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The Industrial Accident Commission's Dilemma and a Proposed Remedy

The preceding exposition, by Mr. Donald Gallagher, of the actual working of the Industrial Accident Commission in adjudicating contested claims for compensation is highly enlightening. The assumption has long been indulged that the Commissioners themselves decide contested claims, because the statute so requires, and the decisions promulgated as decisions of the Commission purport on their face to be Commission decisions. Mr. Gallagher, with his intimate knowledge of the actual, as contrasted with the mere paper appearance, of the internal procedure has shown that that assumption has been almost one hundred per cent wrong. The question is, what is to be done about it?

I doubt very much Mr. Gallagher's suggestion that the continuing jurisdiction given the Commission over its purported decisions can be exercised to prevent the state supreme court's passing upon the legality of the Commission's procedure. Failure of an inferior adjudicating tribunal to follow the procedure prescribed by law is plainly an error of law, redressable by a reviewing court. Instances are too numerous to need citation. It is so common that we have a phrase for it, "trying the trial,"—meaning that the reviewing court examines the procedure followed by the trial tribunal to determine whether the latter has conformed to the requirements of statute or constitution. Nor is the reviewing court stopped by the superficial appearance of regularity on the face of the record. In the first of the two Morgan cases the United States Supreme Court remanded the case to the District Court to "try the trial," to take evidence on the question whether the Secretary of Agriculture had himself given the "full hearing" that the statute required of him.¹

¹ Morgan v. United States (1936) 298 U.S. 468. That the Secretary of Agriculture was engaged in making a rate-order, usually termed quasi-legislative, does not distinguish the case from an inquiry whether the Industrial Accident Commission pursues the statutory procedure in discharging its judicial function. While the result of the Secretary's procedure was an order quasi-legislative in character, the United States Supreme Court said that the procedure prescribed by the statute for arriving at the result resembled judicial procedure. "The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts... If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." Ibid. at 480. If a reviewing court may rightly decide, when the question is raised, whether an administrative officer required by statute to observe "the tradition of judicial proceed-
The alarming situation is that if the state supreme court should require the Industrial Accident Commission actually to decide contested claims in the manner the statute commands, it will be found utterly impossible for the Commission to carry the load. The load would be beyond the endurance of three commissioners even if all three were qualified by training and experience for the task and devoted most of their time to it.

Our first workmen's compensation law, the Roseberry Act, adopted in 1911, was administered by an Industrial Accident Board. It was assumed that the Board could do all the adjudicating. It was authorized to appoint examiners "for such length of time as may be required" but examiners, when used, were merely to report the evidence to the Board for its consideration. The Board took seriously the injunction of the statute:

"Sec. 16. After final hearing by said board, it shall make and file (1) its findings upon all facts involved in the controversy, and (2) its award, which shall state its determination as to the rights of the parties."  

The Roseberry Act was "elective,"—applicable solely where both employer and employee elected to accept its provisions. It was in force only from September 1, 1911, to January 1, 1914. While the number of employers and employees who elected to come under the act was not inconsiderable, it was far below the number that became subject to the Boynton Act, effective January 1, 1914, which was compulsory for numerous classes of employers and their employees. The Boynton Act made numerous improvements in the law but made no substantial change in the procedure. The Industrial Accident Board became the Industrial Accident Commission. The legislature

ings" has done so, much more certainly may it enquire whether an inferior judicial body has acted as such, or has become a mere rubber stamp.

The Supreme Court said that the Secretary's "recitals of his procedure cannot be regarded as conclusive." Accordingly, on the remand to the United States District Court that court took evidence including testimony of the Secretary and his assistants as to what his procedure had been. On this evidence it concluded that the Secretary had in fact given the "full hearing" which the Supreme Court seemed to require. Morgan v. United States (1937) 23 Fed. Supp. 380. On appeal the Supreme Court again reversed the district court and annulled the Secretary's order because the "hearing was fatally defective." Morgan v. United States (1938) 304 U. S. 1, and opinion on denying rehearing (1938) 304 U. S. 23. True the defect finally found was different from the alleged defect most commented upon in the Supreme Court's opinion in 298 U. S. but the second decision also held that it is the duty of a reviewing court to determine whether an inferior body has actually pursued the judicial procedure enjoined upon it by statute.

2 Cal. Stats. 1911, p. 803.
3 Ibid.
4 Act of May 26, 1913, Cal. Stats. 1913, p. 279.
realized the necessity of permanent referees and provided for them, but while in any referred case a referee was to "try any or all issues . . . whether of fact or of law" he was only "to report a finding, order, decision or award to be based thereon," that is, make a recommendation to the Commission. Section 25 of the new act repeated almost verbatim section 16 of the Roseberry Act, quoted above:

"After final hearing by the commission, it shall . . . make . . . its findings . . . and its award which shall state its determination as to the rights of the parties."

The experience under the Roseberry Act had not warned of the load of cases to come. The Board found it necessary to hold only ten formal hearings and to render decisions in only eight cases, during the first sixteen months of its operation. Down to January 1, 1914, when the Boynton Act went into effect, there had been filed for formal adjudication only 69 cases. During the first six months after the Boynton Act went into effect the Commission decided 218 cases. The following twelve months 1151 cases were filed for formal adjudication. For an equal period two years later the number was 1655. For the year July 1, 1922 to June 30, 1923, the number was 2480.

