# Chapter 656

# Workmen's Compensation

**Chapter 656**

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**1. In general**

The rights and remedies provided by this Act are exclusive. Bigby v. Pelican Bay Lbr. Co., (1944) 173 Or 682, 147 P2d 199; Ellis v. Fallert, (1957) 209 Or 406, 307 P2d 283.

Pleadings under this law stand on the same footing as other actions. Coblentz v. State Ind. Acc. Comm., (1955) 203 Or 258, 279 P2d 503; Dimitroff v. State Ind. Acc. Comm., (1957) 209 Or 316, 306 P2d 398; Larson v. State Ind. Acc. Comm., (1957) 209 Or 389, 307 P2d 314. Coblentz v. State Ind. Acc. Comm., supra, **distinguished in** Larson v. State Ind. Acc. Comm., (1957) 209 Or 389, 307 P2d 314.

A special privilege is conferred upon an employer by this Act thereby releasing him from the common-law liability to respond in damages for a personal injury that has been caused by his negligence. Olds v. Olds, (1918) 88 Or 209, 171 P 1046.

The procedure provided by this Act for presenting claims and taking appeals must be followed. Liimatainen v. Ind. Acc. Comm., (1926) 118 Or 260, 262, 246 P 741.

The test of the employe's right to redress is not whether a right of action can be maintained against the employer; this Act contemplates compensation for an injury arising out of circumstances which would not afford an employe a cause of action. Lamm v. Silver Falls Tbr. Co., (1930) 133 Or 468, 277 P 91, 286 P 527, 291 P 375.

A more comprehensive objective than the principles which govern the common-law action of negligence exists under this law. Hovedsgaard v. Grand Rapids Store Equipment Corp., (1931) 138 Or 39, 5 P2d 86.

The common law is not abrogated, but rather its wake is followed, by this law. Williams v. Dale, (1932) 139 Or 105, 8 P2d 578, 82 ALR 922.

The legislature had the right to append such conditions as it chose to the privilege of receiving compensation. Rosell v. Ind. Acc. Comm., (1939) 164 Or 173, 95 P2d 726.

The law at the time of injury determines a claimant's rights. Id.

A workmen's compensation proceeding is sui generis. Hinkle v. Ind. Acc. Comm., (1940) 163 Or 395, 97 P2d 725.

An employer who is subject to this Act is not personally liable to a workman who is injured, or in case of death, to the beneficiaries named in this Act or to the beneficiaries named in the Employers' Liability Act, or to anyone else. Bigby v. Pelican Bay Lbr. Co., (1944) 173 Or 682, 147 P2d 199.

After expiration of time limit, appeal filed on grounds that an award under occupational disease law constituted a denial under workmen's compensation was properly dismissed. Dodd v. State Ind. Acc. Comm., (1957) 211 Or 99, 310 P2d 324, 311 P2d 458, 315 P2d 138.

**2. Constitutionality**

This Act is not unconstitutional under any provision of the Oregon or United States Constitution. Evanhoff v. Ind. Acc. Comm., (1915) 78 Or 503, 154 P 106.

Admiralty jurisdiction is not interfered with to an extent so as to render this law unconstitutional. West v. Kozer, (1922) 104 Or 94, 206 P 542.

**3. Construction**

A liberal construction should be given this law. Dondeneau v. Ind. Acc. Comm., (1926) 119 Or 357, 249 P 820, 50 ALR 1129; Huntley v. Ind. Acc. Comm., (1931) 138 Or 184, 6 P2d 209; Goss v. Ind. Acc. Comm., (1932) 140 Or 146, 12 P2d 322, 1006; Cain v. Ind. Acc. Comm., (1934) 149 Or 29, 37 P2d 353, 96 ALR 1072; Zurich General Acc. & Liability Ins. Co. v. Brunson, (1926) 15 F2d 906; Livingston v. State Ind. Acc. Comm., (1954) 200 Or 468, 266 P2d 684; Bos v. State Ind. Acc. Comm., (1957) 211 Or 138, 315 P2d 172; Newell v. Taylor, (1958) 212 Or 522, 321 P2d 294.

Technical errors in the administration of this law should not greatly concern the Supreme Court. Hartley v. Ind. Acc. Comm., (1927) 123 Or 310, 261 P 71.

The fundamental purpose and object sought by the enactment of this law should not be lost to sight in construing its provisions. State v. Ind. Acc. Comm., (1934) 145 Or 443, 28 P2d 237.

Private policies issued which provide for compensation in accordance with this law should be given a liberal construction. Zurich General Acc. & Liab. Ins. Co. v. Brunson, (1926) 15 F2d 906.

Court's duty to liberally construe this law does not include authority to alter it. Allen v. State Ind. Acc. Comm., (1954) 200 Or 521, 265 P2d 1086.

Statute denying workman's common law right to sue must be strictly construed in his favor. Johnson v. Tbr. Structures, Inc., (1955) 203 Or 670, 281 P2d 723.

The words "arising out of and in the course of his employment" in this law should be liberally construed to as to evenly distribute costs of injuries. Ramseth v. Maycock, (1956) 209 Or 66, 304 P2d 415.

**4. Purpose**

To make every industrial enterprise bear the pecuniary loss of all accidental injuries to its employes resulting from risks to which they are exposed in a substantially greater degree than the ordinary public is the purpose of this law. Lamm v. Silver Falls Tbr. Co., (1930) 133 Or 468, 277 P 91, 286 P 527, 291 P 375; Hinkle v. Ind. Acc. Comm., (1940) 163 Or 395, 97 P2d 725; Bowser v. Ind. Acc. Comm., (1947) 182 Or 43, 185 P2d 891; Newell v. Taylor, (1958) 212 Or 522, 321 P2d 294.

Minimizing litigation and lessening the burden on the taxpayer therefrom, are purposes of this law as well as the benefit to the employer and employe. Williams v. Dale, (1932) 139 Or 105, 8 P2d 578, 82 ALR 922; Bigby v. Pelican Bay Lbr. Co., (1944) 173 Or 682, 147 P2d 199.

It is the manifest purpose of the Act that the compensation should be adjusted from time to time as the employe's

disability increases or diminishes. Chebot v. Ind. Acc. Comm., (1923) 106 Or 660, 212 P 792.

The replacement of an unscientific and cumbersome procedure for determining the right to, and the amount of, compensation for injured workmen by a system which would in all cases designate an award, regardless of the manner of sustaining injuries or becoming incapacitated, which award would be limited in amount but commensurate in some degree with the disability suffered, is an object of this law. Cain v. Ind. Acc. Comm., (1934) 149 Or 29, 37 P2d 353, 96 ALR 1072.

The creation of an administrative force through which injured workmen may receive certain fixed compensation without the formalities attendant upon court procedure, is an object of this law. Miller v. Ind. Acc. Comm., (1934) 149 Or 49, 39 P2d 366.

The broad purpose of the Act as expressed in the preamble discloses that, like the Unemployment Compensation Act, the Act is for the general public welfare. Ind. Acc. Comm. v. Aebi, (1945) 177 Or 361, 162 P2d 513, 161 ALR 211.

This law was enacted to correct recognized evils inherent in litigation against employers by injured employes. Plummer v. Donald M. Drake Co., (1958) 212 Or 430, 320 P2d 245.

**5. Maritime law**

The loading of a barge or ship has direct relation to commerce and navigation and is not a matter of purely local concern. An injury sustained by one so employed is not compensable under the workmen's compensation law. Martinson v. Ind. Acc. Comm., (1936) 154 Or 423, 60 P2d 972. **Contra** West v. Kozer, (1922) 104 Or 94, 206 P 542; Rickert v. Ind. Acc. Comm., (1927) 122 Or 565, 259 P 205, 56 ALR 348; Netherlands Amer. Steam Nav. Co. v. Gallagher, (1922) 282 Fed 171 and Grant Smith-Porter Co. v. Rohde, (1921) 257 US 469, 42 S Ct 157, 66 L Ed 321.

The maritime law is to be administered by the federal courts unaffected by state compensation Acts. Cassil v. U.S. Emergency Fleet Corp., (1923) 289 Fed 774.

The exclusive features of the Oregon Act accepted by employer and employe abrogate the right to recover damages in an admiralty court as to local matters. West v. Kozer, (1922) 104 Or 94, 206 P 542; Grant Smith-Porter Co. v. Rohde, (1921) 257 U.S. 469, 42 S Ct 157, 66 L Ed 321; Netherlands Amer. Steam Nav. Co. v. Gallagher, (1922) 282 Fed 171.

The fact that the United States required contractors to come under the provisions of the state workmen's compensation law is evidence that the United States did not acquire exclusive jurisdiction over the territory in which the work was performed. Atkinson v. State Tax Comm., (1938) 303 US 20, 58 S Ct 419, 82 L Ed 621, aff'g (1937) 156 Or 461, 62 P2d 13, 67 P2d 161.

Where injury sustained while working on a barge in navigable waters within Oregon occurred in the "twilight zone," this law may be applied and Longshoreman's Act is not an exclusive remedy. Hahn v. Ross Island Sand & Gravel Co., (1959) 358 US 273, 79 S Ct 266, 3 L Ed 2d 292, rev'g 214 Or 1, 320 P2d 668.

FURTHER CITATIONS: Buckles v. Continental Cas. Co., (1953) 197 Or 128, 251 P2d 476, 252 P2d 184; Shelton v. Paris, (1953) 199 Or 365, 261 P2d 856; I-L Logging Co. v. Manufacturers & Wholesalers Indem. Exch., (1953) 202 Or 277, 273 P2d 212, 275 P2d 226; Conley v. State Ind. Acc. Comm., (1954) 200 Or 474, 266 P2d 1061; State Ind. Acc. Comm., v. Garreau, (1954) 200 Or 594, 267 P2d 661; M & M Wood Working Co. v. State Ind. Acc. Comm., (1954) 201 Or 603, 271 P2d 1082; Franklin v. State Ind. Acc. Comm., (1954) 202 Or 237, 274 P2d 279; Hurd v. Ill. Bell Tel. Co., (1955) 136 F Supp 125, 140; Williamson v. Weyerhaeuser Tbr. Co., (1955) 221 F2d 5; Hall v. Copco Pac., Ltd., (1955) 224 F2d 884; Bennett v. State Ind. Acc. Comm., (1955) 203 Or 275, 279 P2d 655, 279 P2d 886; Schweigert v. Beneficial Standard Life Ins. Co., (1955) 204 Or 294, 282 P2d 621; Smith v. Smith, (1955) 205 Or 286, 287 P2d 572; Nordling v. Johnston, (1955) 205 Or 315, 283 P2d 994, 287 P2d 420, 48 ALR2d 1369; Gregory v. State Ind. Acc. Comm., (1955) 205 Or 643, 288 P2d 1069; Pease v. Roseburg Lbr. Co., (1956) 206 Or 658, 294 P2d 346; King v. State Ind. Acc. Comm., (1957) 211 Or 40, 309 P2d 159, 315 P2d 148, 318 P2d 272; Manke v. Nehalem Logging Co., (1957) 211 Or 211, 301 P2d 192, 315 P2d 539; Hensler v. Portland, (1957) 212 Or 28, 318 P2d 313; Mikolich v. State Ind. Acc. Comm., (1957) 212 Or 36, 316 P2d 812, 318 P2d 274; Butler v. State Ind. Acc. Comm., (1958) 212 Or 330, 318 P2d 303; Hillman v. No. Wasco County PUD, (1958) 213 Or 264, 323 P2d 664; Ballou v. State Ind. Acc. Comm., (1958) 214 Or 123, 328 P2d 137; Long v. Springfield Lbr. Mills, Inc., (1958) 214 Or 231, 327 P2d 421; Continental Cas. Co. v. Gen. Acc. Fire & Life Assur. Corp., (1959) 175 F Supp 713; Upper Columbia R. Towing Co. v. Glens Falls Ins. Co., (1959) 179 F Supp 705; Burnett v. Hernandez, (1959) 263 F2d 212; King v. Pan Am. World Airways, (1959) 270 F2d 355; Tucker v. State Ind. Acc. Comm., (1959) 216 Or 74, 337 P2d 979; Welter v. M & M Woodworking Co., (1959) 216 Or 266, 338 P2d 651; Claussen v. Ireland, (1959) 216 Or 289, 338 P2d 676; Orr v. State Ind. Acc. Comm., (1959) 217 Or 249, 342 P2d 136; McGuire v. Brown, (1959) 217 Or 300, 342 P2d 774; Howard v. Foster & Kleiser Co., (1959) 217 Or 516, 332 P2d 621, 342 P2d 780; Kennedy v. State Ind. Acc. Comm., (1959) 218 Or 432, 345 P2d 801, 86 ALR2d 1032; Fisher v. Kirk & Son, Inc., (1959) 219 Or 402, 347 P2d 851; Bandy v. Norris, Beggs & Simpson, (1960) 222 Or 1, 342 P2d 839, 351 P2d 445; Bakkensen v. John Hancock Mut. Life Ins. Co., (1960) 222 Or 484, 353 P2d 558; Furrer v. State Ind. Acc. Comm., (1960) 223 Or 151, 353 P2d 565; Fisher v. Rudie Wilhelm Whse., Inc., (1960) 224 Or 26, 355 P2d 242; Cimarron Ins. Co. v. Travelers Ins. Co., (1960) 224 Or 57, 355 P2d 742; Boykin v. State Ind. Acc. Comm., (1960) 224 Or 76, 355 P2d 724; Montgomery v. State Ind. Acc. Comm., (1960) 224 Or 380, 356 P2d 524; Blaine v. Ross Lbr. Co., (1960) 224 Or 227, 355 P2d 461; Smith v. Jacobsen, (1960) 224 Or 627, 356 P2d 421; Thomas v. Foglio, (1961) 225 Or 540, 358 P2d 1066; Thompson v. Gen. Ins. Co. of America, (1961) 226 Or 205, 359 P2d 1097; Davis v. Weyerhaeuser Co., (1962) 231 Or 596, 373 P2d 985; Reynolds v. Halbert, (1962) 232 Or 586, 375 P2d 245; Snook v. St. Paul Fire & Marine Ins. Co., (1963) 220 F Supp 314; Colvin v. Weyerhaeuser Co., (1964) 229 F Supp 1022; Albina Engine and Mach. Works v. O'Leary, (1964) 328 F2d 877; Schnell v. Appling, (1964) 238 Or 202, 395 P2d 113; Boatwright v. State Ind. Acc. Comm., (1966) 244 Or 140, 416 P2d 328; Evoniuk v. Great Am. Ins. Co., (1967) 246 Or 75, 424 P2d 216; Safeco Ins. Co. v. Christensen, (1968) 248 Or 550, 436 P2d 270; Larson v. State Comp. Dept., (1969) 1 Or App 329, 462 P2d 694; Burnett v. W. Pac. Ins. Co., (1970) 255 Or 547, 469 P2d 602; Place v. Friesen Lbr. Co., (1970) 2 Or App 6, 463 P2d 596, rev'd, 258 Or 98, 481 P2d 617; Hiles v. State Comp. Dept., (1970) 2 Or App 506, 470 P2d 165; Williams v. Joyce, (1971) 4 Or App 482, 479 P2d 513, Sup Ct **review denied;** Bailey v. Morrison-Knudsen Co., (1971) 5 Or App 592, 485 P2d 1254.

