliciting the services of helpers was himself an employer liable for compensation under the act and where he, not his employer, was the actual employer of such helpers. Standard Oil Co. v. Industrial Comm. 234 W 498, 291 NW 826.

Findings of the commission that the claimant school janitor did not maintain a separate business, did not hold himself out to and render service to the public, was not himself an employer subject to the workmen's compensation act, and had not taken out workmen's compensation insurance, would make him an employe of the school district under 102.07 (8), Stats. 1939, even though he might for all other purposes be considered an independent contractor. Woodside School Dist. v. Industrial Comm., 241 W 469, 6 NW (2d) 182.

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

In the provision in 102.07 (2) that any fireman claiming compensation shall have deducted from such compensation any sum which he receives from any pension fund to which the municipality may contribute, the word "contribute" means any contribution, whether voluntary or by compulsion of law. The proceeds of the taxation of fire insurance premiums are funds to which a city is entitled for the support of its fire department, and the transfer of such funds to the firemen's pension fund of the city constitutes a "contribution" by the city. Lenfesty v. Eau Claire, 245 W 220, 13 NW (2d) 903.

The purpose of 102.07 (2) is to prevent payment by the city of both pension and workmen's compensation benefits where both were derived from municipal funds, and the statute is not void as violating the constitutional rule of equality and uniformity or as involving a classification that is arbitrary, unreasonable, and not germane to the subject matter of the workmen's compensation act. Lenfesty v. Eau Claire, 245 W 220, 13 NW (2d) 903.

Where an employe at the command and pursuant to the direction of his employer

enters the service of another, no new employer-employe relationship is created, in the absence of consent on the part of the employe to the creation thereof. Boehck Equipment Co. v. Industrial Comm., 246 W 178, 16 NW (2d) 298.

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

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

Compensation insurance policies are referable to statutes as to coverage, and where law is changed so as to bring new persons under compensation act, policy is thereby extended. In such cases insurance company is entitled to additional compensation upon pay roll audit. "Wages irrespective of profits" defined. 21 Atty. Gen. 286.

Administrative employes of W.E.R.A. are in the state service within (1) and 20.07. 24 Atty. Gen. 277.

Vocational student who performs service for another as part of his training and satisfies elements laid down in Neitzke case is employe, whether or not employer does selecting, determines duration of relationship or whether student is or is not paid. 24 Atty. Gen. 538.

Contestants in boxing matches are not employes within contemplation of workmen's compensation act. 24 Atty. Gen. 685.

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

102.08 Nonelection by epileptics, blind persons, corporation officers. Epileptics and persons who are totally blind may elect not to be subject to the provisions of this chapter for injuries resulting because of such epilepsy or blindness and still remain subject to its provisions for all other injuries. Officers of corporations may also elect not to be subject to the provisions of this chapter. Such elections shall be made by giving notice to the employer in writing on a form to be furnished by the industrial commission, and filing a copy of such notice with the industrial commission. An election may be revoked by giving written notice to the employer of revocation, and such revocation shall be effective upon filing a copy of such notice with the industrial commission. [*1931 c. 87 s. 1, 2; 1931 c. 403 s. 10; 1931 c. 469 s. 2; 1933 c. 402 s. 2; 1935 c. 465; 1943 c. 270*]

Note: Where an employe lived and entered into a contract of employment in a sister state, and was injured while working in this state, the Wisconsin act was applicable, and there being only partial dependency the employer was liable to make payment to the state treasury as provided in 102.49. Interstate P. Co. v. Industrial Commission, 203 W 466, 234 NW 889.

As to liability of village for marshal killed while attempting an arrest, see note to 61.28, citing Schofield v. Industrial Commission, 204 W 84, 235 NW 396.

102.11 Earnings, method of computation. (1) The average weekly earnings for temporary disability shall be taken at not less than $12.50 nor more than $40, and for permanent disability or death shall be taken at not less than $20 nor more than $40. Between said limits the average weekly earnings shall be determined as follows:

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

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

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

full-time basis in the same or similar employment in which earnings can be determined under the methods set out in paragraph (a) or (b).

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

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

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

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

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

(3) The weekly wage loss referred to in this chapter, except under subsection (6) of section 102.60, shall be such percentage of the average weekly earnings of the injured employe computed according to the provisions of this section, as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the injury, and other suitable employments, the same to be fixed as of the time of the injury, but to be determined in view of the nature and extent of the injury. [*1935 c. 465; 1937 c. 180; 1943 c. 270; 1945 c. 532, 537; 1947 c. 475*]

Note: The "average daily wage" of a compensation claimant who knew when he commenced work that he was to work six hours a day, and who until he was injured worked six hours every day, on a construction job which was being performed under a contract requiring the employer to employ workmen only six hours a day except in emergencies and to pay time and a half for overtime, should be computed on the basis of a six-hour day. (Sec. 102.11, Stats. 1933) Builders' M. C. Co. v. Industrial Commission, 213 W 246, 251 NW 446.

In determining the amount of a death benefit under the compensation act, the "average annual earnings" of an employe who was killed four days after being hired to work only six hours a day, when at work, as one of four watchmen taking the place of a single full-time watchman under a stagger system in compliance with the National Recovery Act, was computable on the basis of the employe's average annual earning capacity in his employment as employed at the time of the injury; and the average annual earning capacity of such deceased part-time employe was fixed by his earnings during the week preceding the accident, not by the earnings of the full-time watchman during the previous year. (Sec. 102.11, Stats. 1933) Allis-Chalmers Mfg. Co. v. Industrial Commission, 215 W 616, 255 NW 887.

Where an employe had worked only from one-half an hour to three hours per day for one hundred seven of the two hundred eighty-five days he worked during the year preceding his death by injury, and had averaged only four and forty-five hundredths hours per day for the two hundred eighty-five days, he did not work "substantially during the whole year," nor was his work "continuous," and hence his "average annual earnings" were not properly computable under the provisions of sec. 102.11 (2) (a) and (b), Stats. 1933, by multiplying an average daily wage for an eight-hour day by three hundred, but should be computed under the provisions of (2) (c) by taking a sum reasonably representing the average annual earning capacity of such employe at the time of injury. Hammann v. Industrial Commission, 216 W 572, 257 NW 612.

The mere fact that the discharge of the employe from his new work was prompted by his employer anticipating a future increase in his wage loss because of increased medical disability, did not establish that liability for additional compensation had arisen between the time of employment at the new work and the discharge. Glancy M. I. Co. v. Industrial Commission, 216 W 615, 258 NW 445.

In determining wage base of regular full-time employe who was injured after working less than four weeks as operator of scudding machine, the only one of its kind in city, the commission, using average daily wage of scudders in neighboring city, properly resorted to method provided by (2) (b) (Stats. 1929), as against contention that commission should have used method provided by (2) (c) for cases where other statutory methods cannot be reasonably and fairly applied. [Allis-Chalmers Mfg. Co. v. Industrial Commission, 215 W 616, Glancy Malleable Iron Co. v. Industrial Commission, 216 W 615, and other cases, distinguished.] Harsh & Chapline S. Co. v. Industrial Commission, 219 W 473, 263 NW 174.

Where there is no statutory provision prescribing a method for determining the average weekly earnings of a compensation claimant, the determination must be based on his actual earnings during a preceding period sufficiently long to include the usual seasonal fluctuations in hours of employment and wage rates to reasonably and fairly establish his true earning capacity. Struck &

Irwin Fuel Co. v. Industrial Commission, 222 W 613, 269 NW 319.

In compensation proceeding, industrial commission did not err in making award to fifteen-year-old minor on basis of its finding that on attaining age of twenty-seven, had he not been injured, he would have earned wage entitling him to compensation for maximum rate, since by presumption prescribed by statute, commission was required to find, in absence of any proof as to what minor would probably earn after attaining age of twenty-seven years, that on attaining that age he would have earned a wage equivalent to amount on which maximum weekly indemnity is payable. (102.11 (3), Stats. 1931). Milwaukee News Co. v. Industrial Commission, 224 W 130, 271 NW 78.

Where the injured employe had worked for his employer only twenty-three weeks during the year preceding injury and for others during the remainder of such year (so that his average annual earnings were not computable under 102.11 (2) (a), Stats. 1933) and where there was no employe similarly employed who had worked substantially the whole of the preceding year, the average annual earnings of such injured workman were computable under (2) (c). Highway Trailer Co. v. Industrial Commission, 225 W 325, 274 NW 441.

Where a grocery clerk at the time of injury was one of a group of 40 similar clerks regularly employed only 2 days per week on the same days in each week, and there was also a group of full-time grocery clerks regularly employed 5 days per week, there were two distinct classes of employes, and "the particular employment" in which the clerk in question was engaged was that of a clerk working 2 days per week, and her average weekly earnings under (1) (a) should have been computed on that basis. The primary purpose of the compensation act in cases of temporary disability is to compensate, to specified limits, for the wage loss sustained by the injured workman. Carr's, Inc. v. Industrial Comm. 234 W 466, 290 NW 174, 292 NW 1.

The purpose of the provision in (1) (a), for the calculation of average weekly earnings, is to base compensation on the normal income one derives from his employment. National Pressure Cooker Co. v. Industrial Comm. 249 W 381, 24 NW (2d) 697.

102.12 Notice of injury, exception, laches. No claim for compensation shall be maintained unless, within 30 days after the occurrence of the injury or within 30 days after the employe knew or ought to have known the nature of his disability and its relation to his employment, actual notice was received by the employer or by an officer, manager or designated representative of an employer. If no representative has been designated by posters placed in one or more conspicuous places, then notice received by any superior shall be sufficient. Absence of notice shall not bar recovery if it is found that the employer was not misled thereby. Regardless of whether notice was received, if no payment of compensation (other than medical treatment or burial expense) is made, and no application filed with the commission within 2 years from the date of the injury or death, or from the date the employe or his dependent knew or ought to have known the nature of the disability and its relation to the employment, the right to compensation thereofor shall be barred, except that the right to compensation shall not be barred if the employer knew or should have known, within the 2-year period, that the employe had sustained or probably would sustain permanent disability. [*1931 c. 403 s. 13; 1943 c. 270; 1947 c. 475*]

Revisor's Note, 1931: Substance of next to the last sentence is carried to 102.17 (4). (Bill No. 380 S, s. 13)

See note to 102.17, citing Acme B. Works v. Industrial Commission, 204 W 493, 234 NW 756.

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

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

Where employer received actual and complete notice of employe's disability from silicosis within thirty days after employe knew nature of disability and its relation to employment, and absence of written notice was not due to employe's intention to deceive employer, and employer was not misled thereby, employe's right to partial compensation for wage loss due to partial disability was not barred. Where employe's medical disability resulting from silicosis increased when he was subjected to exposure, when employed in new and lighter work at wage loss, additional wage loss was compensable. Glancy M. I. Co. v. Industrial Commission, 216 W 615, 258 NW 445.

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

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

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

That filling station operator shot by robber erroneously considered himself a lessee rather than an employe did not suspend running of limitation against filing of application for compensation under statute requiring filing within two years from date employe knew or ought to have known nature of disability and its relation to employment. Larson v. Industrial Commission, 224 W 294, 271 NW 835.