The state was unusually fortunate in having on the Board under the Roseberry Act and on the Commission under the Boynton Act two such able men as A. J. Pillsbury and Will J. French, not to minimize the contribution of others who served with them from time to time. The Board sat as a board and studied the records and the evidence before rendering decision. The Commission, under the Boynton Act, seems for a time to have followed this practice, in spite of the increase in the number of the cases. The Commissioners even wrote opinions quite comparable to good appellate court opinions, in numerous cases. There were dissents and dissenting opinions, sometimes on the weight of the evidence. And there is at least one case in which all three of the Commissioners wrote separate opinions, one a dissenting opinion.

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6 Ibid., § 76, p. 313.
7 Ibid. at 292.
8 Cal. I.A.C. Rep. 1911-12, p. 5.
9 Ibid. 1913-14, p. 10.
10 The number of cases "filed" each year, as shown in the Commission's reports, is close to the number decided in the same period. Thus the number "filed" July 1, 1920 to June 30, 1921 was 2219, and the number decided in that period was 2056. The following year, filed 2187, decided 2277. See Cal. I.A.C. Rep. 1921, pp. 14-15.
It is no secret, however, that even these able Commissioners succumbed to the ever increasing number of cases, and the burden of their other important duties. A. J. Pillsbury had had a legal training, was possessed of a keen and discriminating mind well adapted to the intricate questions of law and fact that frequently arose. Gradually the Commission's judicial function was more and more borne by him. In a large majority of cases he became the Commission in the adjudication of cases. Before he retired, July 1, 1923, he had found it impossible to read the evidence in any but exceptionally important cases. He came to render decisions, in most cases, on the basis of referees' summaries of the facts, one or both of the other Commissioners concurring, usually pro forma. Indeed before he left the Commission the practice had been adopted of transcribing the stenographic notes of the evidence "only in exceptional cases." And the report of the Commission for the year 1922-23 states:

"In ordinary, simple cases, decision is made by the referee direct, and later approved or disapproved by the Commission."

I think the words I have italicized were even then an understatement. What this approval or disapproval by the Commission has become in nearly all cases in recent years has been made obvious by Mr. Gallagher. Mr. Delger Trowbridge, previously a member of the Commission, said in 1936, "except for such supervision and control as the commissioners themselves may choose to exercise, the referee completely carries on the judicial work of the commission."

This sketchy history of the Commission's arriving at its present unlawful procedure gives ground for condonement. Indeed it puts the blame upon the statute and upon failure to amend the law.

A few years ago Wisconsin faced a similar situation. The Wisconsin Industrial Commission consisted, and still consists, of three members. It was authorized to appoint "examiners," like California "referees," to hold hearings and take testimony. The statute contemplated that the decisions should be made by the Commissioners acting as a body. Thus the statute provided:

"After final hearing the commission shall make and file its findings upon all the facts involved in the controversy, and its award, which shall state its determination as to the rights of the parties,"—the same language as in the California statute.

13 Ibid.
While judicial review of the Commission's decisions in Wisconsin is in a circuit court with appeal to the supreme court, and in California is in a district court of appeal or directly in the supreme court, this difference is not significant, for the scope and limitations of the courts' power to review is identical and is expressed in almost identical words in the two states.16

Under this statutory set-up the following practice developed:

"Each examiner, after a period spent conducting hearings, was given a week within the office to prepare his report on the cases heard. After a preliminary study this examiner with his notes in hand sought out one of the commissioners in his office. If the latter had time available a conference was held between the two at which the examiner, using his hearing notes for the purpose, presented each case as it appeared to him. The stenographic transcript was read only in those rare instances where it became necessary because of the inability of the examiner to clearly recall the tenor of the testimony at the hearing. The examiner then indicated to the commissioner what he thought the decision should be, and if the latter approved, the former was directed to draw up the Commission's findings and award in the case. This, when prepared, was signed by the commissioner, whose signature was then sufficient warrant for the other two commissioners to sign without further investigation. In ninety-nine cases out of a hundred this procedure resulted in the Commission approving the examiner's view of the case."17

The conformity of this practice with the statutory requirement was questioned in 1921.18 On review the circuit court had affirmed an award. On appeal to the supreme court appellant's counsel undertook to raise the point in his brief: "that the award was not made by the Commission acting as a body; that the record was prepared by an examiner of the Commission and submitted to the commissioners individually and approved by them separately."19

The Wisconsin Supreme Court held that the point could not be raised by mere assertion in a brief and affirmed the award on the "presumption of regularity of official acts" which prevails in absence of a proper showing of irregularity. Obviously the point should have

16 § 102.23. The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive. . . . the court may confirm or set aside such order or award; . . . 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."

Cf. CAL. LABOR CODE §§ 5952, 5953.