ATTY. GEN. OPINIONS: Elected county officials as "workmen," 1948-50, p 20; retroactivity of the Act, 1948-50, p 242; effective date of the Act, 1952-54, p 54; constitutionality of retroactive benefit increases, 1954-56, p 77; pay deduction contracts by employers rejecting the Act, 1954-56, p 79; coverage of blind workers at Oregon Service Center, 1954-56, p 157; payment of waitresses' fees and expenses by commission, 1954-56, p 222; segregating additional compensation payable to injured workmen among beneficiaries, 1956-58, p 186; compulsory contribution to fund by justices and judges, 1960-62, p 7; sheepshearers as employes, 1960-62,

p 136; owner-driver of log truck as employe, 1960-62, p 151; right of county court to compensation check of a public officer receiving full salary, 1960-62, p 204; coverage of state hospital volunteer workers, 1960-62, p 261; summer camp program participants as workmen, 1962-64, p 103; disposition of interest earned on State Industrial Accident Fund, 1964-66, p 31; this Act as affecting taxation, 1964-66, p 141; constitutionality of amendment governing referendum, 1964-66, p 155; presumption of constitutionality of enacted amendment, 1964-66, p 205; State Industrial Accident Commission as a corporation, 1966-68, p 264; Attorney General as legal counsel for business matters under this law, 1966-68, p 449; respective jurisdictions of board and department, 1966-68, p 610.

LAW REVIEW CITATIONS: 12 OLR 109; 31 OLR 28; 45 OLR 40-64; 1 WLJ 17.

**656.001 to 656.794**

NOTES OF DECISIONS

This series extends benefits to persons previously regarded as independent contractors. Berry v. State Ind. Acc. Comm., (1964) 238 Or 39, 393 P2d 184.

This law should be liberally construed. Waibel v. State Comp. Dept., (1970) 3 Or App 38, 471 P2d 826.

FURTHER CITATIONS: Thomas v. Foglio, (1962) 231 Or 187, 371 P2d 693; Boling v. Nork, (1962) 232 Or 461, 375 P2d 548; Philpott v. State Ind. Acc. Comm., (1963) 234 Or 37, 379 P2d 1010; Manning v. State Ind. Acc. Comm., (1963) 234 Or 207, 380 P2d 989; Childers v. Schaecher Lbr. Co., (1963) 234 Or 230, 380 P2d 993; Wimer v. Miller, (1963) 235 Or 25, 383 P2d 1005; Memmott v. State Ind. Acc. Comm., (1963) 235 Or 360, 385 P2d 188; Hadeed v. Willamette Hi-Grade Concrete Co., (1964) 238 Or 513, 395 P2d 553; Mason v. Sutherlin Mach. Works, Inc., (1965) 240 Or 51, 399 P2d 1016; Shoemaker v. Johnson, (1965) 241 Or 511, 407 P2d 257; Didier v. State Ind. Acc. Comm., (1966) 243 Or 460, 414 P2d 325; Syler v. State Ind. Acc. Comm., (1966) 244 Or 541, 419 P2d 411; Long v. State Ind. Acc. Comm., (1967) 246 Or 187, 424 P2d 236; Williamson v. Western-Pac. Dredging Corp., (1969) 304 F Supp 509; Brennan v. Schmidt Bros. Farms, (1970) 3 Or App 46, 471 P2d 819.

ATTY. GEN. OPINIONS: Funding of vocational rehabilitation, 1958-60, p 30; fixing wage for compensation not in cash, 1962-64, p 111; crediting interest on invested funds, 1964-66, p 31; department or board jurisdiction over rehabilitation of workmen injured prior to 1966, 1966-68, p 610.

LAW REVIEW CITATIONS. 40 OLR 292.

**656.002**

NOTES OF DECISIONS



**1. In general**

**(1) Under former similar statute.** The word "employment" used in the workmen's compensation law, was construed in its popular significance. Lamm v. Silver Falls Timber Co., (1930) 133 Or 468, 277 P 91, 286 P 527, 291 P 375.

**2. Beneficiaries**

**(1) Under former similar statute.** It was a question of fact for the trial court whether a deceased workman's wife deserted him within the meaning of the statute. Stark v. Ind. Acc. Comm., (1922) 103 Or 80, 204 P 151.

Surviving relatives within the class named in the statute to whose living deceased employe contributed, and who relied partially or wholly on him for support, were beneficiaries. Paul v. Ind. Acc. Comm., (1928) 127 Or 599, 272 P 267, 273 P 337.

The terms "widow" and "surviving spouse" were given their usual, ordinary meaning, and included a woman who married a workman after he received fatal injuries. Rosell v. Ind. Acc. Comm., (1939) 163 Or 173, 95 P2d 726.

To constitute desertion, absence of a wife from her husband had to be against his will, wish and consent. Vader v. Ind. Acc. Comm., (1940) 163 Or 492, 98 P2d 714.

**3. Child**

Dependency is determined as of the date of the accident. Housley v. Everts' Commercial Trans., Inc., (1970) 4 Or App 80, 475 P2d 977, Sup Ct review denied.

The question of whether or not claimants are dependent is one of fact. Id.

**(1) Under former similar statute.** Children born subsequent to an injury were not included within sections providing for increased monthly payments where the injured workman had children. State v. Ind. Acc. Comm., (1925) 115 Or 484, 237 P 680.

**4. Claim**

Employer's filing of an incomplete form reporting workman's injury was not a claim under this section. Printz v. State Comp. Dept., (1969) 253 Or 148, 453 P2d 665.

**5. Compensable injury**

**(1) Arising out of and in the course of employment.** An injury sustained on a highway is in the course of employment if the highway must necessarily be used to leave the employer's premises and the workmen are exposed to hazards of the highway to a greater extent than the common public. Montgomery v. State Ind. Acc. Comm., (1960) 224 Or 380, 356 P2d 524; Willis v. State Acc. Ins. Fund, (1970) 3 Or App 565, 475 P2d 986.

Accident must be a material contributing cause of injured workman's condition. Lemons v. State Comp. Dept., (1970) 2 Or App 128, 467 P2d 128.

In a complex case, the causal connection between the accident and the injury must be shown by expert medical testimony. Id.

If the happening of an accident delays the diagnosis of

a preexisting disease with the result that the disease is not treated as promptly as it otherwise would have been, the injured workman is entitled to compensation for the physical consequences to him of the delay in treatment for the disease. Waibel v. State Comp. Dept., (1970) 3 Or App 38, 471 P2d 826.

A compensable injury occurs when an accidental injury accelerates or aggravates a preexisting condition, causing disability or death. Sowell v. Workmen's Comp. Bd., (1970) 2 Or App 545, 470 P2d 953.

Aggravation by industrial accident of a pre-existing condition is compensable. Watson v. Georgia-Pac. Corp., (1970) 5 Or App 353, 478 P2d 431.

Medical causation is present if the work-related stresses or exertion were a material contributing factor in producing the heart attack. Youngren v. State Acc. Ins. Fund, (1971) 92 Or App Adv Sh 1769, 487 P2d 107, Sup Ct **review denied.**

Plaintiff suffered an accidental injury when his heart condition was aggravated as a result of unusual exertion in the course of his employment. Kinney v. State Ind. Acc. Comm., (1967) 245 Or 543, 423 P2d 186; Lorentzen v. State Comp. Dept., (1968) 251 Or 92, 444 P2d 946.

Evidence supported determination that injury arose out of and in the course of employment. Adams v. State Comp. Dept., (1968) 249 Or 530, 439 P2d 628; Satterfield v. State Comp. Dept., (1970) 1 Or App 524, 465 P2d 239; Willis v. State Acc. Ins. Fund, (1970) 3 Or App 565, 475 P2d 986.

The work activity was not a material contributing factor in producing the injury. Grandell v. Roseburg Lbr. Co., (1968) 251 Or 88, 444 P2d 944; Mayes v. State Comp. Dept., (1969) 1 Or App 234, 461 P2d 841; Youngren v. State Acc. Ins. Fund, (1971) 92 Or App Adv Sh 1769, 487 P2d 107, Sup Ct **review denied.**

An employe who was injured off the employer's premises during a paid coffee break suffered an injury arising out of and in the course of employment. Jordan v. Western Elec. Co., (1970) 1 Or App 441, 463 P2d 598.

Where a trip serves both a business and a personal purpose an injury during the course thereof may arise out of and in the course of employment if someone sometime would have had to make the trip to carry out the business mission. Rosencrantz v. Ins. Serv. Co., (1970) 2 Or App 225, 467 P2d 664.

**(2) Pleading and proof.** In a heart case, the test for determining medical causation is whether stress or exertion connected with decedent's job was a material contributing factor of the fatal heart attack. Coday v. Willamette Tug & Barge, (1968) 250 Or 39, 440 P2d 224; Mayes v. State Comp. Dept., (1969) 1 Or App 234, 461 P2d 841.

In a heart disease case, it is not necessary that claimant show he exerted unusual strain in carrying out his job, but claimant's usual exertion in his employment is enough to establish the necessary legal causal connection. Sahnow v. Fireman's Fund Ins. Co., (1970) 3 Or App 164, 470 P2d 378, Sup Ct **review allowed;** Svatos v. Pac. N.W. Bell Tel. Co., (1970) 4 Or App 396, 478 P2d 648, Sup Ct **review denied.**

In determining if an employe with previously weakened heart suffers compensable injury, the test is whether the employment contribution takes the form of an exertion greater than that of his nonemployment life. Fagaly v. State Acc. Ins. Fund, (1970) 3 Or App 270, 471 P2d 441, Sup Ct **review denied;** State v. Schulman, (1971) 92 Or App Adv Sh 1505, 485 P2d 1252, Sup Ct **review denied. But see** Anderson v. State Acc. Ins. Fund, (1971) 5 Or App 580, 485 P2d 1236.

A claimant must prove by a preponderance of the evidence that he or his decedent sustained a compensable injury. Swanson v. Westport Lbr. Co., (1971) 4 Or App 417, 479 P2d 1005; Cardwell v. State Acc. Ins. Fund, (1971) 92 Or App Adv Sh 1649, 486 P2d 587, Sup Ct **review denied.**

Evidence was sufficient to show medical and legal causation for a claim based on fatal heart attack. Fagaly v. State Acc. Ins. Fund, (1970) 3 Or App 270, 471 P2d 441, Sup Ct **review denied.**

**6. Compensable injury under former similar statute**

**(1) In general.** A claim for increased compensation was of the same dignity as the right to receive compensation in the first instance, by reason of the statute. Chebot v. Ind. Acc. Comm., (1923) 106 Or 660, 212 P 792.

Recovery from his employer subject to the law was not allowed an employe, unless the employe brought himself within one of the exceptions to the law. Bigby v. Pelican Bay Lbr. Co., (1944) 173 Or 682, 147 P2d 199.

The words "in lieu of all claims" precluded not only the injured workman or the named beneficiaries but everyone else from bringing an action for damages against the employer who had complied with the law. Id.

The state was an "employer" within the meaning of the statute. McLean v. Ind. Acc. Comm., (1950) 189 Or 405, 221 P2d 566.

Any workman who undesignedly and unexpectedly suffered an injury, without reference to whether the cause of the injury itself was accidental, was included within the statute. Olson v. State Ind. Acc. Comm., (1960) 222 Or 407, 352 P2d 1096.

Workman's beneficiaries were allowed recovery for death resulting from coronary occlusion upon showing workman was performing even slight activity. Id.

**(2) Arising out of and in the course of employment, generally.** A conjunctive use was given the words "arising out of and in the course of employment" in the statute and both conditions had to be satisfied before compensation could be allowed. Blair v. Ind. Acc. Comm., (1930) 133 Or 450, 288 P 204; Larsen v. Ind. Acc. Comm., (1931) 135 Or 137, 295 P 195; Collins v. Troy Laundry Co., (1931) 135 Or 580, 297 P 334.

A broad and liberal construction was given the words "arising out of and in the course of his employment." Brady v. Ore. Lbr. Co., (1926) 117 Or 188, 243 P 96, 45 ALR 812.

The doing of something for the direct benefit of the employer, at the employe's place of duty and during working hours, were not necessary elements in order to entitle an injured employe to compensation. Lamm v. Silver Falls Tbr. Co., (1930) 133 Or 468, 277 P 91, 286 P 527, 291 P 375.

Where the injury was sustained upon the premises of the employer and was a rational consequence of some hazard connected with the employment, it arose out of and in course of employment. Id.

The common law definitions of the phrase "an accident arising in the scope of the employment" were not given controlling effect in determining whether the injuries were compensable. Id.

The negligence or wrongful act of an employer was not essential to the right of an injured workman under the statute, but rather his right was based wholly upon the fact of employment. McDonough v. Nat. Hosp. Assn., (1930) 134 Or 451, 294 P 351.

The words "out of" were construed to point to the origin or cause of the accident, whereas the words "in the course of" pointed to the time, place and circumstances under which the accident took place; the former were descriptive of the character or quality of the accident, while the latter related to the circumstances under which an accident of that character or quality took place. Larsen v. Ind. Acc. Comm., (1931) 135 Or 137, 295 P 195.

The intendment of the workmen's compensation law was less restrictive than the common-law definition of the scope of employment. Hovedsgaard v. Grand Rapids Store Equip. Corp., (1931) 138 Or 39, 5 P2d 86.

An employe injured by a coemploye "out of and in the course of employment" had no common-law action against the coemploye but had to pursue her remedy for workmen's

compensation. Kowcun v. Bybee, (1947) 182 Or 271, 186 P2d 790.

Jury finding that injuries did not arise out of and in course of employment was affirmed where employe was injured in accident while returning from dealers' meeting and was not being paid for his time, was not required to attend and would not otherwise have been working. Ramseth v. Maycock, (1956) 209 Or 66, 304 P2d 415.

Use of boat for transportation to job which required use of a boat was performance of service for employer and accidental death en route arose out of and in the course of employment. King v. State Ind. Acc. Comm., (1957) 211 Or 40, 309 P2d 159, 315 P2d 148, 318 P2d 282. **Distinguished in** Philpott v. State Ind. Acc. Comm., (1963) 234 Or 37, 379 P2d 1010.

**(a) Causal connection of injury to employment.** For a personal injury to arise out of and in the course of the employment, there had to be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury and there had to be a causal connection between the employment and the injury which had its origin in a risk connected with the employment, and flowed from that source as a rational and natural consequence. Blair v. Ind. Acc. Comm , (1930) 133 Or 450, 288 P 204.

Before an accident could be said to arise out of the employment, the injury had to be directly traceable to the nature of the work or to some risk to which the employer's business exposed the employe; the risk had to be reasonably incidental to the employment. Larsen v. Ind. Acc. Comm., (1931) 135 Or 137, 295 P 195.

The fact that the cancerous condition of the employe injured during logging operations contributed in measure to his death did not defeat a claim for compensation by the widow, as a causal connection was shown. Baker v. Ind. Acc. Comm., (1929) 128 Or 369, 274 P 905.

An abrasion of the heel of a chainman from the heavy boots worn was an injury arising out of his employment. Huntley v. Ind. Acc. Comm., (1931) 138 Or 184, 6 P2d 209.

**(b) Outside the scope of usual duties.** An employe directed by his manager to transport horses belonging to the employe's wife, to be hired by the manager's company, was injured in the course of his employment when struck by an automobile while extricating the horses from an overturned truck in which they were being transported. Reynolds v. Ind. Acc. Comm., (1932) 141 Or 197, 16 P2d 1105.

A state highway fence crew foreman's death by accident while riding in a subordinate's automobile to the district engineer's office with weekly report arose out of and in the course of employment. Munson v. Ind. Acc. Comm., (1933) 142 Or 252, 20 P2d 229.

**(c) Outside regular working hours.** An injury to an employe struck by a car driven by a co-employe as she walked to her car after work, taking place on the parking lot provided by the company, arose "out of and in the course of employment," entitling the employe to compensation. Kowcun v. Bybee, (1947) 182 Or 271, 186 P2d 790.

An injury received by an employe, while seated for his noon lunch, was received in the course of his employment. Zurich Gen. Acc. & Liab. Ins. Co. v. Brunson, (1926) 15 F2d 906.

Where an employe, clearing land on a mountain, while seated on the mountain side to eat his noon lunch, accidentally cut his leg with a knife in attempting to cut a twig, and in replacing his boot after the injury lost his balance and fell into a fire, his injuries were received in the course of his employment. Id.