What claimant thought concerning nature of her disability and its relation to employment is not sufficient to start running of limitation statute; it is necessary that such thought be based on knowledge or appreciation of, or on reliable information regarding nature of, disability and its relation to employment. Trustees, Middle River Sanatorium v. Industrial Commission, 224 W 536, 272 NW 483.

Stonecutter's failure to claim compensation for disability due to silicosis within two years after becoming aware that his lung trouble was caused by stone dust barred his claim, though he knew nothing about silicosis. (Sec. 102.12, Stats. 1935). Universal Granite Q. Co. v. Industrial Commission, 224 W 680, 272 NW 863.

An employe, who in 1930 sustained a hernia during work, immediately experienced severe pain, told the foreman that he was ruptured, was treated by a doctor and fitted with a truss, was disabled from work for the remainder of the day, but did not suffer further disability from the hernia or any wage loss therefrom until 1935, and first filed an application for compensation in 1936, is deemed to have known the nature of his disability and its relation to his employment on the date of sustaining the hernia and hence his right to compensation was barred by the two-year limitation. Creamery Package Mfg. Co. v. Industrial Commission, 226 W 429, 277 NW 117.

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

Though the evidentiary facts found by the industrial commission in a workmen's compensation proceeding are supported by credible evidence in the record, the inference drawn from the facts must be a reasonable one or it must fall. Stewart v. Industrial Comm. 236 W 167, 294 NW 515.

An "accidental injury" is an injury that results from a definite mishap, while an "occupational disease" is a disease acquired as a result of work in the employment and the mere fact that a disease follows an accident does not make the disease an "occupational disease." Andrzeczak v. Industrial Comm. 248 W 12, 20 NW (2d) 551.

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

(2) The commission may refuse to receive testimony as to conditions determined from an autopsy if it appears (a) that the party offering the testimony had procured the autopsy and had failed to make reasonable effort to notify at least one party in adverse interest or the commission at least twelve hours before said autopsy of the time and place it would be performed, or (b) that the autopsy was performed by or at the direction of the coroner for purposes not authorized by chapter 366. The commission may in its discretion withhold findings until an autopsy is held in accordance with its directions. [*1931 c. 403 s. 14; 1939 c. 261*]

Revisor's Note, 1931: There has never been a conjunction between clauses (a) and (b) of (2). It is thought that the meaning indicates that "or" is implied. (Bill No. 380 S, s. 14)

102.14 Jurisdiction of commission. This chapter shall be administered by the commission. [*1931 c. 403 s. 15*]

Revisor's Note, 1931: See 370.01 (3), 101.02 and 101.03. (Bill No. 380 S, s. 15)

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

(2) The commission may provide by rule the conditions under which transcripts of testimony and proceedings shall be furnished. [*1931 c. 403 s. 16*]

Revisor's Note, 1931: The matter of employing help is covered by 14.71. The last sentence of (1) is a duplication of 101.05. (Bill No. 380 S, s. 16)

Industrial commission had jurisdiction to enter award on stipulation of facts by employer and employe for accident occurring some three years before where compensation payments had been made by employer, but could not interfere with award after lapse of one year. J. I. Case Co. v. Industrial Commission, 210 W 574, 246 NW 591.

Statute does not empower commission to amend statute relating to time within which claim must be filed, to enlarge time for filing claim, nor to change manner in which parties are to be brought before commission. Sentinel News Co. v. Industrial Commission, 224 W 355, 272 NW 463.

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

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

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

(4) Any employer violating subsection (3) shall be subject to the penalties provided in subsection (3) of section 102.28, and, in addition thereto, shall be liable to an injured employe for the reasonable value of the necessary services rendered to such employe pursuant to any arrangement made in violation of subsection (3) of this section without regard to said employe's actual disbursements for the same. [*1931 c. 403 s. 17; 1935 c. 465; 1943 c. 270*]

Revisor's Note, 1931: Last two sentences of (1) are transferred to new 102.64. (Bill No. 380 S, s. 17)

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

An order of the commission, made following a hearing noticed as for the purpose of considering "the question of liability (of employer and insurance carrier) for further medical, surgical, and hospital treatment" of an employe who had become insane as the result of a compensable injury, and who was a patient in a private hospital at a cost of $40 per week, that $10.50 per week constituted a reasonable expense for hospital treatment, is an interlocutory and not a final order. Levy v. Industrial Comm. 234 W 670, 291 NW 807.

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

102.17 Procedure; notice of hearing; witnesses, contempt; testimony, medical examination. (1) (a) Upon the filing with the commission by any party in interest of any application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, it shall mail a copy of such application to all other parties in interest and the insurance carrier shall be deemed a party in interest. The commission may bring in additional parties by service of a copy of the application. The commission shall fix a time for the hearing on such application which shall not be more than forty days after the filing of such application. The commission shall cause notice of such hearing, to be given to each party interested, by service of such notice on him personally or by mailing a copy thereof to him at his last known post-office address at least ten days before such hearing. In case a party in interest is located without the state, and has no post-office address within this state, the copy of the application and copies of all notices shall be filed in the office of the secretary of state and shall also be sent by registered mail to the last known post-office address of such party. Such filing and mailing shall constitute sufficient service, with the same force and effect as if served upon a party located within this state. Such hearing may be adjourned from time to time in the discretion of the commission, and hearings may be held at such places as the commission shall designate.

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

and after the date of issuance until the thirtieth day of June following such date of issuance and may be renewed by the commission from time to time, but each renewed license shall expire on the thirtieth day of June following the issuance thereof.

(as) The contents of verified medical and surgical reports, by physicians and surgeons licensed in, and practicing in, Wisconsin, presented by claimants for compensation shall constitute prima facie evidence as to the matter contained therein, subject to such rules and such limitations as the commission may prescribe.

(b) The commission may, with or without notice to either party, cause testimony to be taken, or an inspection of the premises where the injury occurred to be had, or the time books and pay rolls of the employer to be examined by any member of the commission or any examiner appointed by it, and may from time to time direct any employe claiming compensation to be examined by a regular physician; the testimony so taken, and the results of any such inspection or examination, to be reported to the commission for its consideration upon final hearing. All ex parte testimony taken by the commission shall be reduced to writing and either party shall have opportunity to rebut the same on final hearing.

(bm) The provisions of section 326.12 shall not be applicable to proceedings under this act.

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

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

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

(4) The right of an employe, his legal representative or dependent to proceed under this section shall not extend beyond six years from the date of the injury or death or from the date that compensation (other than medical treatment or burial expenses) was last paid, whichever date is latest.

(5) This section does not limit the time within which the state may bring an action to recover the amounts specified in subsection (5) of section 102.49 and section 102.59. [*1931 c. 403 s. 18, 18a; 1931 c. 413; 1931 c. 469 s. 5; 1935 c. 465; 1943 c. 270*]

Revisor's Note, 1931: Subsection (4) is from next to last sentence of 102.12. (3) is renumbered 101.10 (1a) for better arrangement. (5) is transferred to new 102.64. New (5) is based on the last sentence of 102.12. (Bill No. 380 S, s. 18)

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

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

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

Under the compensation act, 102.17 (1) (a), 102.23 (4), 102.64 (2), in a proceeding on a claim for compensation against the state, the state is a party, and the attorney-general is entitled to appear on behalf of the state, so that an order entered by the industrial commission awarding compensation on the application of a state employe, without any notice of the proceeding to, or appearance by, the attorney-general, was void ab initio, and therefore could be vacated by the commission on its own motion more than twenty

days after entry thereof. Johnson v. Industrial Commission, 222 W 19, 267 NW 286.

A consideration of the statutes in question leads to the conclusion that the bar of the two-year statute attaches unless an application be filed with the commission within two years or the person against whom liability is claimed has been made a party within that time pursuant to the provisions of 102.17 (1) (a). Sentinel News Co. v. Industrial Commission, 224 W 355, 271 NW 413, 225 W 245, 273 NW 819.

An award was improperly made to an employe who made his claim before the commission against the highway committee of a county where neither the county nor the state, either of which might or might not have been the employer, was a party to the proceeding. The court should have remanded the matter to the commission for further proceedings. Marinette County Highway Committee v. Industrial Commission, 227 W 560, 278 NW 863.

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

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

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

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

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

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

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

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

(5) If it shall appear to the commission on due hearing that a mistake has been made in an award of compensation for an injury when in fact the employe was suffering from

an occupational disease, the commission may within three years, set aside such award, and make a new award under this section. [*1931 c. 403 s. 19; 1931 c. 414; 1931 c. 469 s. 6, 8; 1933 c. 159 s. 22; 1933 c. 402 s. 2; 1935 c. 465; 1937 c. 180; 1939 c. 513 s. 30*]

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

The power conferred upon the commission to set aside an order or award in compensation cases upon the ground of mistake is not arbitrary and cannot be exercised unless there was a mistake. The commission had jurisdiction to set aside a prior award where a mistake appeared upon the face of the record, notwithstanding the procedure adopted by the commission was irregular in that it did not indicate the nature of the mistake. Welhouse v. Industrial Commission, 214 W 163, 252 NW 717.

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

See note to 102.23, citing Glancy M. I. Co. v. Industrial Commission, 216 W 615, 258 NW 445.

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

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

The industrial commission cannot base an award upon possibilities; there must be at least some proof of every fact essential to the support of the award. Oscar Mayer & Co. v. Industrial Commission, 219 W 474, 263 NW 88.

An award under the compensation act of another state for the death of an employe occurring in such state, if paid, must be credited on a Wisconsin award for the same death. Wisconsin B. & I. Co. v. Industrial Commission, 222 W 194, 268 NW 134.

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

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

A court of equity has jurisdiction to enjoin the enforcement of a judgment, based on a compensation award, on the ground that the judgment was fraudulently obtained because of fraud practiced by the claimant on the industrial commission in obtaining the award. Amberg v. Deaton, 223 W 653, 271 NW 396.

Where commission set aside examiner's order within ten days on petition for review, commission's power to award compensation was not limited to ten-day period. The statute imposes no limitations on power of commission to dispose of petition for review of findings or order of commissioner or examiner, and such power is not limited to cases involving mistake or newly discovered evidence. (102.18 (2), (4), Stats. 1935). Milwaukee County v. Industrial Commission, 224 W 302, 272 NW 46.

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

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

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

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

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

The provision of (3), that the commission shall act in the matter within ten days after the filing of a petition to review the findings and order of an examiner, is merely directory, so that the failure of the commission to act within ten days is not jurisdictional, and the commission may act in the matter after ten days if it fails to act before. State v. Industrial Comm. 233 W 461, 289 NW 769.

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

The commissioners' resort to and their reliance on a sufficient memorandum of the evidence, prepared by a competent and impartial official member of the commission's staff, is permissible and proper within (3), and a determination made by the commis-

sion after such use does not constitute a denial of due process of law. Berg v. Industrial Comm. 236 W 172, 294 NW 506.