17 BROWN, ADMINISTRATION OF WORKMEN'S COMPENSATION [in Wisconsin] (1933) 69.

18 Hackley-Phelps-Bonnell Co. v. Cooley (1921) 173 Wis. 128, 179 N.W. 590.
19 Ibid. at 132, 179 N.W. at 591.
been raised by pleading in the circuit court. The supreme court made this significant statement:

"It would be indeed surprising if a party had no opportunity to show, if such be the fact, that a document in the record purporting to be the findings and award of the Commission was in fact not the act of the Commission." 20

In 1931 the Commission began setting aside one morning a week for a conference of all the commissioners with the examiners to go over the latters' reports on cases unusually difficult or involving large awards, and the commissioners together decided on the orders to be made in these cases. 21 This was an admission of and only a partial cure of the irregularity of their usual procedure. In 1933 an investigator reported:

"In an unofficial way the Commission has long recognized the irregularity of its procedure but feels compelled, because of the pressure of the work upon it, to adopt the course that it has." 22

In 1933 the legislature rescued the Commission from this dilemma. It changed the three commissioners from a trial body into a review board, and authorized trial examiners to make decisions that should be final unless an appeal were taken to the commissioners for review. 23 An appeal to the review board was made a prerequisite to seeking review in the circuit court.

In 1936 the Wisconsin Commission reported that the change had resulted "in speedier and more carefully considered decisions." They also said:

"During the biennium July 1, 1934, and July 1, 1936, the total number of petitions for review from examiners' decisions to the Commission as a body was 485. This number of cases constitutes about 14% of the total number of matters decided by examiners." 24

Likewise, in Minnesota, referees' decisions are final subject to appeal to the Commission for review, and subject to appeal therefrom direct to the supreme court. The Minnesota Commission has said:

"Appeals to the commission [from referees' decisions] are heard by the entire commission in its office in St. Paul. There are three commissioners, and the rules provide that not less than two may hear an appeal. Appeals are on the transcript of the testimony and exhibits and with oral argument

20 Ibid. at 133, 179 N.W. at 592.
21 Dodd, ADMINISTRATION OF WORKMEN'S COMPENSATION (1936) at 259.
22 Brown, op. cit. supra note 17, at 71.
23 Wis. Laws 1933, pp. 865-867, amending § 102.18 of the statutes.
24 Eighteenth Report, Wisconsin Industrial Commission. For this reference I am indebted to Professor Ray A. Brown of the University of Wisconsin Law School. See later statistics at p. 285, infra.
and citations of authorities. Written briefs are permissible, and are often resorted to in the more important cases.\footnote{25}

This smacks a bit of formality that is not essential to this plan of appeals, and a commission can guard against it through its power to prescribe rules of practice and procedure.

While the machinery set up for administration of workmen’s compensation laws still shows much variation among the several states,\footnote{26} the tendency, especially in the larger industrial states, is toward giving finality to referees’ or trial-examiners’ decisions subject to appeal either to the Commission or to some appellate board.

Such is the system in Pennsylvania\footnote{27} and essentially so in New York, although in the latter, while referees’ decisions are final unless reversed or modified by the Industrial Board, the board may review either on appeal or on its own motion.\footnote{28} In Massachusetts the system is essentially the same. There the Industrial Accident Board consists of seven members and there are no deputies, referees or examiners. A single member holds the trial hearing. He actually is the trial examiner and his decision is final subject to appeal to a “reviewing board.” A reviewing board consists of three to five members varying with the character of the issue.\footnote{29} The Massachusetts board is not charged with administration of any other state laws than the compensation act.\footnote{30}

So, in Illinois an arbitrator’s (referee’s) decision is final unless appeal is taken to the Commission. In Ohio, the only other large industrial state, comparable to California, a referee has power merely to recommend a decision, not to make one. The evidence taken by a referee is transcribed and his record referred to a Commissioner who goes over it in the presence of the parties or their representatives, if they choose to appear, and renders a decision. The law provides that the decision of a single Commissioner shall be deemed to be the decision of the Commission when approved and confirmed by a majority of the members. “It is the practice of the commission as a whole to accept and approve the decisions of its individual members as a matter of course.”\footnote{31} Thus while the three Ohio Commissioners individu-

\footnote{25}{Brown, op. cit. supra note 17, at 71 n.}
\footnote{26}{Dodd, op. cit. supra note 21, c. V.}
\footnote{27}{Pa. Stat. (Purdon, Compact ed. 1936) tit. 77, §§ 801-856.}
\footnote{28}{N. Y. Labor Law (1921) § 19.}
\footnote{29}{Dodd, op. cit. supra note 21, at 111, 112, 324.}
\footnote{30}{Ibid. at 111.}
\footnote{31}{Ibid. at 289.}
ally struggle with an enormous task of adjudicating claims, they find it impossible to do so by board action.

Adjudication of contested claims by the three Commissioners in California, by board action or otherwise, obviously is impossible. As shown above, the number of claims to be adjudicated per annum had jumped to about 2500 by 1923. Accurate comparable figures for recent years are not available. My own doubtful guess from the figures that are available is that the burden of adjudication in 1938 was more than double that of 1923. Experience in California and in other states has shown that this burden can be borne only by a sufficient number of trial-examiners or referees of which there are now about twenty in the Industrial Accident Commission. In actual practice they do carry the load. I propose that the statute be amended, in the light of this experience. I propose that by statute referees' decisions be made final unless either or both parties petition for review by a board of review within the Commission; that a review board consist of three experienced referees assigned from the regular panel of referees, and that there be two such reviewing boards, one in Los Angeles and one in San Francisco. Judicial review of final decisions should remain as at present, by writ of review in the district courts of appeal or in the supreme court. An appeal from the decision of a single referee to a review board would take the place of the present petition for a rehearing by "the commission," and like it, would be a prerequisite to carrying the case to a court. The decision of a review board on all issues of fact should have the same finality in subsequent court proceedings that the law and the supreme court's decisions now accord to the findings of fact by "the Commission." The difference would be that the original intendment of the statute would be given practical operation, namely, that an opportunity be given the contestants to have the facts found by a multiple body. The expectation is that appeals to boards of review would be no more numerous than petitions for rehearing now are, and that in a great majority of cases the decision of the trial referee would be accepted by the parties. The gist of the proposal is to give legal effect to the trial referee's decision, yet to allow appeal within the Commission when either party is dissatisfied with that decision. The review board should have power to consider the whole case both as to law and facts.