**(d) Going to and from work.** The mere fact that a workman was going to or returning from his place of employment at the time of the injury did not render the injury compensable. Hopkins v. Ind. Acc. Comm., (1938) 160 Or 95, 83 P2d 487.

A logger injured by freezing while going from a camp closed for the season, was not within the compensation law. Brady v. Ore. Lbr. Co., (1926) 117 Or 188, 243 p 96, 45 ALR 812.

Where a conveyance was furnished by the employer as an incident of the contract of employment, an employe injured while being conveyed to or from his work therein was generally entitled to compensation. Lamm v. Silver Falls Tbr. Co., (1930) 133 Or 468, 277 P 91, 286 P 527, 291 P 375.

An injury upon a road leading to a plant which the contract of employment contemplated the workmen should use was generally regarded to arise in the course of employment; that it was a public road was immaterial, provided the demands of employment exposed the injured man to hazards in a greater degree than the common public. Id.

Although an employe was not to commence work until the next morning, an injury received by him on the employer's logging train while returning to camp after several days layoff, arose in the course of employment. Id.

The fact that no remittances to the Industrial Accident Fund for the time consumed by the employe in traveling were made by the employer would not bar an employe's compensation for an injury while traveling to work. Id.

Where after spending a couple of days in a city on personal business an employe was injured while returning to a logging camp upon a gasoline speeder operated by his company, the injury arose in the course of employment. Varrelman v. Flora Logging Co., (1930) 133 Or 541, 277 P 97, 286 P 541, 290 P 751.

An injury while riding in a fellow employe's automobile, occurring shortly before work in an attempt to park the automobile on a platform not belonging to the employer, did not arise out of or in course of employment, where the duties of the employe did not require him to go upon the platform as part of his work Larsen v. Ind. Acc. Comm., (1931) 135 Or 137, 295 P 195.

An injury from falling over an obstruction created by the employer on the sidewalk, while leaving the employer's building, did not arise "out of and in the course of employment." Collins v. Troy Laundry Co., (1931) 135 Or 580, 297 P 334.

Because he was accompanied by his foreman, who was carrying a weekly work report to his superior at the time of the accident, injuries to a state highway employe while on his way home from work did not arise out of and in the course of his employment. March v. Ind. Acc. Comm., (1933) 142 Or 246, 20 P2d 227.

Where another employe was transporting a fellow employe home from work in the former's truck, evidence did not show as a matter of law that the injury sustained by the latter arose in the course of employment. Younger v. Gallagher, (1933) 145 Or 63, 26 P2d 783.

An employe was entitled to compensation for injuries incurred while going to or from work on travel time paid for by the employer. Livingston v. State Ind. Acc. Comm., (1954) 200 Or 468, 266 P2d 684.

Plaintiff, injured when struck by defendant's auto on employer's premises while plaintiff was on way to work and defendant on way to change clothes, was entitled to compensation but no recovery against the defendant. Stout v. Derringer, (1959) 216 Or 1, 337 P2d 357.

An injury did not arise out of and in the course of employment when it occurred as plaintiff, a contract hauler, left home in his truck to drive to employer's landing. Philpott v. State Ind. Acc. Comm., (1963) 234 Or 37, 379 P2d 1010.

A trip to and from the claimant's home was not in the course of employment unless a business purpose led to the trip or a business activity was actually being carried

on. White v. State Ind. Acc. Comm., (1964) 236 Or 444, 389 P2d 310.

**(e) Personal acts of employe.** Necessary incidents of life did not suspend the employment relation. Zurich Gen. Acc. & Liab. Ins. Co. v. Brunson, (1926) 15 F2d 906.

An injury to an employe at play was compensable as an accident arising out of and in the course of employment. Stark v. Ind. Acc. Comm., (1922) 103 Or 80, 204 P 151.

An injury in play with an air hose during working hours was an accidental injury caused by a violent external means and arose out of and in the course of employment. Id.

**(3) Injury by accident.** The word "accident," as used in the statute, was taken in its popular and ordinary sense and denoted or included any unexpected personal injury resulting to the workman in the course of his employment from any unlooked for mishap or occurrence. Blair v. Ind. Acc. Comm., (1930) 133 Or 450, 288 P 204.

That the results were accidental was not sufficient; Oregon was committed to the doctrine that it was necessary that the injury be caused by accidental means. Demagalski v. Ind. Acc. Comm., (1935) 151 Or 251, 47 P2d 947.

Violent or external means as the cause of the accident was essential. Ramsey v. Ind. Acc. Comm., (1938) 159 Or 43, 77 P2d 1109.

If an employe was actually frozen while engaged in performance of his contract of service with employer, such freezing was deemed an "accident," within the law. Brady v. Ore. Lbr. Co., (1926) 117 Or 188, 243 P 96, 45 ALR 812.

Where deceased was performing usual duties in usual manner during which no mischance, slip or mishap occurred in doing of the acts themselves and which did not bring him in contact with any external object or force, a resulting injury was not sustained by accident. Demagalski v. Ind. Acc. Comm., (1935) 151 Or 251, 47 P2d 947.

**(4) Diseases, infections and poisoning.** A finding that pneumonia resulted from bruises on the employe's leg received in the course of employment was sustained by the evidence. Robertson v. Ind. Acc. Comm., (1925) 114 Or 394, 235 P 684.

Typhoid fever, causing death, contracted from drinking water from a river while constructing a bridge, there being no evidence that the water was furnished to decedent for drinking purposes or that he was obliged to drink the same while engaged in work upon the bridge, was not a compensable accidental injury. Blair v. Ind. Acc. Comm., (1930) 133 Or 450, 288 P 204.

Poison-oak poisoning arising out of and in the course of employment was compensable. Banister v. Ind. Acc. Comm., (1933) 142 Or 97, 19 P2d 403.

A rash caused by arsenic spray used by orchardist was an occupational disease. Ryan v. Ind. Acc. Comm., (1936) 154 Or 563, 61 P2d 426.

**(5) Preexisting and acquired diseases of employe.** Whether directly causing it, lighting up, aggravating, or accelerating a diseased condition, the resulting disability or death was chargeable to the accident. Armstrong v. Ind. Acc. Comm., (1934) 146 Or 569, 31 P2d 186.

Where a preexisting heart disease was aggravated and accelerated by an accidental injury and proximately caused disability or death, compensation was allowable. Id.

A cerebral hemorrhage caused by the rapid activity necessary to catch pheasants, as required by the job of the deceased, acting concurrently with a diseased condition, was not an accidental injury. Demagalski v. Ind. Acc. Comm., (1935) 151 Or 251, 47 P2d 947.

Articular rheumatism although to some degree precipitated by the workman's occupation was not an injury sustained through accident caused by violent or external means. Ramsey v. Ind. Acc. Comm., (1938) 159 Or 43, 77 P2d 1109.

**(6) Pleading and proof.** Plaintiff had to prove that the injury arose out of and in the course of his employment. Younger v. Gallagher, (1933) 145 Or 63, 26 P2d 783.

That he was an employe and not an independent contractor had to be shown by the one seeking compensation. Vient v. Ind. Acc. Comm., (1927) 123 Or 334, 262 P 250.

**(7) Questions of law and fact.** Whether an injury arose out of and in the course of employment was a mixed question of law and fact. Stark v. Ind. Acc. Comm., (1922) 103 Or 80, 204 P 151.

**7. Dependent**

**(1) Under former similar statute.** The wife and children of a marriage celebrated after the occurrence of the injury were not dependents. Casaday v. Ind. Acc. Comm., (1926) 116 Or 656, 242 P 598.

The time as of which to determine who were dependents was the date of the fatal accident. Paul v. Ind. Acc. Comm., (1928) 127 Or 599, 273 P 267, 273 P 337.

It was a question of fact whether or not claimants were "dependents" within this section. Id.

Dependency in fact upon the contributions of the deceased employe in order to live in comfort according to manner of living of people of their condition in life was necessary to make relatives "dependents" within the statute. Id.

That dependents could exist without the deceased's earnings did not prevent a recovery as dependents. Id.

The cost of maintenance of the person contributing had to be exceeded by his contribution to make it a contribution to the support of the family within the statute. Id.

Sums as investments or speculations given by a son to a family were not contributions to the support of the family within the statute. Id.

Where paying a family's indebtedness was the sole purpose of a contribution by an unmarried son, the family was not "dependent" upon the son, although such debts might have rendered it necessary for the family to depend upon him for support. Id.

Instructions for determining whether or not claimants were dependents of the decedent within the law had to be given to the jury. Id.

The workmen's compensation law precluded the mother of a deceased workman who was not dependent upon his earnings in whole or in part from maintaining an action for damages for his death under the employers' liability law. Bigby v. Pelican Bay Lbr. Co., (1944) 173 Or 682, 147 P2d 199.

**8. Employer**

**(1) Under former similar statute.** It was not necessary that the person having the right to control exercise that right in every particular. Whitlock v. State Ind. Acc. Comm., (1962) 233 Or 166, 377 P2d 148; Bauer v. Richardson, (1970) 3 Or App 578, 475 P2d 995.

The state was an "employer" within the meaning of the statute. McLean v. Ind. Acc. Comm., (1950) 189 Or 405, 221 P2d 566.

The true test for an "employer" under the statute was his right to control an employe. Harris v. Ind. Acc. Comm., (1951) 191 Or 254, 230 P2d 175.

Payment of wages was not decisive in determining the existence or identity of an "employer." Id.

The true nature of the contract as to right of control, where not expressed, had to be ascertained by the application of many secondary tests. Butts v. Ind. Acc. Comm., (1951) 193 Or 417, 239 P2d 238.

Employers "subject to The Workmen's Compensation Act" can only mean those who have elected coverage under the Act. Carlston v. Greenstein, (1970) 256 Or 145, 471 P2d 806.

9. Workman

(1) Under former similar statute. Whether one of a crew of four men operating a small sawmill was an employe of the mill owners within the law was a question for jury. Farrin v. Ind. Acc. Comm., (1922) 104 Or 452, 205 P 984.

One performing under a contract to do grading work on a railroad was held an "independent contractor" and not a "workman." Anderson v. Ind. Acc. Comm., (1923) 107 Or 304, 215 P 582.

A painter under contract was held a "workman" and not an "independent contractor." Streby v. Ind. Acc. Comm., (1923) 107 Or 314, 215 P 586.

One delivering crushed rock under contract was an independent contractor. Landberg v. Ind. Acc. Comm., (1923) 107 Or 498, 215 P 594.

A finding that a claimant doing a general blacksmithing business was a workman while repairing a stone-crusher could not be disturbed under the evidence. Van Koten v. Ind. Acc. Comm., (1924) 110 Or 574, 223 P 945.

A holder of an employment card from an employment agency was not an employe but an invitee. Wells v. Clark & Wilson Lbr. Co., (1925) 114 Or 297, 235 P 283.

The burden of proof was on one seeking compensation to prove that he was an employe. Vient v. Ind. Acc. Comm., (1927) 123 Or 334, 262 P 250.

For one assisting in the transportation of horses to be hired by his company to have been an employe of that company at the time, he must have been working subject to the complete direction and control of the company. Reynolds v. Ind. Acc. Comm., (1932) 141 Or 197, 16 P2d 1105.

There had to be a contract of hire in order that an injury be compensable, one who gratuitously performed work was not an employe within the law. Smith v. State Ind. Acc. Comm., (1933) 144 Or 480, 23 P2d 904, 25 P2d 1119. **Distinguished in** Whitlock v. State Ind. Acc. Comm., (1962) 233 Or 166, 377 P2d 148.

An injury to a lodge member who was engaged, without compensation, in the construction of a building for the lodge was not compensable. Id.

A log hauler who furnished his own truck and who was paid stated prices per thousand, but who performed no specific piece of work, who hauled loads selected and loaded by the company to destinations designated for him, who worked exclusively for the company and who could quit or be discharged without legal liability on either party, was an employe and not an independent contractor. Bowser v. Ind. Acc. Comm., (1947) 182 Or 42, 185 P2d 891.

A well drill operator who shared profits with the owner and had complete control over the operation was not a workman within the statute. Fenton v. State Ind. Acc. Comm., (1953) 199 Or 668, 264 P2d 1037.

A minor employed without a work permit was covered by Workmen's Compensation Act, however, his estate could not recover from employer but was limited to benefits provided by the Act. Manke v. Nehalem Logging Co., (1957) 211 Or 211, 301 P2d 192, 315 P2d 539.

Payment of remuneration for the employe's services did not necessarily need to be made to the employe. Whitlock v. State Ind. Acc. Comm., (1962) 233 Or 166, 377 P2d 148.

The test is the right to direct or control, not the exercise of the right. Bauer v. Richardson, (1970) 3 Or App 578, 475 P2d 995.

FURTHER CITATIONS: Warner v. Synnes, (1925) 114 Or 451, 230 P 362, 235 P 305, 44 ALR 904; Nixon v. Hawley Pulp & Paper Co., (1935) 149 Or 526, 41 P2d 807; Davis v. Ind. Acc. Comm., (1937) 156 Or 393, 64 P2d 1330, 66 P2d 279, 68 P2d 118; Cox v. Ind. Acc. Comm., (1942) 168 Or 508, 121 P2d 919, 123 P2d 800; Allen v. State Ind. Acc. Comm., (1954) 200 Or 521, 265 P2d 1086; State Ind. Acc. Comm. v. Garreau, (1954) 200 Or 594, 267 P2d 661; Burrows v. State Ind. Acc. Comm., (1957) 209 Or 352, 306 P2d 395; Ellis v. Fallert, (1957) 209 Or 406, 307 P2d 283; Ballou v. State Ind. Acc. Comm., (1958) 214 Or 123, 328 P2d 137; Zurich Ins. Co. v. Sigourney, (1960) 278 F2d 826; White v. State Ind. Acc. Comm., (1961) 227 Or 306, 362 P2d 302; Davis v. Weyerhaeuser Co., (1962) 231 Or 596, 373 P2d 985; Memmott v. State Ind. Acc. Comm., (1963) 235 Or 360, 385 P2d 188; Lowe v. Socony Mobil Oil Co., (1963) 222 F Supp 624; Marston v. State Comp. Dept., (1969) 252 Or 640, 452 P2d 311; Leech v. Georgia-Pac. Corp., (1969) 254 Or 351, 458 P2d 438, 463 P2d 359; Beaudry v. Winchester Plywood Co., (1970) 255 Or 503, 469 P2d 25; Barr v. State Comp. Dept., (1970) 1 Or App 432, 463 P2d 871; Granato v. Portland, (1971) 5 Or App 570, 485 P2d 1115; Leech v. Georgia-Pac. Corp., (1971) 259 Or 161, 485 P2d 1195.

ATTY. GEN. OPINIONS: Illegitimate child as beneficiary, 1930-32, p 28; definitions of "employ," "employe," "employer," and "workman," 1936-38, p 94; divorce of mother and stepfather as disqualifying stepchildren from receiving award, 1938-40, p 216; status of person working out fine for city ordinance violation, 1938-40, p 295; when timber owner who employs others is an "employer," 1940-42, p 124; injury to employe transported to and from home by employer as arising within employment, 1942-44, p 473; extra wages paid to an employe based on a percentage of the profits of the employer as wages, 1944-46, p 107; status of carpenters working for a school district, 1944-46, p 295; county clerks, treasurers, judges, commissioners and assessors as workmen, 1948-50, p 20; segregating additional compensation payable to injured workman among beneficiaries, 1956-58, p 186; compulsory or voluntary contributions by judges of state courts, 1960-62, p 7; justices and judges as workmen, 1960-62, p 7; status of sheep shearers under the Act, 1960-62, p 136; public officer receiving disability compensation and statutory salary, 1960-62, p 203; coverage of volunteer worker, 1960-62, p 262; persons who buck and snag logs under contract with state as employes, 1960-62, p 234; participants in summer camp program, 1962-64, p 103; fixing wage for compensation not in cash, 1962-64, p 111; school district as employer, 1962-64, p 255.