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

Where there was no evidence that the alleged employer had ever had 3 or more employes at any one time or had carried workmen's compensation or had affirmatively elected to become subject to the act, the commission could dismiss the application for failure of proof that the alleged employer was subject to the act. Webster v. Industrial Comm. 246 W 154, 16 NW (2d) 425.

Under 102.16 (1), as amended by sec. 11, ch. 270, laws of 1943, an award based on a stipulation of settlement in which the word "compromise" does not appear has the same status as an award based on a full hearing, so that the commission, on the application of the employer and his insurance carrier, is without jurisdiction to set aside such order more than 20 days after the effective date of such order, in the absence of proceedings for review taken under 102.18 (3) or (4), within the 20 days. Wacker v. Industrial Comm. 248 W 315, 21 NW (2d) 715.

102.19 Alien dependents; payments through consular officers. In case a deceased employe, for whose injury or death compensation is payable, leaves surviving him alien dependents residing outside of the United States, the duly accredited consular officer of the country of which such dependents are citizens or his designated representative residing within the state shall, except as otherwise determined by the commission, be the sole representative of such deceased employe and of such dependents in all matters pertaining to their claims for compensation. The receipt by such officer or agent of compensation funds and the distribution thereof shall be made only upon order of the commission, and payment to such officer or agent pursuant to any such order shall be a full discharge of the benefits or compensation. Such consular officer or his representative shall furnish, if required by the commission, a bond to be approved by it, conditioned upon the proper application of all moneys received by him. Before such bond is discharged, such consular officer or representative shall file with the commission a verified account of the items of his receipts and disbursements of such compensation. Such consular officer or representative shall make interim reports to the commission as it may require. [*1931 c. 403 s. 20*]

102.195 Employes confined in institutions; payment of benefits. In case an employe shall be adjudged insane or incompetent and confined in a public institution, and shall have wholly dependent on him for support a person or persons, whose dependency shall be determined as if the employe were deceased, compensation payable during the period of his confinement may be paid to the employe and his dependents, in such manner, for such time and in such amount as the commission may by order provide. [*1943 c. 270*]

102.20 Judgment on award. Either party may present a certified copy of the award to the circuit court for any county, whereupon said court shall, without notice, render judgment in accordance therewith; such judgment shall have the same effect as though rendered in an action tried and determined by said court, and shall, with like effect, be entered and docketed. [*1931 c. 403 s. 21*]

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

102.21 Payment of awards by municipalities. Whenever an award is made by the commission against any municipality, the person in whose favor it is made shall file a certified copy thereof with the municipal clerk. Within twenty days thereafter, unless an appeal is taken, such clerk shall draw an order on the municipal treasurer for the payment of the award. If upon appeal such award is affirmed in whole or in part the order for payment shall be drawn within ten days after a certified copy of such judgment is filed with the proper clerk. If more than one payment is provided for in the award or judgment, orders shall be drawn as the payments become due. No statute relating to the filing of claims against, and the auditing, allowing and payment of claims by municipalities shall apply to the payment of an award or judgment under the provisions of this section. [*1931 c. 403 s. 22*]

Revisor's Note, 1931: Municipality includes county, town and school district by definition. See new 102.01. (Bill No. 380 S, s. 22)

102.22 Penalty for delayed payments. If the sum ordered by the commission to be paid shall not be paid when due, such sum shall bear interest at the rate of six per cent per annum. Where the employer or his insurer is guilty of inexcusable delay in making payments, the payments as to which such delay is found shall be increased by ten per cent. Where such delay is chargeable to the employer and not to the insurer, the provisions of section 102.62 shall be applicable and the relative liability of the parties shall be fixed and discharged as therein provided. [*1931 c. 403 s. 23*]

102.23 Judicial review. (1) The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive; and the order or award, either interlocutory or final, whether judgment has been rendered thereon or not, shall be

subject to review only in the manner and upon the grounds following: Within thirty days from the date of an order or award originally made by the commission as a body or following the filing of petition for review with the commission under section 102.18 any party aggrieved thereby may commence, in the circuit court for Dane county, an action against the commission for the review of such order or award, in which action the adverse party shall also be made defendant. In such action a complaint, which need not be verified, but which shall state the grounds upon which a review is sought, shall be served with the summons. Service upon the secretary of the commission, or any member of the commission, shall be deemed completed service on all parties, but there shall be left with the person so served as many copies of the summons and complaint as there are defendants, and the commission shall mail one such copy to each other defendant. If the circuit court is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another thirty days in which such action may be commenced. The commission shall serve its answer within twenty days after the service of the complaint, and, within the like time, such adverse party shall, if he so desires, serve his answer to said complaint, which answer may, by way of counterclaim or cross complaint, ask for the review of the order or award referred to in the complaint, with the same effect as if such party had commenced a separate action for the review thereof. With its answer, the commission shall make return to said court of all documents and papers on file in the matter, and of all testimony which may have been taken therein, and of its order, findings and award. Such return of the commission when filed in the office of the clerk of the circuit court shall, with the papers mentioned in section 270.72, constitute a judgment roll in such action; and it shall not be necessary to settle a bill of exceptions in order to make such return part of the record of such court in such action. Said action may thereupon be brought on for hearing before said court upon such record by either party on ten days' notice to the other; subject, however, to the provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

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

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

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

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

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

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

(5) The commencement of action for review shall not relieve the employer from paying compensation as directed, when such action involves only the question of liability as between the employer and one or more insurance companies or as between several insurance companies. [*1931 c. 403 s. 24; 1933 c. 402 s. 2; 1939 c. 261*]

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

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

Since the conclusion of the industrial commission, upon undisputed facts, that a compensation applicant was performing services growing out of and incidental to his employment at the time of the accident, is a conclusion of law, the court may review the facts to ascertain whether they support such conclusion of the commission. Olson Rug Co. v. Industrial Commission, 215 W 344, 254 NW 519.

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

Failure to file a petition within twenty days to have the industrial commission review its examiner's findings and order did not require dismissal of an action to review such findings and order, since, under 102.18 (3) the examiner's findings and order became the findings and order of the commission as a body, and as such were subject to review in an action brought for that purpose under 102.23, Stats. 1933. Glancy M. I. Co. v. Industrial Comm. 216 W 615, 258 NW 445.

The power to make an award is in the industrial commission, and the court can only confirm or set aside the award. Rhine-

lander P. Co. v. Industrial Commission, 216 W 623, 258 NW 384.

Terms used relating to quantum of evidence necessary to support commission's findings, such as "credible evidence," "some evidence," and "evidence," are synonymous. In action to review award of treble damages to employe under 17 who was alleged to have been injured while illegally permitted to operate elevator, evidence held not to support commission's findings that employe was engaged in operating elevator when injured. Supreme court has no power to set aside commission's award on ground that findings were made against great weight and clear preponderance of evidence. Hills D. G. Co. v. Industrial Commission, 217 W 76, 258 NW 336.

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

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

The provision that an award of the commission may be set aside on the ground that it "was procured by fraud," the fraud referred to is the fraud of the commission, not the fraud of the claimant consisting of perjured testimony or the concealment of material facts. Buehler Bros. v. Industrial Commission, 220 W 371, 265 NW 227.

Findings of the industrial commission in workmen's compensation proceedings cannot be disturbed if there is any credible evidence to support them. Milwaukee E. R. & L. Co. v. Industrial Commission, 222 W 111, 267 NW 62.

Where there is no substantial dispute as to the material facts, a determination by the industrial commission that an employe was injured while performing services growing out of and incidental to his employment is virtually a conclusion of law, reviewable on appeal for the purpose of ascertaining whether the facts support the conclusion of the commission. Continental Baking Co. v. Industrial Commission, 222 W 432, 267 NW 540.

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

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

A finding of an examiner that a logger's action in attempting to stop a motor by grasping an unguarded shaft was out of idle curiosity was a finding of fact which, when supported by the evidence, could not be disturbed on appeal. Peterman v. Industrial Commission, 228 W 352, 280 NW 379.

Subsection (2) does not supply a lack of jurisdiction. Dairy Distributors v. Department of Agriculture and Markets, 228 W 418, 280 NW 400.

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

Interlocutory orders of the commission are not res judicata. Maryland Casualty Co. v. Industrial Commission, 284 NW 36.

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

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

The power to authorize the taking of further evidence before the commission on the remand of a compensation case to it, to the extent that such power exists, is in the circuit court and not in the commission, and on a remand merely for further findings the commission would not be authorized to reopen the case and receive further evidence. Liberty Foundry v. Industrial Comm. 233 W 177, 288 NW 752.

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

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

The rule, that a verdict may properly be directed only when the evidence gives rise to no dispute as to the material issues or only when the evidence is so clear and convincing as reasonably to permit unbiased and impartial minds to come to but one conclusion, is applicable in passing on a finding of the industrial commission. In a proceeding for compensation for injuries sustained by a store manager, who lived above the store of her employer in an apartment, the use of which she received as part of her wages, and who sometimes made out daily reports in the apartment, and who during the course of breakfast started toward the door of the apartment to go down to the store for a missing paper necessary to complete a report, but fell on the floor of the dining room, the undisputed facts permitted of inferences by the commission supporting its findings that the claimant when injured was not performing services growing out of and incidental to her employment, and that her injury did not arise out of her employment, and that when injured she was going to work in the ordinary and usual way but was not on the premises of her employer. Eckhardt v. Industrial Comm., 242 W 325, 7 NW (2d) 841.

The difficulty of proof does not dispense with the necessity of proof, and where a compensation claimant cannot produce credible testimony that will serve to take his conclusion as to the source of his injury out of the category of guesses, he has not produced evidence of convincing influence to form a basis for an award in his favor. Beem v. Industrial Comm. 244 W 334, 12 NW (2d) 42.

An order of the industrial commission, confirming a compromise of a claim for workmen's compensation, is not an appealable order, only orders denying or awarding compensation being subject to judicial review under 102.23. Harrison v. Industrial Comm. 246 W 106, 16 NW (2d) 303.

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

The conclusiveness of findings of fact made by the commission in workmen's compensation proceedings was not altered by the enactment of ch. 277, the Uniform Administrative Procedure Act, since that act does not include proceedings in matters arising out of the compensation act. Bellrichard v. Industrial Comm. 248 W 231, 21 NW (2d) 395.

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

Where the facts established in a workmen's compensation proceeding are virtually undisputed, but may permit of drawing different inferences, there is presented a question of fact and not a question of law, so that the findings of the industrial commission, based on logical inferences from those facts, are entitled to the same conclusiveness as findings based on disputed facts. Green Valley Co-op. Dairy Co. v. Industrial Comm. 250 W 502, 27 NW (2d) 454.

102.24 Remanding record. (1) Upon the setting aside of any order or award the court may recommit the controversy and remand the record in the case to the commission, for further hearing or proceedings; or it may enter the proper judgment upon the findings, as the nature of the case shall demand. An abstract of the judgment entered by the trial court upon the review of any order or award shall be made by the clerk thereof upon the docket entry of any judgment which may theretofore have been rendered upon such order or award and transcripts of such abstract may thereupon be obtained for like entry upon the dockets of the courts of other counties.