32 See the note appended to this discussion, infra at p. 283.
"Any one familiar with workmen's compensation litigation... knows full well that in ninety per cent. of the cases it is the commission's determination of the facts which is the conclusive and decisive factor."\(^{33}\)

The courts in California in reviewing compensation cases have nothing to do with the facts beyond enquiring whether there is almost a complete lack of evidence to support the finding. It would be impractical to change the scope of court review, and extend it to a trial de novo, or even to an independent weighing of the evidence contained in the record.\(^{34}\) The burden on the courts would be enormous, and the result a wasteful duplication of labor. Under such a system the adjudicating function of the Commission, as an expert special court in its limited field, might as well be abolished. Where court review of the evidence is denied, it is highly desirable, some would say imperative, that there be an opportunity for complete review by an appellate board within the Commission. The Federal Longshoremen's and Harbor Workers' Compensation Act is almost the only compensation act under which the sole appeal from the trial examiner's ("deputy commissioner's") decision is to the courts. Congress probably felt forced to adopt this system because it was not feasible to provide a review board accessible to suitors throughout so great an area as the United States.

But why should the review boards consist of referees rather than the three Industrial Accident Commissioners?

Commissioners are appointed for four year terms. While there have been able commissioners in this state who have been repeatedly reappointed, experience of recent years shows that this cannot be relied upon here any more than in other states. An investigator of the Wisconsin Commission commented in 1933 upon the "unusual continuity of service" of the commissioners in that state. While his report was being published he had to append a footnote, stating that a change in governors had resulted in displacing two long-serving commissioners by two new appointees "without so far as is known any previous appreciable experience in workmen's compensation work."\(^{35}\) The workmen's compensation statute itself is far from a

\(^{33}\) Brown, Administrative Commissions and the Judicial Power (1935) 19 Minn. L. Rev. 261, 274.

\(^{34}\) The 1938 Report of the American Bar Association's Committee on Administrative Agencies and Tribunals, though in general insisting upon more extensive judicial review of administrative action, states: "It may well be... that workmen's compensation is one type of administrative activity in which a limitation of the [court] review to questions of law is indicated as the more workable system..." P. 114.

\(^{35}\) Brown, op. cit. supra note 17, at 19-20, n.
simple body of law, and in compensation cases issues may arise requiring for their solution a knowledge of numerous other branches of law. Without graduation from a first class law school supplemented by additional study of the compensation law, a lay appointee to the office of commissioner would find his first term of office almost expired before he became competent to adjudicate compensation cases. Indeed, it has frequently been urged that a compensation adjudicator should have a first class medical education as well as a first class legal education. This would require higher salaries than the state would be willing to pay. A commissioner should be selected for executive ability and wisdom in supervision and direction of policy. Primarily he should be deeply sympathetic with the purposes of workmen's compensation. I would be the last to suggest that he be a lawyer. Such a commissioner would be no more qualified to adjudicate litigated cases than to perform the functions of the Commission's engineers in making safety regulations or of the Commission's doctors in determining the extent of an injured man's disability. Functions requiring expert knowledge should be left to those who possess it by reason of schooling or experience.

On the other hand, referees are chosen solely with respect to their fitness for their special task, and have permanency of tenure under the civil service. The "minimum qualifications" for appointment as referee, prescribed by the State Personnel Board, though long, should be read:

"Active membership in the State Bar of California, and either (1) education equivalent to that represented by graduation from a law school of recognized standing and five years of experience in the practice of law, or (2) some other equivalent combination of education and similar experience; thorough knowledge of the principles and provisions of workmen's compensation laws, of leading court decisions in California on the subject of workmen's compensation law, and of the conduct of proceedings in a trial court and the rules of evidence governing such proceedings; working knowledge of medical, physiological and anatomical terminology in relation to cases of industrial injury; working knowledge of the purposes and organization of the Industrial Accident Commission; working knowledge

I doubt the requirement of so much experience in the practice of law. Barring periods of economic depression able lawyers established in practice after five years could not be expected to transfer to positions carrying such small salaries, in spite of the security of tenure under civil service. The primary qualities should be intelligence, good legal education, and "knowledge of and sympathy with the underlying philosophy of workmen's compensation. . . ." Three years of law practice would suffice for a beginning referee, no doubt leaving much to be learned by experience. With adequate review by senior referees the errors of the beginner would be corrected.
of the procedure before the Industrial Accident Commission; knowledge of and sympathy with the underlying philosophy of workmen's compensation legislation; ability to conduct hearings in a manner that will obtain all pertinent evidence and secure the confidence and respect of all parties; ability to analyze, appraise, and apply legal principles, evidence, and precedents to legal problems; ability to make accurate summaries of evidence and to prepare appropriate findings, awards, orders and other legal documents relating to claim cases; ability to size up situations and people accurately, to adopt an effective course of action, and to get along well with others; ability to address an audience effectively; integrity; initiative; resourcefulness; tact; firmness; impartiality; judicial temperament; clear enunciation; neat personal appearance; pleasing personality; good judgment in legal matters and in the conducting of hearings; normal hearing; good health and freedom from disabling defects."