LAW REVIEW CITATIONS: 10 OLR 203; 11 OLR 214; 37 OLR 35, 85, 91; 45 OLR 43, 44, 57; 48 OLR 116; 1 WLJ 620-622; 2 WLJ 9, 24-26, 75-81, 82-85, 90, 93-95, 6 WLJ 621-626.

**656.004**

NOTES OF DECISIONS

A withdrawal from interference by the courts of all questions relating to workmen's compensation, so far as practicable, subject to the right of appeal, was intended by this law. Chebot v. Ind. Acc. Comm., (1923) 106 Or 660, 212 P 792.

Industrial enterprises are considered hazardous occupations. Bennett v. State Ind. Acc. Comm., (1955) 203 Or 275, 279 P2d 655, 279 P2d 886.

The purpose of this Act is to define the rights and liabilities of employers and their employes who have sustained injuries in the course of their employment. Wimer v. Miller, (1963) 235 Or 25, 383 P2d 1005.

The degree of certainty brought by the Act into this phase of industrial relations was intended to benefit the public as a whole by reducing the volume of litigation and thus diminish the cost to the taxpayer. Id.

FURTHER CITATIONS: Plummer v. Donald M. Drake Co., (1958) 212 Or 430, 320 P2d 245; Shoemaker v. Johnson, (1965) 241 Or 511, 407 P2d 257.

ATTY. GEN. OPINIONS: As discharging certain socio-economic functions of the state, 1962-64, p 72.

LAW REVIEW CITATIONS: 46 OLR 336; 1 WLJ 187.

**656.016**

NOTES OF DECISIONS

In a case involving successive injuries and carriers, if the second accident is the primary cause of the second injury and claim, the carrier at the time of the second accident is liable. Cutright v. Am. Ship Dismantler, (1971) 92 Or App Adv Sh 1687, 486 P2d 591.

FURTHER CITATIONS: Granato v. Portland, (1971) 5 Or App 570, 485 P2d 1115.

**656.018**

NOTES OF DECISIONS

**1. In general**

Employers not covered as workmen under ORS 656.128 are not subject to the "exclusive remedy" provisions of this section. Reynolds v. Harbert, (1962) 232 Or 461, 375 P2d 548. **Distinguished in** Leech v. Georgia-Pac. Corp., (1971) 259 Or 161, 485 P2d 1195.

The Workmen's Compensation Act is in lieu of all claims, not merely claims by named beneficiaries under the Act. Leech v. Georgia-Pac. Corp., (1971) 259 Or 161, 485 P2d 1195.

**2. Under former similar statute**

The words "in lieu of all claims" preclude not only the injured workman or the named beneficiaries but anyone else from bringing an action for damages against the employer who has complied with the law. Ellis v. Fallert, (1957) 209 Or 406, 307 P2d 283. **Contra,** Biddle v. Edward Hines Lbr. Co., (1962) 219 F Supp 69.

A minor employed without a work permit was covered by Workmen's Compensation Act and his estate could not recover from employer but was limited to benefits provided by the Act. Manke v. Nehalem Logging Co., (1957) 211 Or 211, 301 P2d 192, 315 P2d 539.

Plaintiff, who had received an award from the State Industrial Accident Commission, could not bring action against employer on theory that it was not shown plaintiff was employed by an employer subject to the Workmen's Compensation Act. Bandy v. Norris, Beggs and Simpson, (1959) 222 Or 1, 342 P2d 839. **Distinguished in** Johnson v. Dave's Auto Center, Inc., (1970) 257 Or 34, 476 P2d 190.

Once the finding as to employe-employer relationship is made by the tribunal entrusted with that duty, the decision is final and conclusive until set aside. Bandy v. Norris, Beggs and Simpson, (1959) 222 Or 1, 342 P2d 839.

FURTHER CITATIONS: Peterson v. Culp, (1970) 255 Or 569, 465 P2d 876; Granato v. Portland, (1971) 5 Or App 570, 485 P2d 1115.

LAW REVIEW CITATIONS: 47 OLR 364.

**656.020**

CASE CITATIONS: Peterson v. Culp, (1970) 255 Or 269, 465 P2d 876.

**656.023**

CASE CITATIONS: Pre-1965 Act: Bennett v. State Ind. Acc. Comm., (1955) 203 Or 275, 279 P2d 655, 279 P2d 886; Bos v. State Ind. Acc. Comm., (1957) 211 Or 138, 315 P2d 172; Butler v. State Ind. Acc. Comm., (1957) 212 Or 330, 318 P2d 303; Hahn v. Ross Island Sand & Gravel Co., (1959) 358 US 272, 79 S Ct 266, 3 L Ed 2d 292; Nadeau v. Power Plant Engr. Co., (1959) 216 Or 12, 337 P2d 313; Manning v. State Ind. Acc. Comm., (1963) 234 Or 207, 380 P2d 989; Memmott v. State Ind. Acc. Comm., (1963) 235 Or 360, 385 P2d 188; Lowe v. Socony Mobil Oil Co., (1963) 222 F Supp 624; Colvin v. Weyerhaeuser Co., (1964) 229 F Supp 1022; Westfall v. Tilley, (1970) 4 Or App 9, 476 P2d 797.

ATTY. GEN. OPINIONS: Compulsory or voluntary contributions by judges of state courts, 1960-62, p 27; right to receive both sick leave and workmen's compensation, 1962-64, p 255.

LAW REVIEW CITATIONS: 37 OLR 86, 87; 46 OLR 343; 1 WLJ 1-144; 2 WLJ 27.

**656.027**

NOTES OF DECISIONS

1. In general
2. Under former similar statute
   (1) In general
   (2) Particular employments
   (3) Particular workmen

**1. In general**

Under subsection (4), benefits of the Act are not available if the workman is a seaman. Williamson v. Western-Pac. Dredging Corp., (1969) 304 F Supp 509.

Claimant was a covered employe on January 7, 1967. Brennan v. Schmidt Bros. Farms, (1970) 3 Or App 46, 471 P2d 819.

Claimant's employment was "casual" but was "in the course of the trade, business or profession of his employer." Bauer v. Richardson, (1970) 3 Or App 578, 475 P2d 995.

**2. Under former similar statute**

**(1) In general.** Suit against his employer was barred to a workman unless he brought himself within an exception to the law. Lull v. Hansen-Hammond Co., (1928) 126 Or 450, 270 P 402.

There had to be a contract of hire and the relation of master and servant for the workmen's compensation law to apply; one who gratuitously performed work was not an employe within law. Smith v. Ind. Acc. Comm., (1933) 144 Or 480, 23 P2d 904, 25 P2d 1119.

The state was an "employer" within the meaning of the statute. McLean v. Ind. Acc. Comm., (1950) 189 Or 405, 221 P2d 566.

The statute was not applicable when the "principal purpose" of the contract between plaintiff and the company was not the "performance of labor" but rather the hauling of logs. Butts v. Ind. Acc. Comm., (1951) 193 Or 417, 239 P2d 238.

Employers not covered as workmen under ORS 656.128 were not subject to the "exclusive remedy" provisions of former ORS 656.152. Reynolds v. Harbert, (1962) 232 Or 461, 375 P2d 548.

The intent of the 1957 amendment was to extend the benefits of the Act to persons previously regarded as independent contractors. Berry v. State Ind. Acc. Comm., (1964) 238 Or 39, 393 P2d 184.

**(2) Particular employments.** A lather not employed by the contractor and having no contract of hire was held an "independent contractor." Vient v. Ind. Acc. Comm., (1927) 123 Or 334, 262 P 250.

Where farmer engaged neighbor's son, who had access to father's truck, to haul pulp wood to mill at so much per cord, and hauler employed farmer's son to help, the hauler was an independent contractor, and his helper was an employe of the hauler and not of the helper's father.

Cox v. Ind. Acc. Comm., (1942) 168 Or 508, 121 P2d 919, 123 P2d 800.

A workman devoting 95 percent of time in hazardous occupation and 5 percent in nonhazardous occupations, both for the same employer, and who was injured in course of nonhazardous occupation, was within coverage of Workmen's Compensation Law. Bos v. State Ind. Acc. Comm., (1957) 211 Or 138, 315 P2d 172.

**(3) Particular workmen.** Injuries sustained by an engineer employed on a dredge in work having no relation to navigation, although done on a navigable river, were governed by the law, and were not within the exclusive admiralty jurisdiction. Mark v. Portland Gravel Co., (1929) 130 Or 11, 278 P 986.

A motor truck driver with a permit as a motor carrier was a common carrier and hence an independent contractor rather than a private employe where there was no showing that he had a special agreement not within his duties as common carrier. Brothers v. Ind. Acc. Comm., (1932) 139 Or 658, 12 P2d 302.

An employe paid by the state to work on a federal government reservation under license to the state was considered a workman subject to the statute. McLean v. Ind. Acc. Comm., (1950) 189 Or 405, 221 P2d 566.

An officer of a corporation who came within the definition of a workman did not receive benefits when he failed to file an election to become entitled to compensation as a workman. Allen v. State Ind. Acc. Comm., (1954) 200 Or 521, 265 P2d 1086.

A minor employed without a work permit was covered by Workmen's Compensation Act and his estate could not recover from employer but was limited to benefits provided by the Act. Manke v. Nehalem Logging Co., (1957) 211 Or 211, 301 P2d 192, 315 P2d 539.

A contract logging truck operator was an employe of the logger for purposes of the Act. Blaine v. Ross Lbr. Co., (1960) 224 Or 227, 355 P2d 461.

FURTHER CITATIONS: Shea v. Ind. Acc. Comm., (1926) 118 Or 642, 247 P 770; Rickert v. Ind. Acc. Comm., (1927) 122 Or 565, 259 P 205, 56 ALR 348; Davis v. Ind. Acc. Comm., (1937) 156 Or 393, 64 P2d 1330, 66 P2d 279, 68 P2d 118; Didier v. State Ind. Acc. Comm., (1966) 243 Or 460, 414 P2d 325.

ATTY. GEN. OPINIONS: Definitions of terms employ, employe, employer, and workman, 1936-38, p 94; when timber owner who employs others is an "employer," 1940-42, p 124; coverage of workers in Oregon Industries for the Blind under workmen's compensation, 1954-56, p 157; status of sheep shearers under the Act, 1960-62, p 136; coverage of an owner-driver of a logging truck as a workman, 1960-62, p 151; application to contractors felling snags, 1960-62, p 234.

LAW REVIEW CITATIONS: 30 OLR 269; 37 OLR 86; 1 WLJ 115; 5 WLJ 674-677.

**656.031**

ATTY. GEN. OPINIONS: Coverage of state hospital volunteer workers, 1960-62, p 261.

LAW REVIEW CITATIONS: 48 OLR 116.

**656.033**

ATTY. GEN. OPINIONS: Applicability to trainees of Oregon State School for the Deaf, 1966-68, p 449.

**656.044**

ATTY. GEN. OPINIONS: Eligibility of boommen and rafters who only build log rafts and have nothing to do with the transportation to come under the law, 1944-46, p 140.

**656.052**

CASE CITATIONS: Lucas v. State Ind. Acc. Comm., (1960) 222 Or 420, 353 P2d 223; Oregon Farm Bureau v. Thompson, (1963) 235 Or 162, 378 P2d 568.

LAW REVIEW CITATIONS: 37 OLR 87.

**656.054**

CASE CITATIONS: Bell v. Ind. Acc. Comm., (1937) 157 Or 653, 74 P2d 55; Ind. Acc. Comm. v. Goode, (1940) 165 Or 237, 106 P2d 296; Oregon Farm Bureau v. Thompson, (1963) 235 Or 162, 194, 378 P2d 563, 384 P2d 182.

LAW REVIEW CITATIONS: 1 WLJ 194.

**656.056**

CASE CITATIONS: Hollopeter v. Palm, (1930) 134 Or 546, 291 P 380, 294 P 1056; Elliott v. Standard Oil Co. of Calif., (1927) 18 F2d 292.

**656.126**

NOTES OF DECISIONS

An injury outside the state is not compensable unless the employe was hired to perform work within the state and was only temporarily absent. House v. Ind. Acc. Comm., (1941) 167 Or 257, 117 P2d 611.

To be entitled to the protection of the Oregon law, an employe must have acquired that status within Oregon; where he was hired to serve in California, he was an "employe" in that state. Id.

When a claimant is injured in another state he must allege and prove facts necessary to show that he was not subject to the Workmen's Compensation Law of that state but is not required to plead the laws of that state. Coblentz v. State Ind. Acc. Comm., (1955) 203 Or 258, 279 P2d 503.

Where deceased was hired in Oregon by an Oregon company to manage a California branch, and was injured in the course of his employment with the California office, his injury was not compensable under the Oregon law, although the accident occurred in Oregon. House v. Ind. Acc. Comm., (1964) 167 Or 257, 117 P2d 611.

FURTHER CITATIONS: Williamson v. Weyerhaeuser Tbr. Co., (1955) 221 F2d 5; Nadeau v. Power Plant Engr. Co., (1959) 216 Or 12, 337 P2d 313; Davis v. Morrison-Knudsen Co., (1968) 289 F Supp 835; Williamson v. Western-Pac. Dredging Corp., (1969) 304 F Supp 509; Place v. Friesen Lbr. Co., (1970) 2 Or App 6, 463 P2d 596, rev'd, 258 Or 98, 481 P2d 617.

**656.128**

NOTES OF DECISIONS

An officer of a corporation within the meaning of this statute should at least have some financial interest in the company and have a voice in its management. Carson v. Ind. Acc. Comm., (1936) 152 Or 455, 54 P2d 109.

An employe who permits his name to be used in the organization of the corporation in order to comply with the law and who has no financial interest or voice in determining the policy of the company is not precluded from receiving benefits under the statute as an employe. Id.

Although he is a workman within the statutory definition, an officer of a corporation is not entitled to benefits if he fails to file an election as required by this section. Allen

v. State Ind. Acc. Comm., (1954) 200 Or 521, 265 P2d 1086.

Employers not covered as workmen under this section are not subject to the "exclusive remedy" provisions of the workmen's compensation law. Reynolds v. Harbert, (1962) 232 Or 461, 375 P2d 548.

FURTHER CITATIONS: Nordling v. Johnston, (1955) 205 Or 315, 283 P2d 994, 287 P2d 420; Berry v. State Ind. Acc. Comm., (1964) 238 Or 39, 393 P2d 184; Didier v. State Ind. Acc. Comm., (1966) 243 Or 460, 414 P2d 325; Fagaly v. State Acc. Ins. Fund, (1970) 3 Or App 270, 471 P2d 441, Sup Ct **review denied.**

ATTY. GEN. OPINIONS: Fact that no workmen were employed at time of injury as affecting right of employer electing to come under law to benefit, 1924-26, p 74; elected county officials as "workmen," 1948-50, p 20; persons who buck and snag logs under contract with state as employes, 1960-62, p 234.

**656.132**

NOTES OF DECISIONS

A minor employed without a work permit was covered by Workmen's Compensation Act and his estate could not recover from employer but was limited to benefits provided by the Act. Manke v. Nehalem Logging Co., (1957) 211 Or 211, 301 P2d 192, 315 P2d 539.

FURTHER CITATIONS: King v. Union Oil Co., (1933) 144 Or 655, 24 P2d 345, 25 P2d 1055.

**656.154**

NOTES OF DECISIONS

1. In general
2. Constitutionality
3. Third persons
4. Premises
5. Pickup and delivery
6. Proof

**See also** cases under ORS 656.002, 656.202 and 656.578.

**1. In general**

"Injury" and "workman" should be read to mean an injury to a workman of a covered employer. Carlston v. Greenstein, (1970) 256 Or 145, 471 P2d 806.