(2) After the commencement of an action to review any award of the commission the parties may have the record remanded by the court for such time and under such condition as they may provide, for the purpose of having the commission act upon the question of approving or disapproving any settlement or compromise that the parties may desire to have so approved. If approved the action shall be at an end and judgment may be entered upon the approval as upon an award. If not approved the record shall forthwith be returned to the circuit court and the action shall proceed as if no remand had been made. [*1931 c. 403 s. 25, 27*]

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

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

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

Where an award of treble compensation was made by the industrial commission, on the ground that the employe was under seventeen years of age and engaged in prohibited work at the time of injury, and the award was confirmed by the circuit court, but the judgment of the circuit court was reversed and cause remanded by the supreme court with directions to set aside the award of treble compensation, because the employe had not engaged in prohibited work, the circuit court could recommit the matter to the commission, which was then required to correct its award. On return of the matter to the commission by the circuit court after remand, the commission acted within its powers, and with due process of law, in proceeding, on undisputed evidence already before it, to find that the employe was under seventeen years of age and working without a permit at the time of injury, and in making an award of double compensation accordingly. Hills Dry Goods Co. v. Industrial Commission, 222 W 439, 267 NW 905.

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

102.25 Appeal from judgment on award. (1) Said commission, or any party aggrieved by a judgment entered upon the review of any order or award, may appeal therefrom within 30 days from the date of service by either party upon the other of notice of

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

(2) It shall be the duty of the clerk of any court rendering a decision affecting an award of the commission to promptly furnish the commission with a copy of such decision without charge. [*1931 c. 403 s. 26, 27; 1939 c. 261; 1943 c. 270*]

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

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(2) Unless previously authorized by the commission, no fee shall be charged or received for the enforcement or collection of any claim for compensation, nor shall any contract therefor be enforcible, where such fee, inclusive of all taxable attorney's fees paid or agreed to be paid for such enforcement or collection, exceeds ten per cent of the amount at which such claim shall be compromised or of the amount awarded, adjudged or collected, or where such fee computed upon such percentage basis shall exceed in gross the sum of one hundred dollars. The limitation as to fees shall apply to the combined charges of attorneys, solicitors, representatives and adjusters who knowingly combine their efforts toward the enforcement or collection of any compensation claim.

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

(4) The charging or receiving of any fee in violation of this section shall be unlawful, and the attorney or other person guilty thereof shall forfeit double the amount retained by him, the same to be collected by the state in an action in debt, upon complaint of the commission. Out of the sum recovered the court shall direct payment to the injured party of the amount of the overcharge. [*1931 c. 403 s. 28; 1935 c. 465*]

Revisor's Note, 1931: The provision as to attorney-general is transferred to new 102.64. (Bill No. 380 S, s. 28)

Note: The terms of (2) and (3), limiting the fee of an attorney for a compensation claimant to 10 per cent of the award unless the commission fixes the fee, control any contract made by an attorney with his client in such matter, so that the statute cannot be challenged by the attorney as being unconstitutional. Cranston v. Industrial Comm. 246 W 287, 16 NW (2d) 865.

102.27 Claims unassignable, and exempt. No claim for compensation shall be assignable, but this provision shall not affect the survival thereof; nor shall any claim for compensation, or compensation awarded, or paid, be taken for the debts of the party entitled thereto. [*1931 c. 403 s. 29*]

102.28 Preference of claims; employer's liability insurance. (1) The whole claim for compensation for the injury or death of any employe or any award or judgment thereon, and any claim for unpaid compensation insurance premiums shall be entitled to the same preference in bankruptcy or insolvency proceedings as is given by any law of this state or by the federal bankruptcy act to claims for labor, but this section shall not impair the lien of any judgment entered upon any award.

(2) An employer liable under this act to pay compensation shall insure payment of such compensation in some company authorized to insure such liability in this state unless such employer shall be exempted from such insurance by the industrial commission. An employer desiring to be exempt from insuring his liability for compensation shall make application to the industrial commission showing his financial ability to pay such compensation, and agreeing as a condition for the granting of the exemption to faithfully report all injuries under compensation according to law and the requirements of the commission and to comply with this act, and the rules of the commission pertaining to the administration thereof, whereupon the commission by written order may make such exemption. The commission may from time to time require further statement of financial ability of

such employer to pay compensation and may upon ten days' notice in writing, for financial reasons or for failure of the employer to faithfully discharge his obligations according to the agreements contained in his application for exemption, revoke its order granting such exemption, in which case such employer shall immediately insure his liability. As a condition for the granting of an exemption the commission shall have authority to require the employer to furnish such security as it may consider sufficient to insure payment of all claims under compensation. Where the security is in the form of a bond or other personal guaranty, the commission may at any time either before or after the entry of an award, upon at least ten days' notice and opportunity to be heard require the sureties to pay the amount of the award, the same to be enforced in like manner as the award itself may be enforced. Where an employer procures an exemption as herein provided and thereafter enters into any form of agreement for insurance coverage with an insurance company or interinsurer not licensed to operate in this state, his conduct shall automatically operate as a revocation of such exemption. An order exempting an employer from insuring his liability for compensation shall be null and void if the application contains a financial statement which is false in any material respect.

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

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

(5) If compensation is awarded under this act, against any employer who at the time of the accident has not complied with the provisions of subsection (2) of this section, such employer shall not be entitled as to such award or any judgment entered thereon, to any of the exemptions of property from seizure and sale on execution allowed in sections 272.18 to 272.22. If such employer is a corporation, the officers and directors thereof shall be individually and jointly and severally liable for any portion of any such judgment as is returned unsatisfied after execution against the corporation.

(6) Every employer shall upon request of the industrial commission report to it the number of his employes and the nature of their work and also the name of the insurance company with whom he has insured his liability under the workmen's compensation act and the number and date of expiration of such policy. Failure to furnish such report within ten days from the making of a request by registered mail shall constitute presumptive evidence that the delinquent employer is violating the provisions of subsection (2) of this section. [*1931 c. 403 s. 30*]

102.29 Liability of third parties affected. (1) (a) The making of a claim for compensation against an employer or compensation insurer for the injury or death of an employe shall not affect the right of the employe or his personal representative to make claim or maintain an action in tort against any other party for such injury or death, but the employer or his insurer shall be entitled to reasonable notice and opportunity to join in such action. If they or either of them join in such action, they shall be entitled to repayment of the amount paid by them as compensation as a first claim upon the net proceeds of such action (deducting the reasonable costs of collection) in excess of one-third of such net proceeds, which shall be paid to the employe in all cases.

(b) The commencement of an action by an employe or his dependents against a third party for damages by reason of an injury to which sections 102.03 to 102.64 are applicable, or the adjustment of any such claim, shall not affect the right of the injured employe

or his dependents to recover compensation, but any amount recovered by the injured employe or his dependents from a third party shall be applied as follows: Reasonable costs of collection, and expense of treatment paid by the employer and the insurer, shall be deducted, except that if the amount of damages for expense of treatment shall have been separately determined the deduction on account thereof shall not exceed the amount as so determined; then one-third of the remainder shall in every case belong to the injured employe or his dependents, as the case may be; the remainder, exclusive of any damages separately determined for expense of treatment, or so much thereof as is necessary to discharge in equal amount the liability of the employer and the insurer for compensation, other than for expense of treatment, shall be paid to such employer or insurer; and any excess shall belong to the injured employe or his dependents.

(2) An employer or compensation insurer who shall have paid a lawful claim under this chapter for the injury or death of an employe shall have a right to maintain an action in tort against any other party responsible for such injury or death. If reasonable notice and opportunity to be represented in such action by counsel shall have been given to the compensation beneficiary, the liability of such other party to such compensation beneficiary shall be determined in such action as well as his liability to the employer and insurer. If recovery shall be had against such other party, by suit or otherwise, the compensation beneficiary shall be entitled to any amount recovered over and above the amount that the employer or insurer have paid or are liable for in compensation, after deducting reasonable costs of collection, and in no event shall the compensation beneficiary be entitled to less than one-third of the amount recovered from the third party, less the reasonable costs of collection and reimbursement for expense of treatment, except that if the amount of damages for expense of treatment shall have been separately determined the deduction on account thereof shall not exceed the amount as so determined. Settlement of such claims and the distribution of the proceeds therefrom must have the approval of a court or of the industrial commission.

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

(4) Nothing in this act shall prevent an employe from taking the compensation he may be entitled to under it and also maintaining a civil action against any physician or surgeon for malpractice.

(5) If the insurance carrier of the employer and of the third party shall be the same, or if there is common control of the insurer of each, the insurance carrier of the employer shall promptly notify the parties in interest and the industrial commission of that fact; likewise, if the employer has assumed the liability of the third party he shall give similar notice; and, in default of such notice, any settlement with an injured employe or beneficiary shall be void. [*1931 c. 132; 1931 c. 403 s. 31; 1931 c. 469 s. 7; 1935 c. 465; 1947 c. 475*]

Note: Subsection (3) is constitutional. Verhelst C. Co. v. Galles, 204 W 96, 235 NW 556.

An employer is liable for compensation for aggravated damages from malpractice, at least for such results thereof as occur within the ninety days during which the employer is bound to furnish the services of a physician. An employe's action for damages from malpractice in treating a compensable injury is not waived by the taking of compensation, nor is it assigned to the employer. Actions for malpractice brought by the compensated employe and the employer were not premature because the commission had not separated the compensation payable on account of the original injury from that payable by reason of the malpractice, a prior determination of the proper separation of damages not being a condition precedent to the bringing of either action. Lakeside B. & S. Co. v. Pugh, 206 W 62, 238 NW 872.

All legislation being prima facie territorial and not operating beyond the limits of the jurisdiction in which it is enacted, the liability of the co-employe for the accident occurring in Indiana is determined by the law of that state. Subsection (1) (a) does not diminish the recovery against a third party by the amount of compensation awarded under the compensation act. Bernard v. Jennings, 209 W 116, 244 NW 589.

That it was stipulated in a compensation proceeding against the employer of the deceased that he left no one dependent upon him did not bar the parents of such deceased from recovering against a third party, who caused the death, for other elements of pecuniary injury for which recovery is authorized. Sandeen v. Willow River P. Co., 214 W 166, 252 NW 706.

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

Under 102.29 (2), Stats. 1931, a right of action against a third party tort-feasor, hospital, medical and surgical bills constitute "compensation" for which the employer is entitled to be reimbursed, since such items constitute a lawful "claim" under the compensation act, and the word "compensation" as used in this section does not mean merely wage loss sustained. Klotz v. Pfister & Vogel L. Co. 220 W 57, 264 NW 495.

Subsection (2) creates no cause of action, but the employer or compensation insurer stands in the shoes of the employe. London

Guarantee & Acc. Co. v. Wisconsin Pub. Serv. Corp., 228 W 441, 279 NW 76.

The compensation liability of the compensation insurer of a town for the death of an employe was coordinate with the primary liability of the town, but limited or measured by the liability of the town. Standard Surety & Casualty Co. v. Spewachek, 233 W 158, 288 NW 758.