It is true that this shoots at an ideal difficult of attainment under a salary range from $320 to $400 a month. Obviously, however, it is a brave attempt to get men properly qualified for the job.

With the Commissioners removed from the statutory duty of adjudicating cases, a duty they have not been discharging, what functions have they left? It must be remembered that the adjudication of contested claims though important is only a part of the functions of the Commission. It is only in the discharge of this function that the supreme court holds it to be a court. "The Industrial Accident Commission, in awarding compensation under the . . . Act, is a judicial body, and exercises judicial functions. . . ." 78

Mr. Gallagher has enumerated some of the important administrative functions of the Commission outside of the adjudication of contested claims. 88 The largest of these is administration of the State Compensation Insurance Fund. Here the Commissioners correspond to the board of directors in a private insurance company. Through this agency the state carries on about one-third of all the industrial accident insurance business done in the state, carrying for employers the risk of liability for compensating their injured employees. Premiums paid to it by policy holders run to $10,000,000 a year. Payments to beneficiaries of its policies run over $5,000,000 a year, and dividends returned annually to policy holders run over $3,000,000. The Commission as a board of directors administers the fund through a manager appointed by it, and a total personnel of about 500. It is difficult to classify this administrative task as other than executive.

37 Carstens v. Pillsbury (1916) 172 Cal. 572, 576, 158 Pac. 218 (Italics added) and see Note (1936) 24 Calif. L. Rev. 328, Is the California Industrial Accident Commission a Court?
38 See text, supra pp. 241-242.
In another important field the Commission exercises a subordinate legislative function, usually called quasi-legislative. The Safety Department of the Commission through its engineers has issued volumes of safety regulations for numerous branches of industry. The issuance of a code of regulations for a single industry requires months of study, many public hearings and investigations. These regulations have the force of law. Through its regulations and safety orders, its inspections and its educational propaganda, this department is justly entitled to credit for a large decrease of the per capita number of serious industrial injuries in the state.\(^{39}\)

Thus, administering the workmen's compensation law is only one of the three larger functions of the Commission. Even in administering the compensation law there are important purely administrative duties. Among these may be mentioned, granting or refusing permits to employers to carry their own risks without insurance, so-called self-insurance; approving or disapproving commutations and compromises, giving advisory permanent disability ratings, and making medical examinations. In addition there is an important field, which to me seems not sufficiently cultivated by the Commission, that of administratively conciliating claims to avoid their coming to actual contest. Much work of this kind is done, however.\(^{40}\) None of these functions falls within the judicial category.

Admitting the existence of these important purely administrative functions, I doubt whether there is any need for three Commissioners. After all, the Commissioners' task is one of supervision of experts who actually do the work in their respective fields. Is not a one-man commission, a single commissioner, more effective as a general executive and director of policy? My own answer is yes. The statute might be amended to provide that no vacancy occurring in the office of Commissioner be filled until the Commission is reduced to one man, and that thereafter there be a single Commissioner. At the same time this office of Commissioner should be a separate office from that of

\(^{39}\) See Second Biennial Report of the Department of Industrial Relations (1930-32, the last published) 33-42.

\(^{40}\) A secretary in the San Francisco office estimates that he gives personal interviews to the number of 3500 a year and answers approximately as many letters, enquiring about compensation rights before compensation claims are formally filed. An unknown number of contests undoubtly is thus avoided. Such advisory service is one of the advantages of an administrative agency. No court gives advance advice as to legal rights. (The 7000 calls and letters, does not mean 7000 persons, for two or more calls or letters may come from one person.)
the Director of Industrial Relations. The Department of Industrial Relations covers too wide a field for its director also to act either as chairman of the Industrial Accident Commission, as the law now provides, or as the single Industrial Accident Commissioner should the Commission be reduced to one. I am not proposing, however, to take the Industrial Accident Commission out of the Department of Industrial Relations.

THE PROPOSED REMEDY

The proposal is to amend the statute to vest the administration of the workmen's compensation law, the workmen's safety law and the State Compensation Insurance Fund in an administrative body to be called the Industrial Accident Commission which shall consist of a Commissioner, referees, engineers, medical men, statisticians, actuaries, accountants, inspectors, other experts, secretaries and clerical assistants. But, this, you say, is what the law now does. Yes, and no. Yes, with respect to the scope of the Commission's jurisdiction, but no, as to the composition of the Commission. The law now defines the Commission as "consisting of three members," the three Commissioners. This is the vital defect from a legal point of view and is followed up in the statute by vesting all the important functions in these three acting as a board.

I propose a realistic change—that the statute be amended to express the concept that the Commission is an administrative body consisting of its total personnel. I believe that an administrative body so conceived and so composed may be created by the legislature, without amendment of the state constitution. I think such an administrative body may be created by the legislature under the authority given it by section 21, article XX of the constitution as it now stands.

With that start the revised statute may make a distribution of the various functions among the personnel as is appropriate to their qualifications, or vest in the Commissioner a wide discretion in assigning duties among the personnel of the Commission.