**2. Constitutionality**

This section was not considered a violation of Ore. Const. Art. I, §10, providing that there shall be a remedy at law for injury to person. Atkinson v. Fairview Dairy Farms. (1950) 190 Or 1, 222 P2d 732.

This section did not violate Ore. Const. Art. I, §20, providing for equality of privileges and immunities. Plummer v. Drake, (1958) 212 Or 430, 320 P2d 245.

**3. Third persons**

The defendant or his employe and plaintiff's employer must actively join in a physical way in carrying on component parts of the particular work which produces the injury. Johnson v. Timber Structures, Inc., (1955) 203 Or 670, 281 P2d 723; Fisher v. Rudie Wilhelm Whse. Co., (1960) 224 Or 26, 355 P2d 242; Pruett v. Lininger, (1960) 224 Or 614, 356 P2d 547; Thomas V. Foglio, (1961) 225 Or 540, 358 P2d 1066.

A third-party action is authorized when both employers are covered by workmen's compensation, unless the two employers are engaged in a common enterprise. Pruett v. Lininger, (1960) 224 Or 614, 356 P2d 547; Hadeed v. Willamette Hi-Grade Concrete Co., (1964) 238 Or 513, 395 P2d 553; Penrose v. Mitchell Bros. Crane Div., Inc., (1967) 246 Or 507, 426 P2d 861. Penrose v. Mitchell Bros. Crane Div., Inc., supra, **distinguished in** Bass v. Dunthorpe Motor Trans. Co., (1971) 258 Or 409, 484 P2d 319.

This section is a bar to recovery only if plaintiff's employer and the third party have both elected to accept the benefits of the Act and pay contributions. Blaine v. Ross Lbr. Co., (1960) 244 Or 227, 355 P2d 461; Carlston v. Greenstein, (1970) 256 Or 145, 471 P2d 806; Guggisberg v. Croxton, (1970) 257 Or 52, 476 P2d 182.

This section bars action against third-party employers and their workmen when the third-party employer has joint supervision and control over the premises. Shoemaker v. Johnson, (1965) 241 Or 511, 407 P2d 257; Cornelison v. Seabold, (1969) 254 Or 401, 460 P2d 1009.

Compensation for any subsequent injury sustained due to the malpractice or negligence of the physician while the injured workman is being treated for the injury first sustained is required to be awarded by the commission [now board] during the time it has jurisdiction over the matter. McDonough v. National Hosp. Assn., (1930) 134 Or 451, 294 P 351.

A person hired by a county, working for a county and under the exclusive direction of a county is not in the same employ as one working for the Oregon State College under its exclusive direction and control. Walter v. Turtle, (1934) 146 Or 1, 29 P2d 517.

The test of a common enterprise is in what the workmen were doing at the time of the accident. Fisher v. Rudie Wilhelm Whse. Co., (1960) 224 Or 26, 355 P2d 242.

An employer may be in "charge of" work even though he is in charge of an activity which forms only a component part of a common enterprise. Thomas v. Foglio, (1961) 225 Or 540, 358 P2d 1066.

One who merely leases equipment used in the activity out of which plaintiff's injury occurred is not an employer within the meaning of Employers' Liability Law unless he was participating in the activity out of which the injury arose. Id.

Acceptance of benefits under the Act amounts to an election not to proceed against a third party. Wimer v. Miller, (1963) 235 Or 25, 383 P2d 1005.

A physician attending an injured workman is in the position of a third party under this Act. Id.

When separate employers are in a situation contemplated by this section, a cause of action against any employer as a third party so situated does not exist regardless of when negligence occurs that causes the injury on the premises under joint supervision and control. Mason v. Sutherlin Mach. Works, Inc., (1965) 240 Or 51, 399 P2d 1016.

For an action to be barred under subsection (1), defendant must show (1) that he was an employer subject to the Act; (2) that he or his workmen causing injury had joint supervision and control with the injured workmen's employer of the premises on which the injury occurred; and (3) that he and the injured workman's employer were engaged in the furtherance of a common enterprise or in the accomplishment of the same or related purposes in operation. Bass v. Dunthorpe Motor Trans. Co., (1971) 258 Or 409, 484 P2d 319.

"Joint supervision and control" describes a situation where both employers have control of premises in the sense that they have some control of activities which occur there, without regard to the fact that a particular act which causes injury may be within the exclusive control of the employes of only one of them. Id.

A steamship company stevedore could not maintain an action against a lumber company for injuries sustained by the negligence of an employe of the latter where the two companies, having the same stockholders and officers, were "engaged in the furtherance of a common enterprise." Inwall v. Transpacific Lbr. Co., (1940) 165 Or 560, 108 P2d 522.

There was "joint supervision" when the injured employe's

duties included the handling of milk in an establishment owned by a third person. Atkinson v. Fairview Dairy Farms, (1950) 190 Or 1, 222 P2d 732.

When the evidence merely indicated that the plaintiff's employer was repairing a ship while the defendant was loading the same vessel, the premises over which the employers had joint supervision was limited to the ship. Kosmecki v. Portland Stevedoring Co., (1950) 190 Or 85, 223 P2d 1035.

The company owning and operating a delivery truck did not have joint supervision and control of premises with the owner of the premises in which the truck was making deliveries. Johnson v. Tbr. Structures, Inc., (1955) 203 Or 670, 281 P2d 723. **Distinguished in** Fisher v. Rudie Wilhelm Whse. Co., (1960) 224 Or 26, 355 P2d 242.

Where workman was a boat builder launching a boat at city dock, action was allowed against city for negligence of city where his employer was not engaged in furtherance of a common enterprise with the city or with the accomplishment of the same or related purposes. Hensler v. Portland, (1957) 212 Or 28, 318 P2d 313.

Log truck driver whose employer was supplying lumber company with logs was under joint supervision of his employer and lumber company. Long v. Springfield Lbr. Mills, Inc., (1958) 214 Or 231, 327 P2d 421.

There was joint supervision and control over the premises when plaintiff, employe of lumber company, was injured while helping defendant's employe load logs on defendant's truck to be taken to lumber company's mill. Claussen v. Ireland, (1959) 216 Or 289, 338 P2d 676.

Plaintiff, injured by defendant's employe, could not bring a third-party action since both employers were engaged in the common enterprise of getting logs to mills from the timber area. McGuire v. Brown, (1959) 217 Or 300, 342 P2d 774.

While unloading steel trusses at a construction job with employes of the manufacturer of the steel, employes of the warehouse company delivering the steel were engaged in a common enterprise. Fisher v. Rudie Wilhelm Whse. Co., (1960) 224 Or 26, 355 P2d 242.

The phrase "an employer subject to ORS 656.002 to 656.590 [now ORS 656.001 to 656.794]" did not include an employer engaged in a hazardous occupation who has rejected the benefits of the Act. Blaine v. Ross Lbr. Co., (1960) 224 Or 227, 355 P2d 461.

The injured employe while engaged with the person causing the injuries in the performance of component parts of an undertaking on premises occupied by the workmen of both employers was engaged in a common enterprise. Pruett v. Lininger, (1960) 224 Or 614, 356 P2d 547.

**4. Premises**

Plaintiff stevedore loading cargo from warehouse of defendant with latter's employes was injured on "premises over which plaintiff's employer and defendant had joint supervision and control and were engaged in the furtherance of a common enterprise." Hecker v. Crown Mills, (1961) 229 Or 8, 365 P2d 840.

Joint control of the premises was not precluded where the accident occurred on the improved portion of a public highway. Layton v. Leep Logging, Inc., (1967) 247 Or 580, 430 P2d 1008.

There was joint supervision and control over the premises where the injury occurred. Cogburn v. Roberts Supply Co., (1970) 256 Or 582, 475 P2d 67.

**5. Pickup and delivery**

Subsection (3) does not cover logging operations at a woods landing or mill pond as they are commonly conducted. Boling v. Nork, (1962) 232 Or 461, 375 P2d 548; Childers v. Schaecher Lbr. Co., (1963) 234 Or 230, 380 P2d 993; Hadeed v. Willamette Hi-Grade Concrete Co., (1964) 238 Or 513, 395 P2d 553; Patnode v. Carver Elec. & Sign Supplies Co., (1969) 253 Or 89, 453 P2d 675; Gorham v. Swanson, (1969) 253 Or 133, 453 P2d 670.

Subsection (3) codifies the rule that ordinary pick-up-and-delivery situations do not bring the premises under joint supervision or control of any employer other than the one upon whose premises the pickup or delivery is being made. Boling v. Nork, (1962) 232 Or 461, 375 P2d 548; Green v. Market Sup. Co., (1971) 257 Or 451, 479 P2d 736.

**6. Proof**

An employer has the burden of proving his identity as a third person who had joint supervision over the place of injury along with the injured party's employer. Kosmecki v. Portland Stevedoring Co., (1950) 190 Or 85, 223 P2d 1035.

The burden was on defendant lumber company to prove that the wharf upon which an injury to a steamship company employe occurred was under the "joint supervision" of the two companies. Inwall v. Transpacific Lbr. Co., (1940) 165 Or 560, 108 P2d 522.

FURTHER CITATIONS: Newell v. Taylor, (1958) 212 Or 522, 321 P2d 294; Stout v. Derringer, (1959) 216 Or 1, 337 P2d 357; Bandy v. Norris, Beggs and Simpson, (1959) 222 Or 1, 342 P2d 839; Nelson v. Bartley, (1960) 222 Or 361, 352 P2d 1083; Beers v. Chapman, (1962) 230 Or 553, 370 P2d 941; Bassick v. Portland Gen. Elec. Co., (1967) 246 Or 498, 426 P2d 450; St. Paul Fire and Marine Ins. Co. v. United States Nat. Bank, (1968) 251 Or 377, 446 P2d 103; Johnson v. Dave's Auto Center, Inc., (1970) 257 Or 34, 476 P2d 190; Leech v. Georgia-Pac. Corp., (1971) 259 Or 161, 485 P2d 1195.

LAW REVIEW CITATIONS: 39 OLR 80, 81, 132, 186-193; 40 OLR 292; 46 OLR 333-343; 47 OLR 364; 48 OLR 116; 1 WLJ 72, 74; 2 WLJ 52, 54, 55.

**656.156**

NOTES OF DECISIONS

**1. Injury caused by employer**

"Deliberate intention" implies that the employer must have determined to injure the employe; mere carelessness or negligence, however gross, is not sufficient. Jenkins v. Carman Mfg. Co., (1916) 79 Or 448, 155 P 703; Heikkila v. Ewen Transfer Co., (1931) 135 Or 631, 297 P 373; Caline v. Maede, (1964) 239 Or 239, 396 P2d 694.

That the defendant employer singled the plaintiff out with the express purpose of injuring him need not be proved by the injured employe under this section where the act of the defendant was unlawful and deliberately committed by him with the intention of inflicting injury. Weis v. Allen, (1934) 147 Or 670, 35 P2d 478.

Punitive damages are recoverable in a proper case in an action by an employe against his employer under this statute. Id.

No limit to the amount of recovery on the part of the injured employe is imposed by this statute, but it creates an additional fund for the payment of a part of the damages for injuries sustained. Id.

No election is required by the employe as to whether to pursue his remedy under the compensation law or sue at common law; he is assured the compensation to which he is entitled under the law, and in addition is granted the right to avail himself of his common-law remedy. Id.

A third person having "joint supervision" of the place of injury along with the injured man's employer, is not an employer within the meaning of this section. Atkinson v. Fairview Dairy Farms, (1950) 190 Or 1, 222 P2d 732.

The use of a motor truck with defective brakes in defiance of statute, and another truck in the lead to serve as a brake for the hind truck, although deliberately intended, does not show a deliberate intention to injure the employe so as to

authorize an action under this section. Heikkila v. Ewen Transfer Co., (1931) 135 Or 631, 297 P 373.

**2. Self-inflicted injury of workman**

Although the deceased employe commenced the sport with an air hose during working hours which resulted in his death, the employer was liable for his death. Stark v. Ind. Acc. Comm., (1922) 103 Or 80, 204 P 151.

LAW REVIEW CITATIONS: 10 OLR 410; 14 OLR 292.

**656.202**

NOTES OF DECISIONS



**See also** cases under ORS 656.154.

**1. Compensation**

Compensation is fixed as of the date of the injury. State v. Ind. Acc. Comm., (1925) 115 Or 484, 237 P 680.

Before the 1921 amendment, children born subsequent to an injury were not included in the estimate of compensation of an injured workman. Id.

Where there has been an overpayment, there is no reason why the commission may not adjust later payments to comply with the rights of the workman under the Act. State ex rel. Britt v. State Ind. Acc. Comm., (1964) 238 Or 130, 393 P2d 649.

The burden of proof of employment injury is on the claimant. Blisserd v. State Ind. Acc. Fund, (1971) 92 Or App Adv Sh 1786, 486 P2d 312.

**2. Beneficiaries and dependents**

Dependents are determined as of the date of the injury. State v. Ind. Acc. Comm., (1925) 115 Or 484, 237 P 680.

It is only in case the injury results in death that the injured workman's beneficiaries or dependents receive compensation. Casaday v. Ind. Acc. Comm., (1926) 116 Or 656, 242 P 598.

**3. Right of deceased employe's estate to collect compensation**

An employe's personal representative may recover unpaid instalments accruing before his death. Heuchert v. Ind. Acc. Comm., (1942) 168 Or 74, 121 P2d 453.

If an employe dies from a cause dissociated from the injury, his personal representative may recover only instalments accruing during his life. Id.

**4. Injury by accident**

**(1) Elements.** In determining whether the physical harm sustained by an employe was the consequence of the accident or the injury, the controlling question is the continuity of the chain of causation and the absence of any intervening independent agency. Baker v. Ind. Acc. Comm., (1929) 128 Or 369, 274 P 905.

An injury is not sustained by "accident" where an unusual or unexpected result occurs upon the doing of an intentional act, and there is no mischance, slip, or mishap in the doing of the act itself. Gottfried v. Ind. Acc. Comm., (1942) 168 Or 65, 120 P2d 970.

**(2) Time.** An accident is an event the time of which can be definitely fixed. Chalfant v. Arens, (1941) 167 Or 649, 120 P2d 219.

An application for compensation specifying that the accident occurred after he had left work and several miles away, although not conclusive, fortified the conclusion that no reasonably definite time could be specified as of which an accident occurred in the course of his employment. Id.

**(3) Evidence.** There must be substantial evidence of injury by accident which arose out of and in the course of employment and which must have been caused by violent or external means. Chalfant v. Arens, (1941) 167 Or 649, 120 P2d 219.

Declarations of a decedent concerning the cause of an injury which later caused his death were not admissible to establish a workmen's compensation claim. Pratt v. State Ind. Acc. Comm., (1954) 201 Or 658, 271 P2d 659. **Distinguished in** King v. State Ind. Acc. Comm., (1957) 211 Or 40, 309 P2d 159, 315 P2d 148, 318 P2d 282.

**(4) Particular injuries.** An injury to an eye by irritation from heat, smoke and overexertion while fighting fire, was compensable as an accident, it being immaterial that the injured employe could not fix the exact date of the injury. Dondeneau v. Ind. Acc. Comm., (1926) 119 Or 357, 249 P 820, 50 ALR 1129.

An abrasion on the heel of a chainman, with blood poisoning subsequently developing, was an injury by accident caused by violent and external means. Huntley v. Ind. Acc. Comm., (1931) 138 Or 184, 6 P2d 209.

Although the rupture of a cancer was the immediate cause of death, where there is some competent evidence that the lifting of sacks of nuts was the proximate cause of the death, death was caused by external means. Elford v. Ind. Acc. Comm., (1932) 141 Or 284, 17 P2d 568.