The compensation insurer of the town, on paying the required amount into the state treasury pursuant to 102.49 (5) and an award of the commission thereunder, had a right to bring an independent action for reimbursement against a third party whose negligent act caused the death of the employe involved, and the town, not having paid anything into the state treasury, had no right of action against such third party for reimbursement, and had no authority to release the insurer's claim against such third party. The right of a compensation insurer to reimbursement from a third-party tortfeasor is statutory and is not dependent on the subrogation clause of its policy. Standard Surety & Casualty Co. v. Spewachek, 233 W 158, 288 NW 758.

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

Where an employe, awarded workmen's compensation against his employer, also brings a third party action under 102.29 (1), Stats. 1939, the proceeds of the judgment must be applied in accordance with the statute, which requires that, after deduction of costs and the employe's one-third distributive share, there shall be paid to the employer's compensation insurer so much of the remainder as is necessary to discharge its compensation liability, and not merely such amount as will reimburse it for compensation payments already made. Richman v. Honkamp, 245 W 68, 13 NW (2d) 597.

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

(2) The failure of the assured to do or refrain from doing any act required by the policy shall not be available to the insurance carrier as a defense against the claim of the injured employe or his dependents. [*1931 c. 403 s. 32*]

Revisor's Note, 1931: "Existing contract" in line three of 102.30 (1) refers to the year 1911 (ch. 50, Laws 1911). That clause is thought to be obsolete. (Bill No. 380 S, s. 32)

A mother employing her son could not, as a dependent, recover against her insurance carrier for the son's death. The insurer was not estopped to deny liability because it had collected premiums based on wages paid to the decedent. [Columbia C. Co. v. Industrial Commission, 200 W 8, 227 NW 292, distinguished.] Independence I. Co. v. Industrial Commission, 209 W 109, 244 NW 566.

The rules of Independence Indemnity Co. v. Industrial Comm., 209 W 109, to the effect that the establishment of a liability of the employer to the injured employe, or to the employe's dependent in case of the employe's death, is a condition precedent to any liability by the employer's insurance carrier and that a person employing his own child cannot, as a dependent, recover against his insurance carrier for the child's death, are re-examined and reaffirmed. Thomas v. Industrial Comm., 243 W 231, 10 NW (2d) 206.

The payment of money, as a gratuity, to an injured employe by an employer during the period of temporary disability does not relieve the insurance carrier from its obligation to meet the indemnity provided by the workmen's compensation act, and, while liability under the act is for wage loss, an employer or his insurance carrier is not relieved from liability where the employer has made gifts or donations to the injured employe. Modern Equipment Co. v. Industrial Comm. 247 W 517, 20 NW (2d) 121.

102.31 Liability insurance; policy regulations. (1) (a) Every contract for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this act, and provisions thereof inconsistent with the act shall be void. Such contract shall be construed to grant full coverage of all liability of the assured under and according to the provisions of the act, notwithstanding any agreement of the parties to contrary unless the commission has theretofore by written order specifically consented to the issuance of a policy on a part of such liability, except that an intermediate agency or publisher referred to in section 102.07 (6) may, under its own policy, cover liability of employes as defined in said section 102.07 (6) for an intermediate or independent news agency, provided the policy of insurance of such publisher or intermediate agency is indorsed to cover such persons. If the publisher so

covers it shall not be necessary for the intermediate or independent news agency to cover liability for such persons. No policy shall be canceled by either party within the policy period nor terminated upon expiration date until a notice in writing shall be given to the other party, fixing the date on which it is proposed to cancel it, or declaring that the party does not intend to renew the policy upon expiration date. Such cancellation or termination shall not become effective until 30 days after written notice has been given to the commission unless prior thereto the employer obtains other insurance coverage or an order exempting him from carrying insurance as provided in section 102.28 (2). Such notice to the commission shall be served personally or by registered mail on the commission at its office in Madison. Issuance of a new policy shall automatically revoke and terminate any former policy or policies issued by the same company.

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

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

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

(5) Two or more companies, licensed to carry on the business of workmen's compensation insurance in this state, may with the approval of the commissioner of insurance, form a corporation for the purpose of insuring special risks under the workmen's compensation act. The articles of incorporation shall contain a declaration that the various company members shall contribute such amounts as may be necessary to meet any deficit of such corporation, such declaration to be in lieu of all capital, surplus and other requirements for the organization of companies and the transaction of the business of workmen's compensation insurance in this state. Such corporation shall be owned, operated and controlled by its company members as may be provided in the articles of incorporation.

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

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

(8) If any employer who has by the industrial commission been granted exemption from the carrying of compensation insurance shall arbitrarily or unreasonably refuse employment to or shall discharge employes because of a nondisabling physical condition, the industrial commission shall revoke the exemption of such employer. [*1931 c. 244; 1931 c. 403 s. 33; 1933 c. 402 s. 2; 1937 c. 180; 1939 c. 261, 351; 1943 c. 270*]

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

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

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

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

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

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

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

(7) No lump sum settlement shall be allowed in any case of permanent total disability upon an estimated life expectancy, except upon consent of all parties, after hearing and finding by the commission that the interests of the injured employe will be conserved thereby. [*1931 c. 403 s. 34, 35*]

Revisor's Note, 1931: Paragraph (1) of (5) of 102.09 is brought here to better the arrangement. This amendment conforms the language to the meaning as construed in Flanner Co. v. Industrial Commission, 193 W 46, 213 NW 660. (7) is from the seventh subdivision of (d) of (2) of 102.09. (Bill No. 380 S, s. 35)

102.33 Blanks and records. The commission shall print and furnish free to any employer or employe such bank forms as it shall deem requisite to facilitate efficient administration of this act; it shall keep such record books or records as it shall deem required for the proper and efficient administration of this act. [*1931 c. 403 s. 36, 37*]

102.34 Nonelection, notice by employer. Knowledge of the fact that an employer is subject to this act shall conclusively be imputed to all employes. Every employer who would be subject to this act but for the fact that he has elected not to accept its provisions thereof, shall post and maintain printed notices of such nonelection on his premises, of such design, in such numbers, and at such places as the commission, shall, by order, determine to be necessary to give information to his employes. [*1931 c. 403 s. 37*]

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

(2) Any employer, or duly authorized agent thereof, who, because of a claim or attempt to claim compensation benefits from such employer, shall discriminate or threaten to discriminate against an employe as to his employment, shall forfeit to the state not less than $50 nor more than $500 for each offense. No action under this subsection shall be commenced except upon request of the industrial commission. [*1931 c. 403 s. 45; 1943 c. 270*]

102.36 [*Repealed by 1931 c. 403 s. 40*]

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

trial commission at such times and in such manner as it may require by general order, upon forms to be procured from the commission. [*1931 c. 403 s. 41*]

102.38 Records of payments; reports thereon. Every insurance company which transacts the business of compensation insurance, and every employer who is subject to the workmen's compensation act, but who has not insured his liability, shall keep a record of all payments made under the provisions of chapter 102 of the statutes and of the time and manner of making such payments, and shall furnish such reports based upon these records to the industrial commission as it may require by general order, upon forms to be procured from the commission. [*1931 c. 403 s. 42*]

102.39 General orders; application of statutes. The provisions of chapter 101, relating to the adoption, publication, modification and court review of general orders of the commission shall apply to all general orders adopted pursuant to this chapter. [*1931 c. 403 s. 43*]

102.40 Reports not evidence in actions. Reports furnished to the commission pursuant to sections 102.37 and 102.38 shall not be admissible as evidence in any action or proceeding arising out of the death or accident reported. [*1931 c. 403 s. 44; 1939 c. 261*]

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

(2) PHYSICIAN, SELECTION OF. The employe shall have the right to make choice of his attending physician from a panel of physicians to be named by the employer. Where the employer has knowledge of the injury and the necessity for treatment, his failure to tender the same shall constitute such neglect or refusal. Failure of the employer to maintain a reasonable number of competent and impartial physicians, ready to undertake the treatment of the employe, and to permit the employe to make choice of his attendant from among them, shall constitute neglect and refusal to furnish such attendance and treatment. The commission may upon summary hearing permit an injured employe to make selection of a physician not on the panel.

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

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

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

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

(7) TREATMENT REJECTED BY EMPLOYE. No compensation shall be payable for the death or disability of an employe, (a) if his death be caused by or in so far as his disability may be aggravated, caused or continued by an unreasonable refusal or neglect to submit to or follow any competent and reasonable surgical treatment, (b) or in the case of tuberculosis to submit to or follow hospital or sanatorium treatment when found by

the commission to be necessary unless such employe shall have elected Christian Science treatment in lieu of medical, surgical, hospital or sanatorium treatment. [*1931 c. 403 s. 46, 47; 1931 c. 469 s. 9; 1937 c. 180; 1939 c. 261; 1943 c. 270; 1945 c. 537*]

Note: The only medical treatment the expense of which is recoverable is that administered by a "physician," who, within the definition of the term in chapter 147, must be a doctor of medicine, and a chiropractor is not such a physician. Corsten v. Industrial Commission, 207 W 147, 240 NW 834.

A reasonable time within which the commission may find that additional medical and hospital treatment beyond the ninety-day period immediately following the accident has tended and will tend to lessen the period of compensation liability is not limited, in the first instance, to the time within which the commission makes its award, even though the ninety-day period has then expired, but does not extend to nine years after the making of the original award in the circumstances existing in the instant case. (Stats. 1923). A. D. Thomson Co. v. Industrial Commission, 222 W 445, 268 NW 113, 269 NW 253.

An employer's statutory liability for hospitalization furnished to an employe in a compensation case was not discharged by the employer having procured indemnity insurance from a surety company, nor by the hospital first seeking payment from the insurance carrier at the suggestion of the employer. St. Mary's Hospital v. Atlas Warehouse & C. S. Co., 226 W 568, 277 NW 144.

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

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

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

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

(4) If the disability period involves a fractional week, indemnity shall be paid for each day of such week, except Sundays only, at the rate of one-sixth of the weekly indemnity. [*1931 c. 66 s. 2; 1931 c. 101; 1931 c. 403 s. 48; 1931 c. 469 s. 10, 11; 1935 c. 465; 1939 c. 261; 1943 c. 270*]

Note: "Fourth day," providing that indemnity shall be due a disabled employe on the fourth day after he leaves work, is construed as meaning the fourth compensable or working day. Phoenix H. Co. v. Industrial Commission, 207 W 597, 242 NW 135.

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

(1) In case of temporary disability aggregate indemnity shall not exceed the amount payable in case of permanent total disability.

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

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

(a) One thousand weeks for all persons under 31 years of age.

(b) For each successive yearly age group, beginning with 31 years, the maximum limitation shall be reduced by 18 weeks, until a minimum limit of 280 weeks shall be reached.