As to the adjudication of contested claims it may provide that the decisions of trial referees shall be the decision of the Commis-

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41 Cal. Labor Code §111.
42 Ibid. V, pt. 1.
44 Cal. Labor Code § 111.
45 The statute should not fix the personnel in precise numbers of the various categories but leave opportunity for increase or decrease within the limits of the budget as
sion, if no petition for review is filed within a stated time with the Commissioner. In case a petition for review is filed the Commissioner shall assign the case for review by a board of three senior referees, referees of three or more years experience, the decision of a board of review to be the decision of the Commission, without any further action whatsoever in the Commission, the only appeal therefrom to be to the courts, as at present, by writ of review.

The statute may itself provide for two boards of review, one in San Francisco, one in Los Angeles, or authorize the Commissioner to establish them. All personnel may be appointed as the statute now provides except that appointing power now vested in the Commission should be vested in the Commissioner.

Care should be taken not to divorce the referees completely from the general supervision of the Commissioner. He should be authorized to designate referees to the reviewing boards to sit there at his pleasure. They should be subject to his direction on all questions of policy, even in matters of policy with respect to interpretation of the compensation law, but he should have no control whatever over their decisions in specific cases. In the last resort the courts redress errors of law. Because of this supervisory jurisdiction of the courts diverse rulings on the law between the northern and the southern review boards would quickly be ironed out.

Two important details are (1) the scope of the review and (2) the procedure of review. The provisions of the present law with respect to rehearings are admirably suited to the proposed review, on both}

at present. Excluding the chairman of the Industrial Accident Commission who is also Director of the Department of Industrial Relations and excluding the Director's general administrative staff, the budget for the biennium 1937-39 discloses the following numbers and types of personnel of the commission: (1) General Administration: 2 commissioners, 1 attorney, 1 assistant attorney, 1 secretary, 1 referee (assigned to administrative duties), 1 field-secretary and 12 clerical assistants; (2) Accident Prevention: 1 chief of bureau, 1 assistant chief of bureau, 29 in the category of "engineer and inspector," or assistant or supervising "engineer and inspector" and 15 clerical assistants; (3) Hearings and Compensation: 1 chief of bureau, 20 referees, 18 hearing reporters, 1 supervising hearing reporter, 1 permanent-disability-rating expert, 1 medical director, 2 assistant medical directors, 1 medical examiner and 42 clerical assistants of various grades; (4) Special Surveys: 1 supervising labor statistics clerk, and 4 assistants.

The United States Employees' Compensation Commission has no right to supervise the deputy commissioners in their decision of specific cases but "may by general regulation instruct the deputy commissioners as to the interpretation of the law to be adopted by them in the absence of a controlling court decision," according to an opinion of the Attorney General. (1931) 36 Ops. ATT'Y GEN'L 465, 468. I am indebted to United States Deputy Commissioner Warren H. Pillsbury for this reference.

CAL. LABOR CODE §§ 5900-5910.
these points. The present law supposes that the Commission as such shall render the initial decision and provides that any person aggrieved may apply to the Commission for a rehearing. But rehearing petitions at the present time are passed upon by single referees with only that perfunctory approval by the Commissioners that they give to original decisions, as described by Mr. Gallagher. The review upon rehearing contemplated by the statute opens every issue of law and fact. The procedural provisions provide for narrowing the issue to the exact points complained of and exclude new evidence except where it is both "material" and could not with reasonable diligence have been produced at the original hearing.

Substitute for the rehearing a review of the same scope by a board of three senior referees and the intended plan of review is given a new birth.

THE CONSTITUTIONAL QUESTION

How can it be said that this proposed change in the organization of the Commission is contrary to section 21 of article XX of the constitution?

That section reads in part:

"The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create and enforce a complete system of workmen's compensation. . . . A complete system of workmen's compensation includes . . . full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation. . . ."

The second paragraph reads in part:

"The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination. . . ."

When this section was adopted in 1918, it is true that the Commission then in existence, as created by statute, was "a board to consist of three members . . . which shall be known as the 'industrial accident commission,'" but the new section 21 of article XX does not purport to adopt this statutory creation in the form it then had.

48 A casual reading of Labor Code § 5903 might raise a doubt, because it purports to confine the review to "one or more of the following grounds and no other," enumerating five grounds. These grounds, however, cover every issue of law or fact. Italics supplied.

49 Section 3 of the Boynton Act, Cal. Stats. 1913, p. 280. The Act of May 23, 1917, otherwise extensively amending the Boynton Act, gave statutory continuance to the Commission "as created" by the former law. Cal. Stats. 1917, p. 833.
I concede that a plausible argument to the contrary may be based upon the third paragraph of section 21 of article XX which reads:

"Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the industrial accident commission of this State or the State compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed."

But the argument would not be sound. To sustain it, the paragraph just quoted would have to be construed as disabling the legislature from abolishing the Industrial Accident Commission. That construction would be contrary to the second paragraph of the section, which gave and still gives the legislature authority to adopt exclusively either of two other modes of administration. The authority is to choose "any" of three agencies, "either separately or in combination." If the legislature sees fit to have compensation litigation decided "by the courts" alone as ordinary civil litigation, it is expressly authorized to do so. This broad authority was given because in several states this system was and still is used, and the draftsmen must have thought that experience might prove it desirable in the future to abandon enforcement by a commission. The fact that experience has proved the contrary is irrelevant.