Injury was not caused by accidental means where plaintiff's intentional act resulted in an unusual or unexpected result but there was no mischance, slip, or mishap in doing the act. Chalfant v. Arens, (1941) 167 Or 649, 120 P2d 219.

Where plaintiff in firing a boiler deliberately looked at the fire, the resulting impairment of his vision was not caused by accidental means and was not compensable. Id.

Where an employe of a baking company stooped over quickly to pick up a bun that had fallen off the tray and hurt his back in so doing, the injury was not sustained by "accident" and was not compensable. Gottfried v. Ind. Acc. Comm., (1942) 168 Or 65, 120 P2d 970.

Injury occurring during working hours as plaintiff removed springs from wrecked car to install on his truck, where he was employed to haul gravel in his own truck from stock piles to road under repair, did not arise out of and in the course of his employment. Stuhr v. Ind. Acc. Comm., (1949) 186 Or 629, 208 P2d 450.

Workman's beneficiaries were allowed recovery for death resulting from coronary occlusion upon showing workman was performing even slight activity. Olson v. State Ind. Acc. Comm., (1960) 222 Or 407, 352 P2d 1096.

Employe injured after work while crossing public thoroughfare partially controlled by employer was entitled to compensation. Montgomery v. State Ind. Acc. Comm., (1960) 224 Or 380, 356 P2d 524.

**5. Under pre-1965 Act, hazardous occupations**

The work was not hazardous unless it was being performed in conjunction with a hazardous occupation then being engaged in by the employer. Bennett v. State Ind. Acc. Comm., (1955) 203 Or 275, 279 P2d 655, 279 P2d 886; Manning v. State Ind. Acc. Comm., (1963) 234 Or 207, 380 P2d 989; Oregon Farm Bureau v. Thompson, (1963) 235 Or 162, 378 P2d 563; Memmott v. State Ind. Acc. Comm., (1963) 235 Or 360, 385 P2d 188. Oregon Farm Bureau v. Thompson, supra, **distinguished in** Memmott v. State Ind. Acc. Comm., (1963) 235 Or 360, 385 P2d 188, and Richert v. State Ind. Acc. Comm., (1965) 240 Or 381, 401 P2d 701.

A service station employe was not engaged in a hazardous occupation. State Ind. Acc. Comm. v. Garreau, (1954) 200 Or 594, 267 P2d 661.

Work on a residence was not hazardous. Bennett v. State Ind. Acc. Comm., (1955) 203 Or 275, 279 P2d 655, 279 P2d 886.

A workman devoting 95 percent of time in hazardous occupation and 5 percent in nonhazardous occupations, both for the same employer, and who was injured in course of nonhazardous occupation, was within coverage of Workmen's Compensation Law. Bos v. State Ind. Acc. Comm., (1957) 211 Or 138, 315 P2d 172.

"Occupation" meant the employer's trade or business. Memmott v. State Ind. Acc. Comm., (1963) 235 Or 360, 385 P2d 188.

A tavern was not a hazardous occupation and the preparation and sale of snacks to supplement beer sales did not convert the operation of a tavern to that of a restaurant, which was a hazardous occupation. Babb v. Lewis, (1966) 244 Or 537, 419 P2d 423.

FURTHER CITATIONS: Burrows v. State Ind. Acc. Comm., (1957) 209 Or 352, 306 P2d 395; Butler v. State Ind. Acc. Comm., (1957) 212 Or 330, 318 P2d 303; Kehoe v. State Ind. Acc. Comm., (1958) 214 Or 629, 332 P2d 91; Bandy v. Norris, Beggs and Simpson, (1959) 222 Or 1, 342 P2d 839, 351 P2d 445; Zurich Ins. Co. v. Sigourney, (1960) 278 F2d 826; Ritters v. Beals, (1961) 225 Or 504, 358 P2d 1080; Davis v. Weyerhaeuser Co., (1962) 231 Or 596, 373 P2d 985; Bush v. C.J. Montag & Sons, Inc., (1967) 246 Or 391, 425 P2d 527; Clayton v. State Comp. Dept., (1969) 253 Or 397, 454 P2d 628.

ATTY. GEN. OPINIONS: A workman who terminates his employment, leaves the premises of the employer in his private car and is struck by a train off the premises of the employer as injured "by accident arising out of and in the course of his employment," 1944-46, p 82; physician-legislator employed to examine injured workmen, 1952-54, p 124; effective date of benefits under 1965 Act, 1964-66, p 228.

LAW REVIEW CITATIONS: 15 OLR 81; 1 WLJ 28, 42; 2 WLJ 24-36, 37-47, 6 WLJ 621-626.

**656.204**

NOTES OF DECISIONS

Under a former similar statute, where commission failed to show that there was no divorce or other dissolution of a former marriage, recited in the stipulation of facts to exist in Finland, the second wife was entitled to compensation as a widow of the deceased workman. Alto v. Ind. Acc. Comm., (1926) 118 Or 231, 246 P 359.

Under a former similar statute, the word "widow" included one who married a workman after a fatal injury. Rosell v. Ind. Acc. Comm., (1939) 164 Or 173, 95 P2d 726.

A relationship recognized as a marriage in another state where it was consummated will be recognized in Oregon even though such relationship would not be a marriage if the same facts had been relied upon to create a marriage in Oregon. Boykin v. State Ind. Acc. Comm., (1960) 224 Or 76, 355 P2d 724.

Adult invalid child who survives workman is not entitled to the allowance under this section where there is no surviving widow. Leech v. Georgia-Pac. Corp., (1969) 254 Or 351, 458 P2d 438.

Where workman dies with wife and 28 year old invalid child surviving him, widow is not entitled to additional allowance for such dependent child. Id.

Legislature intended that a child under 18 years of age should not receive under this section any payments in his own right where a surviving widow is an eligible beneficiary. Id.

The omission of some dependents as beneficiaries did not appear arbitrary and the classification of beneficiaries was constitutional under the privileges and immunities provision, Ore. Const. Art. 1 §20 and U.S. Const., Am. 14. Leech v. Georgia-Pac. Corp., (1971) 259 Or 161, 485 P2d 1195.

FURTHER CITATIONS: Fenton v. State Ind. Acc. Comm., (1953) 199 Or 668, 264 P2d 1037; State v. Schulman, (1971) 92 Or App Adv Sh 1505, 485 P2d 1252, Sup Ct review denied.

ATTY. GEN. OPINIONS: Reduction of award upon divorce, 1922-24, p 31; what constitutes support within statute, 1922-24, p 239; eligibility of married girls under 18 receiving compensation, 1930-32, p 411; amount of compensation for dependent children of deceased workman when mother dies after her remarriage, 1938-40, p 431; rights of widow and minor children to receive benefits after adoption of children by others, 1938-40, p 436; retroactivity of the Act, 1948-50, p 242.

LAW REVIEW CITATIONS: 2 WLJ 90.

**656.206**

NOTES OF DECISIONS

Where any useful vision remains, the disability is partial and an award for total disability is not authorized. Chebot v. State Ind. Acc. Comm., (1923) 106 Or 660, 212 P 792; Borman v. State Comp. Dept., (1969) 1 Or App 136, 459 P2d 885.

The upper limit of recovery for loss of use of an extremity is the award provided in the schedule for the loss of the same limb by separation. Jones v. State Comp. Dept., (1968) 250 Or 177, 441 P2d 242; Trent v. State Comp. Dept., (1970) 2 Or App 76, 466 P2d 622.

An employe that is so injured that he can perform no service other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled. Cooper v. Publishers Paper Co., (1970) 3 Or App 415, 474 P2d 27; Swanson v. Westport Lbr. Co., (1971) 4 Or App 417, 479 P2d 1005.

Under a former similar statute, the total loss of sight of one eye and the loss of 50 percent of the vision of the other authorized an award as for partial disability only, not for total disability. Chebot v. Ind. Acc. Comm., (1923) 106 Or 660, 212 P 792.

Under a former similar statute, a wife and children of a marriage of the claimant celebrated after injury were not dependents within the statute. Casaday v. Ind. Acc. Comm., (1926) 116 Or 656, 242 P 598.

When an injury comes within a certain fixed schedule of compensation, the commission [now board] has no discretion to exercise about awarding the compensation and can attach no conditions thereto. Hoffmeister v. Ind. Acc. Comm., (1945) 176 Or 216, 156 P2d 834.

"Useful vision" means vision which is useful in a gainful occupation. Borman v. State Comp. Dept., (1969) 1 Or App 136, 459 P2d 885.

To defeat a claim of permanent disability if evidence of degree of obvious physical impairment, coupled with other factors such as claimant's mental capacity, education, training or age, place claimant prima facie in the odd-lot category, the burden is on the employer to show that some kind of suitable work is regularly and continuously available to claimant. Swanson v. Westport Lbr. Co., (1971) 4 Or App 417, 479 P2d 1005.

In considering what is a suitable occupation, it must have been intended that factors, other than physical impairment, should be taken into consideration. Surratt v. Gunderson Bros. Engr. Corp. (dictum), (1971) 259 Or 65, 485 P2d 410, modifying 3 Or App 228, 471 P2d 817.

The preponderance of evidence supported a finding of permanent total, not partial, disability. Pykonen v. State Acc. Ins. Fund, (1970) 3 Or App 74, 471 P2d 855; Mumpower v. State Acc. Ins. Fund, (1970) 4 Or App 357, 478 P2d 425, Sup Ct **review denied.**

FURTHER CITATIONS: Dimitroff v. State Ind. Acc. Comm., (1957) 209 Or 316, 306 P2d 398; Tooley v. State Ind. Acc. Comm., (1965) 239 Or 466, 398 P2d 184; Dalton v. Cape Arago Lbr. Co., (1970) 4 Or App 249, 478 P2d 433.

ATTY. GEN. OPINIONS: Divorce of mother and stepfather as disqualifying stepchildren, 1938-40, p 216; segregation of additional compensation payable to injured workman among beneficiaries, 1956-58, p 186.

LAW REVIEW CITATIONS: 2 WLJ 13.

**656.208**

NOTES OF DECISIONS

Widow may obtain benefits even though commission [now board] has not made order during life of deceased workman adjudging him permanently totally disabled. Mikolich v. State Ind. Acc. Comm., (1957) 212 Or 36, 316 P2d 812, 318 P2d 274.

The right to benefits does not survive without at least an award of such benefits being made. Fertig v. State Comp. Dept., (1969) 254 Or 136, 455 P2d 180, 458 P2d 444.

FURTHER CITATIONS: Olson v. State Ind. Acc. Comm., (1960) 222 Or 407, 352 P2d 1096; Boykin v. State Ind. Acc. Comm., (1960) 224 Or 76, 355 P2d 724; Fertig v. State Comp. Dept., (1969) 254 Or 136, 455 P2d 180, 458 P2d 444; Majors v. State Acc. Ins. Fund, (1970) 3 Or App 505, 475 P2d 439.

ATTY. GEN. OPINIONS: Stepchildren as entitled to receive payments despite divorce of mother and stepfather, 1938-40, p 216; widow of a deceased workman, though married subsequent to the time of the injury, as entitled to benefit payments, 1944-46, p 196.

LAW REVIEW CITATIONS: 2 WLJ 90.

**656.210**

NOTES OF DECISIONS

The legislature's intent was to consider the welfare of wife and child as well as the injured workman in awarding compensation. Ellis v. Fallert, (1957) 209 Or 406, 307 P2d 283.

An award for temporary total disability was proper where the treatment prescribed by the commission's [now board's] physician was light exercise and work, although claimant was able to work a few hours at a time at light work. Vader v. Ind. Acc. Comm., (1940) 163 Or 492, 98 P2d 714.

An allegation that temporary total disability would be for a designated period was properly construed as a mere opinion where the claimant's condition was not stationary. Id.

FURTHER CITATIONS: Dimitroff v. State Ind. Acc. Comm., (1957) 209 Or 316, 306 P2d 398; Tooley v. State Ind. Acc. Comm., (1965) 239 Or 466, 398 P2d 184; Fertig v. State Comp. Dept., (1969) 254 Or 136, 455 P2d 180, 458 P2d 444; Surratt v. Gunderson Bros. Engr. Corp., (1971) 259 Or 65, 485 P2d 410.

ATTY. GEN. OPINIONS: Basis upon which compensation shall be paid to person working but one day each week, 1930-32, p 495; segregation of additional compensation payable to injured workman among beneficiaries, 1956-58, p 186; payment recoverable for first three days, effective date of benefits under 1965 Act, 1964-66, p 228.

LAW REVIEW CITATIONS: 2 WLJ 68.

**656.212**

CASE CITATIONS: Tooley v. State Ind. Acc. Comm., (1965) 239 Or 466, 398 P2d 184; Ryf v. Hoffman Constr. Co., (1969) 254 Or 624, 459 P2d 991; Surratt v. Gunderson Bros. Engr. Corp., (1971) 259 Or 65, 485 P2d 410.

ATTY. GEN. OPINIONS: Segregation of additional compensation payable to injured workman among beneficiaries, 1956-58, p 186.

LAW REVIEW CITATIONS: 2 WLJ 5, 13.

**656.214**

NOTES OF DECISIONS

1. In general
2. Scheduled disabilities
   (1) Foot
   (2) Loss of sight
   (3) Loss of digits
3. Unscheduled disabilities

**1. In general**

No compensation is allowable for pain, suffering or nervousness in and of themselves, but the disabling effects of such may be considered in determining the disabling effect of a particular injury. Wilson v. Ind. Acc. Comm., (1950) 189 Or 114, 219 P2d 138; Walker v. State Comp. Dept., (1967) 248 Or 195, 432 P2d 1018. **But see** Surratt v. Gunderson Bros. Engr. Corp., (1971) 259 Or 65, 485 P2d 410, modifying 3 Or App 228, 471 P2d 817.

Two awards should be made in the situation where an injury to an unscheduled portion of the body results in disability to both unscheduled and scheduled portions. Foster v. State Acc. Ins. Fund, (1971) 259 Or 86, 485 P2d 407, modifying 4 Or App 50, 474 P2d 20, 476 P2d 933.

The award for disability to a scheduled member should not be duplicated in the award for an unscheduled disability. Surratt v. Gunderson Bros. Engr. Corp., (1971) 259 Or 65, 485 P2d 410, modifying 3 Or App 228, 471 P2d 817.

Compensation is paid for disability, not injury. Foster v. State Acc. Ins. Fund, (1970) 4 Or App 50, 474 P2d 20, 476 P2d 933, modified, 259 Or 86, 485 P2d 407.

**2. Scheduled disabilities**

Impairment of earning capacity cannot be considered in determining awards for specific scheduled permanent partial disabilities. Kajundzich v. State Ind. Acc. Comm., (1940) 164 Or 510, 512, 102 P2d 924; Surratt v. Gunderson Bros. Engr. Corp., (1971) 259 Or 65, 485 P2d 410, modifying 3 Or App 228, 471 P2d 817.

Disability for loss of use of a scheduled member is limited to that set forth in the schedule. Jones v. State Comp. Dept., (1968) 250 Or 177, 178, 441 P2d 242; Surratt v. Gunderson Bros. Engr. Corp., (1971) 259 Or 65, 485 P2d 410, modifying 3 Or App 228, 471 P2d 817.

**(1) Foot.** Injury to claimant's foot resulting in disability to his leg justified an award based on loss of the function of the leg. Kajundzich v. Ind. Acc. Comm., (1940) 164 Or 510, 102 P2d 924.

**(2) Loss of sight.** A total loss of sight of one eye and the loss of 50 percent of the vision of the other eye authorized an award as for partial disability only. Chebot v. Ind. Acc. Comm., (1923) 106 Or 660, 212 P 792.

Where claimant had useful vision in his eye and the jury found a loss of the entire sight of the eye, although testi-

mony indicated the eye was blind only for industrial use, claimant was entitled to 100 percent recovery. Wilson v. Ind. Acc. Comm., (1950) 189 Or 114, 219 P2d 138.