(4) Where the permanent disability is covered by the provisions of sections 102.52, 102.53 and 102.55, such sections shall govern; provided, that in no case shall the percentage of permanent total disability be taken as more than 100 per cent. [*1931 c. 66 s. 1; 1931 c. 403 s. 49; 1937 c. 180; 1939 c. 261; 1943 c. 270; 1945 c. 532; 1947 c. 475*]

102.45 [*Repealed by 1933 c. 454 s. 8*]

102.45 Benefits payable to minors; how paid. Compensation and death benefit payable to an employe or dependent who was a minor when his right began to accrue, may, in the discretion of the commission, be ordered paid to a bank, trust company, trustee,

parent or guardian, for the use of such employe or dependent as may be found best calculated to conserve his interests. Such employe or dependent shall be entitled to receive payments, in the aggregate, at a rate not less than that applicable to payments of primary compensation for total disability or death benefit as accruing from his twenty-first birthday. [*1945 c. 537*]

102.455 Policemen, firemen or conservation wardens subject to Wisconsin retirement act. (1) Whenever a policeman, fireman, or conservation warden, who is a participating employe under sections 66.90 to 66.919 shall, while engaged in the performance of duty, be injured or contract a disease due to his occupation, and be found upon examination to be so completely and presumably permanently disabled, either physically or mentally, as to render necessary his retirement from either of the aforesaid services, the commission shall order payment to him monthly of a sum equal to one-half of his monthly salary in such service at the time that he became so disabled. If such a person might be entitled to a benefit under either 66.906 (2) or 66.907 (2) he shall make application therefor within 30 days after the entry of an order directing payment under this subsection and there shall be deducted from payments to be made under this subsection such sums as may be paid to such person pursuant to section 66.906 (2) or 66.907 (2).

(2) If such injury or disease shall cause the death of such person, and he shall die leaving surviving a widow or an unmarried child under the age of 18 years, the commission shall order monthly payments as follows:

(a) To the widow, unless she shall have married the deceased after he sustained such injury or contracted such disease, one-third of the monthly salary being paid to the deceased in such service at the time of his disability or death, until she marries again.

(b) To the guardian of each such child, $15.00 until he becomes 18 years of age; provided, however, that the total monthly payments ordered under this subsection shall not exceed 65 per cent of the monthly salary being paid to the deceased in such service at the time of his disability or death, and there shall be a pro rata reduction in the benefits paid hereunder, if necessary, in order to comply with such limitation. If any such widow or child might be entitled to a benefit under section 66.907 (1), 66.908 or 66.909 she or he shall make application therefor within 30 days after the entry of any order directing payments in accordance with this subsection, and there shall be deducted from the payments to be made under this subsection such sums as may be paid pursuant to sections 66.907 (1), 66.908 and 66.909 because of the death of the participating employe. On or before the 15th day of January in each year any widow entitled to a benefit under this subsection shall file with the municipality which makes payments hereunder an affidavit stating that she has not married again. The monthly payment ordered to any widow under this subsection shall begin in each calendar year only after such affidavit shall have been filed with the clerk of such municipality, and no payment shall be made for any month in such year prior to the one in which such affidavit was filed. [*1947 c. 206, 362*]

102.46 Death benefit. Where death proximately results from the injury and the deceased leaves a person wholly dependent upon him for support, the death benefit shall equal four times his average annual earnings, but when added to the disability indemnity paid and due at the time of death, shall not exceed seventy per cent of weekly wage for the number of weeks set out in paragraphs (a) and (b) of subsection (3) of section 102.44, based on the age of the deceased at the time of his injury. [*1931 c. 403 s. 50; 1937 c. 180*]

Note: No death benefits could be awarded where employe's claim became barred by his failure to file application within period limited by act. Kohler v. Industrial Commission, 224 W 369, 271 NW 383.

To be totally dependent, the claimant must be wholly and solely dependent on the deceased employe for support. Burrows v. Industrial Comm. 246 W 152, 16 NW (2d) 434.

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

(1) Where the injury proximately causes permanent total disability, it shall be the same as if the injury had caused death.

(2) Where the injury proximately causes permanent partial disability, the unaccrued compensation shall first be applied toward funeral expenses, not to exceed $300, any remaining sum to be paid to dependents, as provided in this section and sections 102.46 and 102.48 and there shall be no liability for any other payments. All computations under this subsection shall take into consideration the present value of future payments. [*1931 c. 403 s. 51; 1945 c. 537*]

Revisor's Note, 1931: Next to the last sentence is a duplication of new 102.51 (4). (Bill No. 380 S, s. 51)

Where employer and employe entered into stipulation of compromise, upon which industrial commission made an award of

compensation for occupational disease, payable in instalments, right of employe was not contractual and disposition of proceeds of award remained subject to compensation act regardless of fact that award was based upon stipulation, and, accordingly, upon employe's death before all instalments had been paid, his executor could not bring action for unaccrued instalments, since, under compensation act, unaccrued instalments were to go for funeral expenses and to dependents, and commission had primary jurisdiction in matter of determining who were dependents. Dowe v. Specialty Brass Co., 219 W 192, 262 NW 605.

A widow, as a person wholly dependent on an employe receiving workmen's compensation for permanent partial disability and dying from causes not connected with his injury before disability indemnity ceased, is entitled to the employe's unaccrued compensation as a death benefit, but is limited to an amount not greater than the death benefit payable in cases of permanent total disability where the employe's death results from his injury, which death benefit is as fixed by 102.46, Stats. 1943. [Milwaukee v. Industrial Comm. 185 W 307, distinguished by different governing statutory provisions.] Vander Heiden v. Industrial Comm. 246 W 543, 17 NW (2d) 898.

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

(1) An unestranged surviving parent or parents, residing within any of the states or District of Columbia of the United States, shall receive a death benefit of $1,500. If the parents are not living together, the commission shall divide this sum in such proportion as it shall determine to be just, considering their ages and other facts bearing on dependency.

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

(3) Death benefit, other than burial expenses, except otherwise provided, shall be paid in weekly instalments corresponding in amount to fifty per cent of the weekly earnings of the employe, until otherwise ordered by the commission. [*1931 c. 403 s. 52; 1931 c. 469 s. 3; 1937 c. 180; 1947 c. 475*]

Note: Since the parents of the deceased employe were partially dependent on him, the parents were entitled to the death benefit notwithstanding that they had inherited from him more than they would have received from him had he continued to live, and that such inheritance made it improbable that the public would ever be called on to support them. Wisconsin B. & I. Co. v. Industrial Commission, 222 W 194, 268 NW 134.

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

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

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

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

(5) In each case of injury resulting in death, leaving no person wholly dependent for support, the employer or insurer shall pay into the state treasury such an amount, when added to the sums paid or to be paid on account of partial dependency, as shall equal the death benefit payable to a person wholly dependent, such payment to the state treasury in no event to exceed $2,500. The payment into the state treasury shall be made in all such cases regardless of whether the dependents or personal representatives of the deceased employe commence action against a third party as provided in section 102.29. If such payment is not made within 20 days after the commission makes request therefor, any sum payable shall bear interest at the rate of 6 per cent per annum.

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

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

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

(9) The benefits payable under this section when added to the indemnity paid and due at the time of death and those benefits payable to the surviving spouse shall not in the aggregate exceed the maximum amount that might have accrued to the injured employe for permanent total disability if death had not ensued. [*1931 c. 403 s. 53; 1931 c. 469 s. 4; 1935 c. 465; 1939 c. 513 s. 31; 1943 c. 270; 1947 c. 475*]

Note: The obligation of an employer to pay the designated amount into the state treasury where the employe dies leaving no person wholly dependent, is not restricted to partial dependency and such payment is required regardless of whether the dependent or personal representation of the deceased employe commence action against the third party, as provided in 102.29. Wisconsin G. & E. Co. v. Industrial Commission, 202 W 314, 232 NW 699.

See note to 102.08, citing Interstate P. Co. v. Industrial Commission, 203 W 466, 234 NW 889.

When injured employe makes settlement during his lifetime which disposes of entire claim of himself and his wife and has been approved by industrial commission, his minor children cannot claim benefit under this section after his death. 24 Atty. Gen. 267.

A town which sent firemen to the assistance of a resident of another town, pursuant to an arrangement between the towns, was not liable for the death of a bystander whose assistance was requested by the fire chief, since the bystander was not an employe of the assisting town. Town of Milton v. Industrial Commission, 230 W 168, 283 NW 287.

Where a minor son worked regularly after school hours as a truck driver in the business of his parents, who were partners, and he was paid at the regular wages paid to other employes for delivery work, and was allowed to keep his wages, and was delivering laundry on his regular route when accidentally killed, he was at the time of his death an "employe" under a contract of hire, within 102.07 (4), although he did not have a labor permit, lived at home, and was not required to pay for board or lodging, and hence, since he left no dependents, in that his employer-parents could not as dependents recover against their own insurance carrier, there became payable into the state treasury, under 102.49 (5), the sum of $2,000. Thomas v. Industrial Comm., 243 W 231, 10 NW (2d) 206.

102.50 Burial expenses. In all cases where death of an employe proximately results from the injury the employer or insurer shall pay the reasonable expense for burial not exceeding $300. [*1931 c. 403 s. 54; 1945 c. 537*]

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

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

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

(c) No person who is a nonresident alien shall be found to be either totally or partially dependent on a deceased employe for support who cannot establish dependency by proving contributions from the deceased employe by written evidence or tokens of the transfer of money, such as drafts, letters of credit, canceled checks, or receipts for the payment to any bank, express company, United States post office, or other agency commercially engaged in the transfer of funds from one country to another, for transmission of funds on behalf of said deceased employe to such nonresident alien claiming dependency.

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

(4) DEPENDENCY AS OF DATE OF INJURY. Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the injury to the employe, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions; and the death benefit shall be directly recoverable by and payable to the dependents entitled thereto or their legal guardians or trustees; in case of the death of a dependent whose right to a death benefit has thus become fixed, so much of the same as is then unpaid shall be payable to his personal representatives in gross.

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

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

(7) CERTAIN DEFENSE BARRED. In proceedings for the collection of primary death benefit or burial expense it shall not be a defense that the applicant, either individually or as a partner, was an employer of the deceased. [*1931 c. 14; 1931 c. 403 s. 55; 1931 c. 433; 1931 c. 469 s. 12; 1939 c. 437; 1943 c. 270; 1945 c. 537*]

Note: The right of children under eighteen years of age to compensation for the death of their father not living with his wife at the time of death is not affected by the provision restricting the right to cases where there is no surviving dependent parent, where it was not contended that the employe's wife was dependent upon him for support. The provision that the charging of full support of a child upon a divorced parent shall constitute living with the parent so charged is applicable only after a divorce is adjudged. Olson-Walker v. Industrial Commission, 207 W 576, 242 NW 350.

Son of employe by divorced first wife held "dependent," and entitled to share compensation awarded for employe's death with employe's second wife, although divorce decree awarded mother custody of son, since employe still had obligation to support son at time of employe's death. Shea v. Industrial Commission, 217 W 263, 258 NW 779.

A thirty-five-year-old son of a deceased employe, if being supported by the employe at the time of the latter's injury without any contractual obligation to do so, was "dependent," within the compensation act, so as to be entitled to a death benefit, even though the son was physically fit and mentally competent, especially where the son was being supported by the employe because the son could not find work owing to the economic depression. Northern Hotel Co. v. Industrial Commission, 223 W 297, 270 NW 66.

There being no conclusive presumption of deceased employe's grandchildren's dependency on him, their partial dependency is a fact question. Universal Foundry Co. v. Industrial Commission, 224 W 311, 272 NW 23.