That the legislature still has three choices shows that the Amendment of 1918 did not intend to deprive the legislature of power to abolish the Commission it had created.

But it may be argued that the third paragraph means that so long as the legislature retains the Commission it must continue it as constituted in 1918. If that were the proper construction why did the second paragraph authorize the legislature to make use of "an industrial accident commission" instead of the Industrial Accident Commission of this State?

I take paragraph three as intending to ratify and confirm the creation and existence of the Commission for the purpose of legalizing all its past acts, or removing doubt as to their legality. Its creation in 1913 and its existence up to 1918 are ratified and confirmed but the legislature is left with "plenary power" to establish for the future such "an industrial accident commission" as it may choose.

To read paragraph three restrictively does violence to the dominant tenor of the section as a whole. I have never read any constitutional grant of power to any legislature that so clearly expressed the will to grant the legislature unrestricted discretion. "Plenary power," and again "plenary powers," are granted. Authority to make "full
provision” for this and that is repeatedly given. The legislature is to be “unlimited by any provision of this Constitution” in creating and enforcing a “complete system” of workmen’s compensation. Where specification is resorted to it is by way of enlargement or amplification, not restriction.

The fact is that by 1918 all constitutional doubts about the essentials of the compensation law and its administration by a commission had been resolved. These had been settled by the 1911 version\(^5\) of section 21 of article XX and by important and enlightened decisions of the state supreme court.

But there was new legislation that was in doubt, and not expressly covered by the constitutional provision of 1911. Chiefly there were the extensions first made by the Boynton Act of 1913\(^5\) and continued in the extensive revision of 1917,\(^5\) (1) into the field of accident prevention and (2) the creation of the State Compensation Insurance Fund. The administration of these was vested in the Commission giving it two new functions. Included in the Commission’s new accident prevention powers was authority to make safety rules and regulations having the force of law. In view of the separation of powers provision of the Constitution\(^5\) and vesting of the legislative power of the state in the legislature,\(^5\) was this not an unconstitutional delegation of legislative power? As to the State Compensation Insurance Fund the legislature had put the state into “private business” and conferred management of the business upon state officials, the Commission. Was this constitutional? The printed “arguments” submitted to the voters along with the proposed amendment emphasize these as the legislative powers that needed to be granted and confirmed.\(^5\)

\(^{50}\) Section 21 of article XX as adopted in 1911 read as follows:

“The legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment irrespective of the fault of either party. The legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section, by arbitration, or by an industrial accident board, by the courts, or by either, any or all of these agencies, anything in this Constitution to the contrary notwithstanding. (Amendment approved October 10, 1911.)”

\(^{51}\) Cal. Stats. 1913, p. 279.

\(^{52}\) Cal. Stats. 1917, p. 831.

\(^{53}\) Cal. Const. (1879) art. III.

\(^{54}\) Cal. Const. (1879) art. IV, § 1.

\(^{55}\) One by State Senator Herbert C. Jones says: “The amendment of 1911, while providing for compensation, did not give the desired full and complete sanction for safety legislation or the creation of a state insurance fund.”
Accordingly, the first paragraph of the new section 21 confers new “plenary power” on the legislature, “unrestricted by any provision of this constitution” to make “full provision for securing safety in places of employment” and for the “establishment and management of a state compensation fund.” Thus the legislature’s power over these two subjects was made certain for the future, but what about the validity of the acts of the Commission in exercise of these new functions between 1913 and 1918? To ratify and confirm these was the chief purpose of the third paragraph of section 21, article XX. It will be noted that the State Compensation Fund is expressly mentioned therein.

If the third paragraph is properly construed to ratify only past transactions, the legislature is left for the future with the authority under the second paragraph to create “an industrial accident commission.” No number of members is stated. The legislature may increase or decrease the membership. Moreover, there is nothing in the expression “industrial accident commission” that requires two or more members to be styled “commissioner” or any member to be styled “commissioner.” Conceding without deciding, as the judges often say, that the Constitution contemplates a multiple body, that requirement is fully satisfied by an administrative body composed of an executive head and all the other officers essential to the discharge of the various functions. If the legislature’s first choice in exercise of its “plenary power” to create “an administrative body” had been the form I propose, it seems to me no question would have arisen. It is only the long existence of the three-man-commission that beclouds thought and suggests that the legislature has exhausted its power to choose.

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NOTE ON THE AVAILABLE STATISTICS

We have no statistics of the number of compensable injuries that occur in the state. The law requires every employer to report every injury suffered by his employees in the course of their employment, except injuries that cause no disability beyond the day of injury and require no more than ordinary first-aid treatment. Labor Code § 6407. The categories of injuries thus required to be reported are broader than the categories that are compensable under the statute. Thus all injuries causing disability beyond the day must be reported, but a disability is not compensable unless it lasts beyond the seventh day after the employee leaves work as a result of the injury. Labor Code § 4652. Also the law requires reports from the relatively few employers who are not subject to the statute, thus, employers of domestic labor, or agricultural employers who have rejected
the act. See Labor Code § 3352. An informed guess is that 90% of all employees in the state are now covered by the act.

With this explanation, we can look at the statistics of reported injuries for two years about twelve years apart.