In proving loss of vision, it is necessary to produce expert medical testimony concerning the extent of the loss. Orr v. State Ind. Acc. Comm., (1959) 217 Or 249, 342 P2d 136.

**(3) Loss of digits.** Where injury to a thumb results in no unusual complications, compensation for an injury to the hand is improper. Graham v. Ind. Acc. Comm., (1940) 164 Or 626, 102 P2d 927.

Under paragraph (b), loss of "all five digits" is equivalent to what was under former law the loss of a hand. Grudle v. State Acc. Ins. Fund, (1970) 4 Or App 326, 479 P2d 250.

Under subsection (3), the loss of use allowance for loss of effective opposition does not include consequential disability to the hand. Id.

Where fewer than five digits on one hand are injured compensation can be awarded only in accordance with paragraphs (j) and (k). Id.

**3. Unscheduled disabilities**

The shoulder is separate from the arm and if injured, claimant is entitled to award for unscheduled disability. Audas v. Galaxie, Inc., (1970) 2 Or App 520, 467 P2d 654, Sup Ct **review denied;** Hannan v. Good Samaritan Hosp., (1970) 4 Or App 178, 471 P2d 831, 476 P2d 931, Sup Ct **review denied;** Foster v. State Acc. Ins. Fund, (1970) 4 Or App 50, 474 P2d 20, 476 P2d 933, modified, 259 Or 86, 485 P2d 407.

Loss of earnings is a factor to be considered in awarding permanent partial disability for an unscheduled injury. Audas v. Galaxie, Inc., (1970) 2 Or App 520, 467 P2d 654, Sup Ct **review denied;** Hannan v. Good Samaritan Hosp., (1970) 4 Or App 178, 471 P2d 831, 476 P2d 931, Sup Ct **review denied.**

Loss of earning capacity is a proper test in determining claimant's unscheduled disability. Surratt v. Gunderson Bros. Engr. Corp., (1971) 259 Or 65, 485 P2d 410, modifying 3 Or App 228, 471 P2d 817; Hawes v. State Acc. Ins. Fund, (1971) 92 Or App Adv Sh 1830, 486 P2d 1294.

To defeat a claim of permanent disability if evidence of degree of obvious physical impairment, coupled with other factors such as claimant's mental capacity, education, training or age, place claimant prima facie in the odd-lot category, the burden is on the employer to show that some kind of suitable work is regularly and continuously available to claimant. Swanson v. Westport Lbr. Co., (1971) 4 Or App 417, 479 P2d 1005; Bailey v. Morrison-Knudsen Co., (1971) 5 Or App 592, 485 P2d 1254.

The limitation affixed to unscheduled injuries applies only to the particular injury which results from a particular accident. Green v. Ind. Acc. Comm., (1952) 197 Or 160, 251 P2d 437, 252 P2d 545.

The fact that a workman's second injury involved the same part of his body as that injured in the first accident has no bearing upon his right to compensation for the permanent injury actually suffered as the result of the second accident. Id.

In determining the extent of an unscheduled permanent partial disability, claimant is a competent witness as to the pain he suffered and his impaired ability to perform physical labor. Martin v. Douglas County Lbr. Co., (1970) 4 Or App 69, 476 P2d 940.

The legislature, by the 1967 amendment, intended that there be but one award where the injury is to an unscheduled member resulting in disability to a scheduled and an unscheduled member. Foster v. State Acc. Ins. Fund, (1970) 259 Or 86, 485 P2d 407, modifying 4 Or App 50, 474 P2d 20, 476 P2d 933.

FURTHER CITATIONS: Dimitroff v. State Ind. Acc. Comm., (1957) 209 Or 316, 306 P2d 398; McClenny v. State Ind. Acc. Comm., (1963) 236 Or 383, 388 P2d 117; Tooley v. State Ind. Acc. Comm., (1965) 239 Or 466, 398 P2d 184; Nesselrodt v. State Comp. Dept., (1967) 248 Or 452, 435 P2d 315; Borman v. State Comp. Dept., (1969) 1 Or App 136, 459 P2d 885; Fertig v. State Comp. Dept., (1969) 254 Or 136, 455 P2d 180, 458 P2d 444; Beagle v. Rudie Wilhelm Whse. Co., (1970) 2 Or App 533, 470 P2d 386; Lisoski v. The Embers, (1970) 2 Or App 60, 465 P2d 888; Trent v. State Comp. Dept., (1970) 2 Or App 76, 466 P2d 622.

ATTY. GEN. OPINIONS: Industrial blindness as complete loss of sight for compensation purposes, notwithstanding the retention of some visual efficiency, 1942-44, p 434.

LAW REVIEW CITATIONS: 39 OLR 26; 2 WLJ 3, 5, 13, 14, 15, 68.

**656.216**

CASE CITATIONS: Fertig v. State Comp. Dept., (1969) 254 Or 136, 455 P2d 180, 458 P2d 444; Bivens v. Weyerhaeuser Co., (1971) 92 Or App Adv Sh 1772, 487 P2d 119; Wilson v. Gilchrist Tbr. Co., (1971) 92 Or App Adv Sh 1779, 487 P2d 104.

**656.218**

NOTES OF DECISIONS

The right to benefits does not survive without at least an award of such benefits being made. Fertig v. State Comp. Dept., (1969) 254 Or 136, 455 P2d 180, 458 P2d 444; Majors v. State Acc. Ins. Fund, (1970) 3 Or App 505, 475 P2d 437.

FURTHER CITATIONS: Cox v. Ind. Acc. Comm., (1942) 168 Or 508, 121 P2d 919, 123 P2d 800.

ATTY. GEN. OPINIONS: Widow of deceased workman as entitled to both a fatal award and balance of permanent partial disability award, 1930-32, p 419.

LAW REVIEW CITATIONS: 2 WLJ 90.

**656.220**

NOTES OF DECISIONS

The statute limiting the compensation for hernia, when operated upon, to payment for temporary disability does not preclude recovery for other injuries received at the time the hernia was caused. Plowman v. Ind. Acc. Comm., (1933) 144 Or 138, 23 P2d 910.

A workman should not be precluded from recovering additional compensation, if after diagnosis and an operation for hernia he is not relieved and he discovers that, in addition to hernia, he has, in fact, sustained injuries for which he had not been compensated. Id.

Where compensation in the full sum specified by this section was awarded, in a claim based on hernia alone, the commission [now board] did not err in awarding nothing for other injuries and classifying claimant's condition as temporary total disability. McDermott v. Ind. Acc. Comm., (1923) 107 Or 526, 215 P 591.

Plaintiff was entitled to recover for preexisting hernia and stroke which jury could have found as a proximate cause of the hernia operation. Tucker v. State Ind. Acc. Comm., (1959) 216 Or 74, 337 P2d 979.

ATTY. GEN. OPINIONS: Performance of operation as condition precedent to receiving compensation for hernia, 1926-28, p 488.

LAW REVIEW CITATIONS: 37 OLR 85.

656.222

**1. In general**

The commission's [now board's] jurisdiction continues during a disability, the proximate cause of which may reasonably be traced to the injury. McDonough v. Nat. Hosp. Assn., (1930) 134 Or 451, 294 P 351.

Before the 1935 amendment, only those injuries for which the workman was still receiving compensation, or for which lump sum payment had been made which, if divided into monthly instalments, would still be in process of payment to him at the time of further injuries, were covered by the statute. Cain v. Ind. Acc. Comm., (1934) 149 Or 29, 37 P2d 353, 96 ALR 1072.

**2. Computation of compensation**

Inclusion of compensation for additional injuries caused by the malpractice of a physician was required when compensation was awarded. McDonough v. Nat. Hosp. Assn., (1930) 134 Or 451, 294 P 351.

Before the 1935 amendment, a further injury to the same part of his body previously involved, which increased the degree of existing permanent partial disability for which the employe was receiving compensation in monthly instalments, required adjustment of his future compensation with regard to the combined effects of his injuries. Cain v. Ind. Acc. Comm., (1934) 149 Or 29, 37 P2d 353, 96 ALR 1072.

Before the 1935 amendment, a workman who repeatedly suffered the same type of injuries did not receive any greater compensation because of the recurrence of the injury to the same part of his body than was warranted by the discernible additional degree of disability brought about by the specific injury for which he sought compensation. Id.

It is not the legislative intention, by this section, to limit an injured workman suffering unscheduled permanent partial disabilities in more than one accident to a maximum combined recovery equivalent to the maximum recovery provided in OCLA 102-1760 [ORS 656.214(4)] for unscheduled permanent partial disabilities in one accident. Green v. Ind. Acc. Comm., (1952) 197 Or 160, 251 P2d 437, 252 P2d 545.

The fact that a workman's second injury involved the same part of his body as that injured in the first accident has no bearing upon his right to compensation for the permanent injury actually suffered as the result of the second accident. Id.

This section requires that in case of successive permanent partial disabilities involving a member of the body named in the schedule, the amount paid under the former awards must be deducted from the last award. Nesselrodt v. State Comp. Dept., (1967) 248 Or 452, 435 P2d 315.

FURTHER CITATIONS: Degidio v. Ind. Acc. Comm., (1922) 105 Or 642, 207 P 176; Hannan v. Good Samaritan Hosp., (1970) 4 Or App 178, 471 P2d 831, 476 P2d 931, Sup Ct review denied.

656.226

NOTES OF DECISIONS

To identify recipient of death benefits, the status of a woman as the "surviving wife" is controlled by reference to this section rather than the domestic relations law. Albina Engine and Mach. Works v. O'Leary, (1964) 328 F2d 877.

LAW REVIEW CITATIONS: 12 OLR 238; 23 OLR 90; 2 WLJ 91.

656.228

CASE CITATIONS: Ellis v. Fallert, (1957) 209 Or 406, 307 P2d 283.

ATTY. GEN. OPINIONS: Segregating additional compensation payable to injured workman among beneficiaries, 1956-58, p 186.

656.230

NOTES OF DECISIONS

"Lump sum payment" means a payment before it becomes due under monthly payments. Verban v. Ind. Acc. Comm., (1942) 168 Or 394, 123 P2d 988.

FURTHER CITATIONS: Carr v. Ind. Acc. Comm., (1936) 153 Or 517, 57 P2d 1278; Lucas v. State Ind. Acc. Comm., (1960) 222 Or 420, 353 P2d 223.

ATTY. GEN. OPINIONS: Lump sum payment of death benefits to nonresident widow, 1940-42, p 245.

656.232

ATTY. GEN. OPINIONS: Award to an illegitimate child residing in Sweden, 1930-32, p 513; cancellation clause as applied to payments to Italian nationals, 1950-52, p 11.

656.234

NOTES OF DECISIONS

The promisee in a note could not enjoin revocation of and compel compliance with a power of attorney which was given by the promisor as security, and which directed the Industrial Accident Commission to send the promisee checks due the promisor upon an allowed claim under the workmen's compensation law, since the power, if not coupled with an interest, was revoked by the promisor, and, if coupled with an interest, was an equitable assignment void under the statute. Scott v. Hall, (1945) 177 Or 403, 163 P2d 517.

Claim for overpayment was not subject matter in the hands of the trustee in bankruptcy. State ex rel. Britt v. State Ind. Acc. Comm., (1964) 238 Or 130, 393 P2d 217.

The stipulation was not a release. Schulz v. State Comp. Dept., (1968) 252 Or 211, 448 P2d 551.

656.236

NOTES OF DECISIONS

Award though based on agreement could be remanded to consider an increase. Schulz v. State Comp. Dept., (1968) 252 Or 211, 448 P2d 551.

FURTHER CITATIONS: Dimitroff v. State Ind. Acc. Comm., (1957) 209 Or 316, 306 P2d 398; Johnson v. Dave's Auto Center, Inc., (1970) 257 Or 34, 476 P2d 190.

656.245

NOTES OF DECISIONS

**1. Under former similar statute**

A conclusion of law that the court was not limited to the scale established by the commission under the statute in making an allowance for surgical and medical services was clearly erroneous. Miller v. Ind. Acc. Comm., (1917) 84 Or 507, 159 P 1150, 165 P 576.

No appeal was provided from the action of the commission in designating a physician and hospital for an injured workman. Smith v. Ind. Acc. Comm., (1922) 104 Or 640, 208 P 746.

A judgment awarding compensation for permanent partial disability during the period of temporary total disability or the healing period did not conform to the statute where the extent of permanent disability was incapable of any reasonably definite ascertainment. Helton v. Ind. Acc. Comm., (1933) 142 Or 49, 18 P2d 831.

It was presumed that after each injury suffered by a workman the commission in awarding him compensation endeavored to restore him, as far as possible, to the desired condition. Cain v. Ind. Acc. Comm., (1934) 149 Or 29, 37 P2d 353, 96 ALR 1072.

An injured workman was not entitled to medical treatment that was palliative and not curative after his physical condition became stationary. Tooley v. State Ind. Acc. Comm., (1965) 239 Or 466, 398 P2d 184.

FURTHER CITATIONS: Dimitroff v. State Ind. Acc. Comm., (1957) 209 Or 316, 306 P2d 398.

ATTY. GEN. OPINIONS: Right of doctors in Clackamas County to organize for the purpose of entering into contract for treatment of accidents and sickness, for which workmen pay through deductions from their wages, 1936-38, p 518; authority to contract for vocational rehabilitation services, 1958-60, p 30; vocational rehabilitation services by State Industrial Accident Commission, 1958-60, p 30; charge for cost of care in state tuberculosis hospital, 1962-64, p 72.

LAW REVIEW CITATIONS: 2 WLJ 55, 68.

**656.248**

ATTY. GEN. OPINIONS: Authority to contract for vocational rehabilitation services, 1958-60, p 30.

**656.262**

NOTES OF DECISIONS

The right to recover a penalty is as much a procedural right as the collection of an attorney fee. Larson v. State Comp. Dept., (1969) 1 Or App 329, 462 P2d 694.

FURTHER CITATIONS: Shupe v. State Comp. Dept., (1967) 248 Or 129, 432 P2d 793; Chetney v. Western Foundry Co., (1970) 255 Or 165, 464 P2d 833; Norton v. State Comp. Dept., (1968) 252 Or 75, 448 P2d 382; Printz v. State Comp. Dept., (1969) 253 Or 148, 453 P2d 665; Logan v. Boise Cascade Corp., (1971) 5 Or App 636, 485 P2d 441, Sup Ct **review denied.**

**656.265**

NOTES OF DECISIONS

1. In general
2. Under former similar statute
   (1) In general
   (2) Letter as an application
   (3) Others' reports as applications
   (4) Filing claim late in nonfatal cases
   (5) Filing claim in fatal cases

**1. In general**

Employer has burden of proving that he was prejudiced by the late filing of the notice. Satterfield v. State Comp. Dept., (1970) 1 Or App 524, 465 P2d 239.

Claimant has the burden of establishing good cause for failure to file within the statutory time. Wilson v. State Acc. Ins. Fund, (1970) 3 Or App 573, 475 P2d 992.

Whether plaintiff had good cause for failure to file within the statutory time is a factual question the answer to which depends upon the circumstances of each case. Id.

When read with ORS 656.262(7), paragraph (4) (b) only bars the employer from denying the claim on the ground it had been untimely filed. Logan v. Boise Cascade Corp., (1971) 5 Or App 636, 485 P2d 441, Sup Ct **review denied.**

**2. Under former similar statute**

**(1) In general.** Neither the method of paying wages nor the fact that no payroll was kept was a bar to compensation under the workmen's compensation law. Farrin v. Ind. Acc. Comm., (1922) 104 Or 452, 205 P 984.

Whosoever claimed under the law had to bring himself within its terms as to filing the application required by the statute. Rohde v. Ind. Acc. Comm., (1923) 108 Or 426, 217 P 627.