A person not related to the employe by blood or marriage may be a member of the family of the deceased employe, so as to be entitled to compensation on his death. An award of benefits, on the ground of dependency, to the stepdaughter of a deceased employe, who had lived in her house, could not be based on the total contributions made by him toward the current household expenses, but must be based on the difference between the total contributions he made and the cost of his support. Duluth-Superior Milling Co. v. Industrial Commission, 226 W 187, 275 NW 515, 276 NW 300.

Under the provision in (1) a wife is deemed to be "living with her husband" when there is no legal separation and no actual separation in the nature of an estrangement. The industrial commission could properly find that a wife was "living with her husband" at the time of his death, where, although there was a physical separation and the husband was staying at the farm of a son-in-law under an arrangement made because of the husband's excessive drinking and the wife's impaired health, there was no legal separation, no actual severance of the marital relation, and no estrangement. Berg v. Industrial Comm. 236 W 172, 294 NW 506.

Under provisions in the workmen's compensation act the legislative intent was to give a husband, a wife, or a child under the age of 18 years if there is no surviving dependent parent, the benefit of a conclusive presumption of being solely and wholly dependent on the deceased employe, and to require other dependents to establish their dependency in order to share in the death benefit, but the words "solely" and "wholly" as used in (1) are synonymous, meaning total dependency on the deceased employe, and do not exclude other dependents from

sharing in the death benefit. Hence, where a son under 18 and a son over 18 were both totally dependent for support on their father, and there was no surviving dependent parent, the death benefit should have been divided between the two sons, instead of being awarded solely to the son under 18. Krueger v. Industrial Comm. 237 W 158, 295 NW 33.

On a record in a workmen's compensation proceeding showing that a wife had left her husband 11 days preceding his death, removed some of her personal effects, and commenced an action for divorce, but that there was not such ill will or such definite termination of their mutual affection and desire to preserve their marital relations as to reasonably admit of finding that there was an estrangement and such actual separation in the nature of an estrangement as to constitute a severance of the marital relation, the wife was entitled to death benefits under the provision in 102.51 (1), that a wife is conclusively presumed to be solely and wholly dependent for support on a husband "with whom she is living" at the time of his death. Samp v. Industrial Comm., 240 W 559, 3 NW (2d) 371.

It is the intent of the statutes, although fixing the status of "dependents," such as a wife, and their rights to death benefits, as of the date of injury, to provide only for dependents alive at the time of the death of the injured person. Chilovi v. Industrial Comm. 246 W 482, 17 NW (2d) 575.

Under (2) the family relationship contemplated, although it need not be a blood relationship, must consist of legitimate ties; hence an unmarried woman living with a married man cannot be considered a member of his family, and likewise her child living with them cannot be so considered. T. J. Moss Tie Co. v. Industrial Comm. 251 W 57, 27 NW (2d) 725.

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

(1) The loss of an arm at the shoulder, 500 weeks;
(2) The loss of an arm at the elbow, 450 weeks;
(3) The loss of a hand, 400 weeks;
(4) The loss of a palm where the thumb remains, 275 weeks;
(5) The loss of a thumb and the metacarpal bone thereof, 125 weeks;
(6) The loss of a thumb at the proximal joint, 100 weeks;
(7) The loss of a thumb at the distal joint, 40 weeks;
(8) The loss of all fingers on one hand at their proximal joints, 225 weeks;
(9) Losses of fingers on each hand as follows:
(a) An index finger and the metacarpal bone thereof, 60 weeks;
(b) An index finger at the proximal joint, 50 weeks;
(c) An index finger at the second joint, 30 weeks;
(d) An index finger at the distal joint, 12 weeks;
(e) A middle finger and the metacarpal bone thereof, 45 weeks;
(f) A middle finger at the proximal joint, 35 weeks;
(g) A middle finger at the second joint, 20 weeks;
(h) A middle finger at the distal joint, 8 weeks;
(i) A ring finger and the metacarpal bone thereof, 26 weeks;
(j) A ring finger at the proximal joint 20 weeks;
(k) A ring finger at the second joint, 15 weeks;
(l) A ring finger at the distal joint, 6 weeks;
(m) A little finger and the metacarpal bone thereof, 28 weeks;
(n) A little finger at the proximal joint, 22 weeks;
(o) A little finger at the second joint, 16 weeks;
(p) A little finger at the distal joint, 6 weeks;
(10) The loss of a leg at the hip joint, 500 weeks;
(11) The loss of a leg at the knee, 425 weeks;
(12) The loss of a foot at the ankle, 250 weeks;
(13) The loss of the great toe with the metatarsal bone thereof, 83⅓ weeks;
(14) Losses of toes on each foot as follows:
(a) A great toe at the proximal joint, 25 weeks;
(b) A great toe at the distal joint, 12 weeks;
(c) The second toe with the metatarsal bone thereof, 25 weeks;
(d) The second toe at the proximal joint, 8 weeks;
(e) The second toe at the second joint, 6 weeks;
(f) The second toe at the distal joint, 4 weeks;
(g) The third, fourth or little toe with the metatarsal bone thereof, 20 weeks;
(h) The third, fourth or little toe at the proximal joint, 6 weeks;
(i) The third, fourth or little toe at the second or distal joint, 4 weeks;
(15) The loss of an eye by enucleation or evisceration, 275 weeks;
(16) Total impairment of one eye for industrial use, 250 weeks;
(17) Total deafness 333⅓ weeks;
(18) Total deafness of one ear, 50 weeks. [*1931 c. 210; 1931 c. 403 s. 56, 57; 1931 c. 469 s. 13; 1947 c. 475*]

Note: The mere naming of an injury not listed in the statutory schedule is not a sufficient fact basis for a conclusion of law as to the proper compensation. The application of a rule of law to a state of facts is not "a finding of fact." Gerue v. Medford B. Co., 205 W 68, 236 NW 528.

The "healing period" within the meaning of 102.09 (5) (a) and (fm), Stats 1927, is the period prior to the time when the condition becomes stationary, and requires the postponement of fixing permanent partial disability to a time when it becomes apparent that the injured member will get no better or no worse because of the injury. Evidence that injury to an employe's leg incapacitates him from working, is still causing pain, and that the prognosis is a likelihood of necessity of amputation, is held to warrant the conclusion of the commission that the healing period has not passed, even though such evidence is opposed by very strong testimony that the condition is at present fixed and that the permanent partial disability is of much less extent than would result in the case of amputation. Knobbe v. Industrial Commission, 208 W 185, 242 NW 501.

Where an employe sustained a permanent partial disability of the index, ring and little fingers of one hand of a certain per cent at the proximal joints as compared with amputation at such joints, and an amputation of the middle finger of the same hand between the second and proximal joints, compensation for such injuries should have been computed pursuant to the statutory minor permanent partial disability schedules as provided for each injury, 102.54 and 102.55 (2), Stats. 1937. Western Condensing Co. v. Industrial Comm. 234 W 452, 291 NW 339.

102.53 [*Repealed by 1931 c. 469 s. 13*]

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

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

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

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

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

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

(2) In cases where the injured employe is above 50 years of age when injured the periods for which indemnity shall be payable, in addition to the healing period, shall be reduced from those specified in section 102.52 by 2 per cent for each year that the age of such employe exceeds 50. [*1947 c. 475*]

[*102.54 Stats. 1945 repealed by 1947 c. 475*]

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

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

(3) For all other injuries to the members of the body or its faculties which are specified in this schedule resulting in permanent disability, though the member be not actually severed or the faculty totally lost, compensation shall bear such relation to that named in this schedule as disabilities bear to the disabilities named in this schedule. Indemnity in such cases shall be determined by allowing weekly indemnity during the healing period resulting from the injury and the percentage of permanent disability resulting thereafter as found by the commission. [*1931 c. 403 s. 59; 1943 c. 207; 1947 c. 475*]

Note: Where an employe suffered an injury which resulted in an aphakic eye, and, because of consequent inability to correlate the vision of the injured eye with the uninjured eye, the employe had little or no use of the injured eye, but, in case the vision of the uninjured eye should be lost, the injured eye could be fitted with lenses which would give useful vision, it was within the jurisdiction of the commission to find that the impairment or loss of vision of the injured eye for industrial use was not total but was 74.48 per cent. Moen v. Industrial Comm., 242 W 337, 8 NW (2d) 368.

[*102.555 Stats. 1945 repealed by 1947 c. 475*]

102.56 Disfigurement. If an employe is so permanently disfigured about the face, head, neck, hand or arm as to occasion loss of wage, the commission may allow such sum for compensation on account thereof, as it may deem just, not exceeding his average annual earnings as defined in section 102.11. [*1931 c. 403 s. 60*]

102.565 Silicosis; disabling; medical examination; conditions of liability. (1) When an employe working subject to this chapter is, because he has a nondisabling silicosis, discharged from employment in which he is engaged, or after an examination of an

employe as provided in subsection (2) and a finding by the commission that it is inadvisable for the employe to continue in his employment, such employe terminates his employment, and suffers wage loss by reason of such discharge or such termination of employment, the commission may allow such compensation on account thereof as it may deem just, not exceeding thirty-five hundred dollars. In case of such discharge, prior to a finding by the industrial commission that it is inadvisable for him to continue in such employment, the liability of the employer who shall so discharge his employe shall be primary, and the liability of the insurance carrier shall be secondary under the same procedure and to the same effect as provided by section 102.62.

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

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

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

(5) If, after his discharge by an employer or after termination of his employment, the employe becomes disabled, not because of additional exposure, but due to exposure in such employer's service, any amount which shall have been paid under this section shall be credited against compensation found to be payable by such employer for disability caused by silicosis, but shall not operate to reduce the number of weeks provided under the law for disability.

(6) Payment of a benefit under this section to an employe shall estop such employe from any further recovery whatsoever from any employer under this section. [*1935 c. 465, 488; 1937 c. 180*]

102.57 Violations of safety provisions, penalty. Where injury is caused by the failure of the employer to comply with any statute or any lawful order of the commission, compensation and death benefits as provided in this chapter shall be increased fifteen per cent. [*1931 c. 403 s. 61*]

Note: Compensation can be awarded for failure to comply with a safety order only where the employer would be liable for a penalty or forfeiture under 101.28. Fritschler v. Industrial Commission, 209 W 588, 245 NW 669.

Claim for increased compensation is not barred by six-year limitations, since such claim is not a separate cause of action. Increased compensation imposed where injury is caused by employer's violation of safety orders is not a "penalty" or "forfeiture" within two-year limitation for actions on statutory penalties or forfeitures. R. J. Wilson Co. v. Industrial Commission, 219 W 463, 263 NW 204.

In order to support a conclusion that the employer failed to keep the elevator gate in proper operating condition, the evidence had to show that the gate was not in such condition, that it did not function at the time of the employe's injury, and that the employer knew or ought to have known of such condition. Badger Dye Works v. Industrial Commission, 221 W 407, 266 NW 787.

The employer's obligation to pay increased compensation for his failure to provide a safety device of the standard required by the commission's order is not excused by the fact that the employe failed to use a noncomplying, inefficient and awkward device. Daniels v. Industrial Comm., 241 W 649, 6 NW (2d) 640.