<table>
<thead>
<tr>
<th>Reported injuries</th>
<th>July 1 to June 31</th>
<th>Calendar year</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1924-25</td>
<td>1937</td>
</tr>
<tr>
<td>Class 1. Death</td>
<td>645</td>
<td>613</td>
</tr>
<tr>
<td>Class 2. Permanent impairment of 1% or more</td>
<td>1,215</td>
<td>983</td>
</tr>
<tr>
<td>Class 3. Temporary disability</td>
<td>87,209</td>
<td>88,621</td>
</tr>
<tr>
<td>(Lasting longer than the day of injury)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sub-total</td>
<td>89,069</td>
<td>90,217</td>
</tr>
<tr>
<td>Class 4. Medical attention only</td>
<td>122,109</td>
<td>240,978</td>
</tr>
<tr>
<td>(More than ordinary first aid, but without disability, the injured being able to return to work immediately or at his next turn or shift)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Totals</td>
<td>211,178</td>
<td>331,195</td>
</tr>
</tbody>
</table>

Claims for compensation filed with the Commission 3,163 8,902

Class 4 is a category requiring medical attention but where there is no resulting disability. The statute requires the employer to provide or to pay for this medical treatment but since in the facts it is usually of brief duration, and of slight expense, injuries in this category seldom require the filing of a claim.

Most of the deaths in Class 1 would give rights under the act to their dependents, if any there be.

Class 2 injuries all give rise to compensation claims for both medical treatment and indemnity for injury if the employment is within the act (which is true in a high percentage of the cases) except in those few cases where special defenses exclude them. Labor Code § 3600 (d), (e).

Class 3 gives rise to the bulk of compensation claims but also includes many injuries that are not compensable at all, except for the payment of medical expense, since the statute does not require payment of indemnity for a disability that does not last beyond the seventh day after the employee leaves work as a result of the injury.

The subtotals above of Classes 1, 2 and 3 show 89,059 such injuries in 1924-25 and 90,217 in 1937. If there was a constant ratio of compensable cases to non-compensable cases in the two years, we would not need to know exactly what number each year were compensable to arrive at a conclusion that the number of compensable injuries had not increased over the twelve year period. It seems a sound guess that the ratio would not vary greatly.

If so, why were there only 3,163 compensation claims reported filed with the Commission in 1924-25 and 8,902 reported filed in the calendar year 1938? Either there is some error here or litigation of compensation cases has nearly trebled.

Inquiry discloses that the practice of the Compensation Department has changed in recent years, allegedly to promote convenience of reference, so that many matters requiring merely administrative ruling without referee hearings are now given file numbers and placed in the same files with claims requiring adjudication. The officer who is best qualified by information and experience to form an opinion writes me:

"It would be the wildest guess to attempt to give the percentage that would actually go to trial as litigated cases, but it would be my personal opinion that over 6000 would actually be set for trial."
He adds,

"Some... come up over and over again as a supplemental pleading, requiring many hearings before our 245 weeks of continuing jurisdiction puts an end to this."

Assuming the guess to be correct that 6000 claims requiring adjudication were filed in 1938, the question remains why has the number doubled in a dozen years without any apparent increase in the number of compensable injuries? The question involves assumptions that could only be verified by study and investigation. If the assumptions are found to be substantially correct still further study and investigation would be required to determine the causes of the increased litigation. Several possible causes can be imagined, such as over-litigious insurance carriers, over-reaching claimants, increase in petty ambulance chasing by lawyers and inciting workers to litigate, or the fault may be in commission procedure, or in its publicity work. Whether these causes or others exist in fact can only be ascertained by investigation.

This is all aside from the main subject here considered, namely, a proper procedure for adjudicating cases that actually are litigated.

Another point on accessible statistics. The report of the Department of Industrial Relations to the Governor's Council, January, 1939, contains statistics of the Compensation Department for the calendar year 1938. Here is found the report that 8902 claims were filed that year (commented on above) and also the statement that during the year there were rendered "9532 original decisions," 1147 decisions granting or denying rehearings and "3263 decisions rendered on supplemental matters"—"a grand total of 13,942 final decisions." It is unfortunate that an uninitiated reader would assume these decisions all to be adjudications of litigated issues. In fact, there are included many administrative rulings and orders, some of merely routine character. It would take a good deal of paring down to get these figures to a basis comparable to the figures in the earlier reports of the Commission.

RECENT WISCONSIN STATISTICS

More recent figures just received from Wisconsin show that for the three years subsequent to July 1, 1936, appeals were taken to the Commission in 19.7 per cent of the referees' decisions, as compared with about 14 per cent in the preceding two years. This increase is disappointing, but the Wisconsin Director of Workmen's Compensation writes: "The commission believes that the present method is a great improvement over the old one.... Under the new system the examiner who hears the case and observes the witnesses properly makes the initial decision. The commission is now able to afford a rather thorough review of those cases in which appeal is taken." Obviously an appeal-late board consisting of experienced referees could make better than a "rather thorough review."

The Director writes, "The apparently large number of appeals from the examiners' orders to the commission is probably accounted for by the fact that absolutely no expense is involved...." Additionally his figures show that in the three year period in question 29.6 per cent of the Commission's appellate decisions were carried to the circuit court. Also it appears that about 5.8 per cent of all examiners' decisions thus reached the circuit court. Since appeal to the court is on issues of law it may be that litigants would not be so prone to take such appeals from an appellate board composed of referees of adequate legal training. Experience in the several states is so various, however, that nothing but an actual test of a proposed change will show how it will work in California.