When increased compensation is claimed in a workmen's compensation proceeding on the ground that the injury was caused by the employer's failure to comply with a "lawful" order of the commission, there must be, as an essential basis for the recovery of such penalty, an order, "in conformity with law;" and when it appears in an action to vacate an award for such increased compensation that the order relied on is not in conformity with law and is therefore unlawful, the award must be set aside. Robert A. Johnston Co. v. Industrial Comm., 242 W 299, 7 NW (2d) 854.

Where the employe's injury while attempting to feed paper into the horizontal feed roll of a converting machine was caused by the absence of a guard at that point, the injury was caused by the employer's failure to comply with a safety order of the industrial commission requiring the top, "front," and open sides of horizontal feed rollers to be inclosed by a cover, warranting an award of 15 per cent increased compensation under this section, since the "front" of the roll in question was the side where the paper being processed entered. Marinette Paper Co. v. Industrial Comm. 251 W 60, 27 NW (2d) 722.

102.58 Decreased compensation. Where injury is caused by the failure of the employe to use safety devices where provided and adequately maintained, and their use is reasonably enforced, by the employer, or where injury results from the employe's wilful failure to obey any reasonable rule adopted by the employer for the safety of the employe

and of which the employe had notice, or where injury results from the intoxication of the employe, the compensation, and death benefit provided herein shall be reduced 15 per cent. [*1931 c. 403 s. 62; 1943 c. 270; 1945 c. 537*]

Note: Where an employe, intoxicated and in no condition to counsel the driver of an automobile or act for his own safety, got into the car and rode with the drunken driver, the employe's own intoxication proximately contributed to his injuries when the car left the road because of the drunken driver's default, and the compensation to which the employe would otherwise have been entitled was reduced 15%. Nutrine Candy Co. v. Industrial Comm., 243 W 52, 9 NW (2d) 94.

102.59 Pre-existing disability, indemnity, state fund, investment. (1) If an employe has at the time of injury permanent disability the equivalent of 15 per cent or more of permanent total disability, and, as a result of such injury, incurs further permanent disability the equivalent of 15 per cent or more of permanent total disability, he shall be paid from the funds provided in this section additional compensation equivalent to the amount which would be payable for said previous disability if it had resulted from such injury or the amount which is payable for said further disability, whichever is the lesser; provided, however, that if said disabilities result in permanent total disability the additional compensation shall be in such amount as will complete the payments which would have been due had said permanent total disability resulted from such injury. The payment of compensation under this section may commence at any time following the date of the second disability except that the amount paid as weekly compensation including the amount to be paid from the funds provided in this section shall not exceed the amount of weekly compensation provided in this chapter for total disability.

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

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

(4) For the proper administration of the funds available under this section the commission shall, by order, set aside in the state treasury suitable reserves to carry to maturity the liability for special additional indemnity in each case, and for any contingent death benefit. Such moneys shall be invested by the state annuity and investment board, in the securities authorized in section 206.34. [*1931 c. 403 s. 63; 1933 c. 402 s. 2; 1939 c. 261; 1939 c. 513 s. 31; 1943 c. 270*]

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

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

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

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

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

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

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

(7) The provisions of subsections (1) to (6) of section 102.60 shall not apply to employes as defined in subsection (6) of section 102.07 if the agency or publisher shall establish by affirmative proof that at the time of the injury the employe was not employed with the actual or constructive knowledge of such agency or publisher. [*1931 c. 403 s. 64; 1937 c. 401; Spl. S. 1937 c. 6; 1945 c. 537*]

Note: Double the amount otherwise recovered should be allowed for the death of a minor of permit age engaged in digging a sewer without permit for such employ-

ment. Aylward v. Industrial Commission, 202 W 171, 228 NW 133, 231 NW 599, 232 NW 535.

A father claiming treble compensation, under 102.60 (3) and 103.05 (3), for the death of a minor son injured while operating an elevator, had the burden of proving that the son's operation or use of the elevator was with the knowledge or consent of his employer. Rutta v. Industrial Commission, 216 W 238, 257 NW 15.

Burden of proof was upon employe, claiming treble damages for injuries alleged to have been sustained while he was illegally permitted to operate elevator, to establish that he was engaged in operating elevator when injured. Hills D. G. Co. v. Industrial Commission, 217 W 76, 258 NW 336.

Statute imposing double compensation for injury to minor employed without written permit held to entitle minor to double compensation, though minor was employe only by virtue of statute enlarging term so as to include all helpers and assistants of employes, whether paid by employer or employe, if employed with knowledge actual or constructive of employer. (102.60, Stats. 1931). Milwaukee News Co. v. Industrial Commission, 224 W 130, 271 NW 78.

An award of treble compensation to a minor injured in an employment prohibited as to minors of his age will not be set aside because of false representations as to age by the minor to the employer in obtaining the employment. Bloomer Brewery, Inc. v. Industrial Comm., 239 W 605, 2 NW (2d) 226.

For purposes of primary compensation an employe is impliedly authorized to do work other than that for which he may be specifically employed; but for purposes of treble compensation to an employe who is a minor, 102.60 (3) requires that he shall be "employed, required, suffered, or permitted" to work at prohibited employment, and contemplates that the authority to do the prohibited work in which he was engaged at the time of injury shall be fairly inferred from the terms of a specific employment or pursuant to a specific requirement imposed without its terms or that it shall be done with the employer's knowledge and acquiescence. Anderson v. Industrial Comm. 250 W 330, 27 NW (2d) 499.

102.61 Indemnity under rehabilitation law. An employe who is entitled to and is receiving rehabilitation instruction pursuant to section 41.71 shall, in addition to his other indemnity, be paid a sum sufficient to maintain him during rehabilitation, subject to the following conditions and limitations:

(1) He must undertake the course of instruction within sixty days from the date when he has sufficiently recovered from his injury to permit of his so doing, or as soon thereafter as the state board of vocational and adult education shall provide opportunity for his rehabilitation.

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

(3) He may not have maintenance in excess of ten dollars per week during training, nor for a maintenance period in excess of twenty weeks in all.

(4) The commission shall determine the rights and liabilities of the parties under this section in like manner and with like effect as it does other issues under compensation. [*1931 c. 403 s. 65; 1937 c. 349*]

Note: Proceedings before the commission had in accordance with the practice adopted by the commission, with apparently universal acquiescence, ever since the original enactment of the compensation act, including hearings and taking of testimony by an examiner appointed by the commission, were in compliance with the act as thus practically interpreted, and cannot be held to have disregarded or impaired any right of the claimant. Derong v. Industrial Commission, 209 W 88, 244 NW 591.

102.62 Primary and secondary liability; unchangeable. In case of liability for the increased compensation or increased death benefits provided for by section 102.57, or included in section 102.60, the liability of the employer shall be primary and the liability of the insurance carrier shall be secondary. In case proceedings are had before the commission for the recovery of such increased compensation or increased death benefits the commission shall set forth in its award the amount and order of liability as herein provided. Execution shall not be issued against the insurance carrier to satisfy any judgment covering such increased compensation or increased death benefits until execution has first been issued against the employer and has been returned unsatisfied as to any part thereof. Any provision in any insurance policy undertaking to guarantee primary liability or to avoid secondary liability for such increased compensation or increase death benefits shall be void. [*1931 c. 403 s. 66*]

Note: Compromise agreement between injured employe and compensation insurance carrier, which purported to release insurer and employer from all liability, did not relieve employer from statutory liability for increased compensation for injury caused by employer's violation of safety orders, since insurer, whose liability for such increased compensation was secondary, could not, under compensation act, bargain for release of primary liability of employer. R. J. Wilson Co. v. Industrial Commission, 219 W 463, 263 NW 204.

102.63 Refunds by state. Whenever the commission shall certify to the state treasurer that excess payment has been made under section 102.59 or under subsection (5) of section 102.49 either because of mistake or otherwise, the state treasurer shall within five days after receipt of such certificate draw an order against the fund in the state treasury into which such excess was paid, reimbursing such payor of such excess payment together with interest actually earned thereon. [*1931 c. 403 s. 67*]

102.64 Attorney-general shall represent state and commission. (1) The attorney-general shall represent the state in all cases involving payment into or out of the state

treasury under the provisions of subsection (3) of section 20.07, and sections 102.49 and 102.59. He shall have power to compromise the amount of such payments but such compromises shall be subject to review by the commission.

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

(3) In any action to review an order or award of the commission, and upon any appeal therein to the supreme court, the attorney-general shall appear on behalf of the commission, whether any other party defendant shall be represented or not, except that in actions brought by the state the governor shall appoint an attorney to appear on behalf of the commission. [*1931 c. 403 s. 68*]

Revisor's Note, 1931: Section 102.64 is from third and four sentences of 102.16 (1); and 102.17 (5); and the second sentence of 102.26 (1) without change of meaning. (Bill No. 380 S, s. 68)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) REPORTS AND PAYMENTS INTO STOCK FUND. (a) Every stock carrier shall, on or before July 1, 1936, file with the commissioner of insurance, under oath, on a form pre-

scribed and furnished by the commissioner of insurance, stating the amount of earned premiums on policy year nineteen hundred thirty-four under policies issued or renewed to insure payment of benefits under this chapter. Thereafter, on or before the first day of July of each year, each such carrier shall file similar returns, stating the amount of such earned premium on policy years after nineteen hundred thirty-four.

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

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

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

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

(6) RECIPROCAL WORKMEN'S COMPENSATION SECURITY FUND. There is created a fund to be known as "the reciprocal workmen's compensation security fund," for the purpose of assuring to persons entitled thereto the benefits provided by this chapter for employ-

ments insured in insolvent reciprocal carriers. Such fund shall be applicable to the payments due under the provisions of this chapter, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this section, of an insolvent reciprocal carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by reciprocal carriers, as herein defined, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the commissioner of insurance and the industrial commission in accordance with the provisions of this section.

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

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

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

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

(10) CUSTODY AND INVESTMENT OF FUNDS. The funds created by this section shall be kept separate and apart from all other state moneys, and the faith and credit of the state of Wisconsin is pledged for their safekeeping. The state treasurer shall be custodian

of said funds; and all disbursements from said funds shall be made by the state treasurer upon vouchers signed by the commissioner of insurance, or his deputy, as hereinafter provided, except that the moneys of said funds may be invested by the state annuity and investment board pursuant to section 25.17. Interest income from such investments shall be credited to the proper fund. All purchases and sales of investments shall be based upon statements of fund balances and requirements to be furnished periodically by the commissioner of insurance and the industrial commission.

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

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

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

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

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

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

nor a statement of the annual receipts and disbursements and the condition of each fund. [*1935 c. 485; 1939 c. 513 s. 32; 1947 c. 469*]

Note: Unpaid award to injured employe against foreign mutual insurance company which insured employer at time of accident and later withdrew from Wisconsin and assigned assets to foreign stock company, upon failure of assignee company to meet payments should be paid from "mutual fund" set up by (4) and recovery therefor may be made by state treasurer under (11) from liquidator of assignee company. 27 Atty. Gen. 401.