A waiver of an employe's application for an allowance was not within the power of the commission. Id.

No jurisdiction to allow a claim for compensation was conferred on the commission by the filing of the report required by the statute. Id.

Admission in evidence, as a self-disserving admission, of an employer's report was not permitted. Wise v. Ind. Acc. Comm., (1934) 148 Or 461, 35 P2d 242.

The statutory time could not be waived by either the commission or the courts. Rosell v. Ind. Acc. Comm., (1939) 164 Or 173, 95 P2d 726.

**(2) Letter as an application.** A letter might be a sufficient application if it contained the requisite matter. Grunnett v. Ind. Acc. Comm., (1923) 108 Or 178, 215 P 881.

**(3) Others' reports as applications.** The employe's own application for compensation was the sole process by which an injured employe could move the commission for an allowance; the reports by the physician and employer conferred no jurisdiction. Rohde v. Ind. Acc. Comm., (1923) 108 Or 426, 217 P 627.

The commission's acknowledgment of receipt of an unauthorized application on behalf of an employe by his employer did not validate the application where the acknowledgment made no intimation as to the validity of the claim. Id.

The commission was not estopped from challenging the sufficiency of an unauthorized application by the employer by taking such application into custody and marking it "Filed." Id.

Ratification, after the time limited for filing an application, of the employer's unauthorized application was ineffective. Id.

A letter from the claimant's attorney referring to an application by the employer did not confer jurisdiction, where the letter did not indicate approval of the employer's act. Id.

**(4) Filing claim late in nonfatal cases.** The statute, in authorizing the commission to permit the filing of a claim after three months "upon a sufficient showing," contemplated an investigation of the case before acting upon the application. Wooldridge v. Arens, (1940) 164 Or 410, 98 P2d 1, 102 P2d 717. **Distinguished in** Kehoe v. State Ind. Acc. Comm., (1958) 214 Or 629, 332 P2d 91.

By filing a claim after three months from the accident date the claimant did not thereby become entitled to have his claim heard on the merits; the commission had to be accorded the right to determine whether the claimant had made a sufficient showing to be entitled to a hearing on the merits. Landauer v. Ind. Acc. Comm., (1944) 175 Or 418, 154 P2d 189.

Claim had to be filed within three months after accident, or if injured party's condition did not then indicate that injury was compensable, a showing under oath was made, including not only injured's own duly verified statement, but an affidavit, or at least a certificate, by a qualified physician from which a finding would be warranted that there was a causal connection between the accident and the subsequent development of the injury. Id.

Where the facts constituted a "sufficient showing" for failure to make a claim within three months in a non-fatal case, the commission's discretion was ended and it could not refuse an application within the one-year period. Tice v. Ind. Acc. Comm., (1948) 183 Or 593, 195 P2d 188.

The commission did not take jurisdiction of a claim by granting a rehearing on the question of whether it had taken jurisdiction of the claim. Wooldridge v. Arens, (1940) 164 Or 410, 98 P2d 1, 102 P2d 717.

Proof that claimant was ignorant of a fractured hip because of doctors' diagnoses of other ills, was a sufficient showing for failure to file within three months. Tice v. Ind. Acc. Comm., (1948) 183 Or 593, 195 P2d 188.

When plaintiff filed a claim after three months but within one year and the claim was dismissed on its merits, the trial court correctly withdrew from the consideration of the jury the question of whether the commission abused its discretion in denying plaintiff's claim because of late filing. Kehoe v. State Ind. Acc. Comm., (1958) 214 Or 629, 332 P2d 91.

When claim was rejected on its merits, the commission could not thereafter raise the bar of late filing. Montgomery v. State Ind. Acc. Comm., (1960) 224 Or 380, 356 P2d 524.

Under provisions of a policy conforming it to Workmen's Compensation Act, duty to file claim within one year rested with employe. Booth v. Nirshel, (1965) 239 Or 634, 399 P2d 364.

A sufficient showing for the delayed filing was made. Johnson v. State Comp. Dept., (1969) 252 Or 279, 449 P2d 145.

**(5) Filing claim in fatal cases.** Claim for death filed more than one year after fatal injury could not be entertained. Dragicevic v. Ind. Acc. Comm., (1924) 112 Or 569, 230 P 354.

Applications had to be filed within one year from the date of the accident rather than the date of the death. Rosell v. Ind. Acc. Comm., (1939) 164 Or 173, 95 P2d 726.

FURTHER CITATIONS: Mikolich v. State Ind. Acc. Comm., (1957) 212 Or 36, 316 P2d 812, 318 P2d 274; Johnson v. State Comp. Dept., (1967) 246 Or 449, 425 P2d 496; Printz v. State Comp. Dept., (1969) 253 Or 148, 453 P2d 665.

ATTY. GEN. OPINIONS: Deceased's half-brother filing claim in behalf of himself and all other dependents, with or without power of attorney, 1920-22, p 461.

LAW REVIEW CITATIONS: 1 WLJ 188.

**656.268**

CASE CITATIONS: Pykonen v. State Acc. Ins. Fund, (1970) 3 Or App 74, 471 P2d 855; Dalton v. Cape Arago Lbr. Co., (1970) 4 Or App 249, 478 P2d 433; Bivens v. Weyerhaeuser Co., (1971) 92 Or App Adv Sh 1772, 487 P2d 119.

**656.271**

NOTES OF DECISIONS



**1. In general**

Under subsection (1), the test is whether the written opinion supports the claim by setting forth facts which, if true, would constitute reasonable grounds for the claim. Larson v. State Comp. Dept., (1968) 251 Or 478, 445 P2d 486.

Aggravation by industrial accident of a pre-existing condition is compensable. Watson v. Georgia-Pac. Corp., (1970) 5 Or App 353, 478 P2d 431, 484 P2d 1115.

**2. Under former similar statute**

**(1) In general.** The duty to award increased compensation contained no elements of discretion not associated with the duty to award compensation in the first instance. Chebot v. Ind. Acc. Comm., (1923) 106 Or 660, 212 P 792.

The purpose of a formal application for an increase of compensation was not to give jurisdiction but to fix the time from which compensation at the new rate should begin. Id.

A new proceeding was not initiated by the application for an increased compensation. Id.

An application for increased compensation because of aggravation was distinct from a petition for rehearing. White v. Ind. Acc. Comm., (1940) 163 Or 476, 96 P2d 772, 98 P2d 955.

The claimant for additional compensation had to prove that his disability became worse subsequent to the last award of compensation. Hisey v. Ind. Acc. Comm., (1940) 163 Or 696, 99 P2d 475.

**(2) Payment of medical services as an award.** Allowing payment of medical services was not an award of compensation within the meaning of the statute. Gerber v. Ind. Acc. Comm., (1940) 164 Or 353, 101 P2d 416; Lindeman v. Ind. Acc. Comm., (1948) 183 Or 245, 192 P2d 732. **Distinguished in** Billings v. State Ind. Acc. Comm., (1960) 225 Or 52, 357 P2d 276.

**(3) Aggravated injuries.** Aggravation referred to the progress of workman's condition resulting from the specific injury for which compensation had been made. Keefer v. Ind. Acc. Comm., (1943) 171 Or 405, 135 P2d 806.

Compensation for subsequent injury due to the malpractice of the physician must be awarded by the commission while it has jurisdiction over the matter. McDonough v. Nat. Hosp. Assn., (1930) 134 Or 451, 294 P 351.

**(4) Application.** Letters to and by the commission and a report of the medical examiner of the commission were not an application for an increase of compensation, nor a final decision from which an appeal was authorized. Degidio v. Ind. Acc. Comm., (1922) 105 Or 642, 207 P 176.

The statements furnished by a claimant to the commission before its award for hernia were sufficient to sustain claimant's subsequent claim for additional compensation for injury to sacroiliac joints. Plowman v. Ind. Acc. Comm., (1933) 144 Or 138, 23 P2d 910.

A petition of an employe showed an aggravation in such disability and the degree thereof as required by the statute where the sufficiency of the petition was questioned only by a motion for judgment on the pleading, by objection to the introduction of evidence and by a motion for nonsuit. Stacey v. Ind. Acc. Comm., (1933) 145 Or 195, 26 P2d 1092.

Formal complaints or requests in legal and technical language were not required. Miller v. Ind. Acc. Comm., (1934) 149 Or 49, 39 P2d 366.

A letter might be a sufficient application if it contained the requisite matter. Id.

A letter of inquiry was not an application for additional compensation. Jacoby v. Ind. Acc. Comm., (1940) 165 Or 230, 106 P2d 294.

**(5) Time limit on filing application.** The time for filing an application began to run from the date of the first award of compensation, not from the date of the increased compensation awarded on a rehearing. Billings v. State Ind. Acc. Comm., (1960) 225 Or 52, 357 P2d 276; Marsh v. State Ind. Acc. Comm., (1963) 235 Or 297, 383 P2d 999; Hamrick v. State Ind. Acc. Comm., (1967) 246 Or 229, 424 P2d 894.

The 1957 amendment to ORS 656.278 preserved the ap-

pealability of orders made on motion of the commission during the time in which a workman could have applied for relief as a matter of right. Pate v. State Ind. Acc. Comm., (1964) 238 Or 499, 395 P2d 438.

FURTHER CITATIONS: State v. Ind. Acc. Comm., (1925) 115 Or 484, 237 P 680; Goss v. Ind. Acc. Comm., (1932) 140 Or 146, 12 P2d 322, 1006; Allen v. Ind. Acc. Comm., (1932) 140 Or 449, 8 P2d 1088; Colvin v. Ind. Acc. Comm., (1953) 197 Or 401, 253 P2d 910; Dimitroff v. State Ind. Acc. Comm., (1957) 209 Or 316, 306 P2d 398; Dodd v. State Ind. Acc. Comm., (1957) 211 Or 99, 310 P2d 324, 311 P2d 458, 315 P2d 138; Buell v. State Ind. Acc. Comm., (1964) 238 Or 492, 395 P2d 442; Neet v. State Comp. Dept., (1966) 244 Or 331, 417 P2d 996; Hinch v. State Comp. Dept., (1970) 4 Or App 76, 475 P2d 976, Sup Ct **review denied;** Cornell v. Stimson Lbr. Co., (1970) 257 Or 215, 477 P2d 898; Lawton v. State Acc. Ins. Fund, (1971) 5 Or App 539, 485 P2d 1104.

ATTY. GEN. OPINIONS: The Soldiers' and Sailors' Civil Relief Act as tolling the period of limitation set by this section during which one serving in the Armed Forces may file an application for increased compensation for aggravation, 1944-46, p 421.

LAW REVIEW CITATIONS: 23 OLR 202; 1 WLJ 189, 190; 2 WLJ 66-74, 86-89.

**656.278**

NOTES OF DECISIONS



**1. In general**

Submission to arbitration of a question pending before the commission is not authorized, but after an appeal to the circuit court such submission is proper. Holst v. Ind. Acc. Comm., (1926) 117 Or 370, 244 P 319.

A litigant's failure to comply with this section was fatal to his claim. Turner v. State Ind. Acc. Comm., (1965) 240 Or 247, 401 P2d 8.

**(1) Under former similar statute.** A letter by a claim agent of the commission as to the action of the commission upon an application of an injured workman was not admissible in evidence as a copy of any order, decision or award of the commission. Miller v. Ind. Acc. Comm., (1934) 149 Or 49, 39 P2d 366.

Proceedings before the commission had to be in writing. Garner v. Ind. Acc. Comm., (1939) 162 Or 256, 92 P2d 193.

Consideration of all facts including those arising since making the order, decision or award involved, was required on rehearing, and the commission had to enter such order as the facts and law warranted. Id.

Authority to deny the application and confirm its previous decision or award if in its opinion it had previously fully considered all the matters raised by the application was possessed by the commission. Id.

The statute did not provide for a second petition for rehearing and the time to appeal was not extended by a second petition for rehearing. Gerber v. Ind. Acc. Comm., (1940) 164 Or 353, 101 P2d 416. Overruling Hutchins v. Ind. Acc. Comm., (1940) 163 Or 419, 97 P2d 944.

Previous maximum permanent partial disability award did not affect a workman's right to compensation for permanent injury to the same part of his body in a second accident. Green v. State Ind. Acc. Comm., (1953) 197 Or 160, 251 P2d 437, 252 P2d 545.

**2. Jurisdiction to alter awards**

So long as a compensable disability traceable to the injury continues, the commission [now board] has jurisdiction over the case. Chebot v. Ind. Acc. Comm., (1923) 106 Or 660, 212 P 792.

Quasi-judicial powers of the commission [now board] are indicated by the provision for continuing power and jurisdiction. Graves v. Ind. Acc. Comm., (1924) 112 Or 143, 223 P 248.

The object of granting continuing jurisdiction was to make clear that jurisdiction extended beyond the period within which the claimant had a right to invoke it. Verban v. Ind. Acc. Comm., (1942) 168 Or 394, 123 P2d 988.

The continuing jurisdiction conferred upon commission [now board] does not authorize it to change awards where there has been no change in the physical condition of the claimant. Hoffmeister v. State Ind. Acc. Comm., (1945) 176 Or 216, 156 P2d 834. **But see** Holmes v. State Ind. Acc. Comm., (1961) 227 Or 562, 362 P2d 371, 363 P2d 563.

A ruling by an administrative quasi-judicial body which is subject by statute to review in the circuit court cannot be preserved from review through invoking the doctrine of res judicata. Holmes v. State Ind. Acc. Comm., (1961) 227 Or 562, 362 P2d 371, 363 P2d 563.

Commission [now board] may not act capriciously but only if "such action is justified." Id.

**3. Appeal**

This provision grants the right of appeal from any order of the commission [now board] which terminates or diminishes its former award, where not made on its own motion. Garner v. Ind. Acc. Comm., (1939) 162 Or 256, 92 P2d 193.

When an order intended to be final has been made, a workman who has not within 60 days thereafter filed a written petition for a rehearing cannot question a recital in an order thereafter made to the effect that such subsequent order was made by the commission [now board] on its own motion. Id.

Orders on the commission's [now board's] own motion made in the exercise of its continuing jurisdiction would not be appealable. Verban v. Ind. Acc. Comm., (1942) 168 Or 394, 123 P2d 988.

Orders within the period in which plaintiff might have petitioned for rehearing are not made in the exercise of the commission's [now board's] continuing jurisdiction, nor on its own motion, and are appealable even though plaintiff did not petition for a rehearing. Id.

Where an order was made pursuant to an application for additional compensation and not on the commission's own motion, a subsequent terminating order sua sponte was an appealable order. Hinkle v. Ind. Acc. Comm., (1940) 163 Or 395, 97 P2d 725.

An order decreasing the award on the commission's own initiative was appealable where a final order had been made and the commission within 60 days had increased the award without a petition for rehearing. Verban v. Ind. Acc. Comm., (1942) 168 Or 394, 123 P2d 988.

It would have been error for the trial court to allow an amendment, sought by the commission, which would have permitted the jury to reduce the award which the commission made in its order from which plaintiff appealed. Kennedy v. State Ind. Acc. Comm., (1959) 218 Or 432, 345 P2d 801, 86 ALR2d 1032.

The 1957 amendment to this section preserves the appealability of orders made on motion of the commission during the time in which a workman could have applied for relief as a matter of right. Pate v. State Ind. Acc. Comm., (1964) 238 Or 499, 395 P2d 438.

FURTHER CITATIONS: White v. Ind. Acc. Comm., (1940) 163 Or 476, 96 P2d 772, 98 P2d 955; Simmons v. Ind. Acc. Comm., (1942) 168 Or 256, 122 P2d 793; Burrows v. State

Ind. Acc. Comm., (1957) 207 Or 352, 306 P2d 395; Dimitroff v. State Ind. Acc. Comm., (1957) 209 Or 316, 306 P2d 398; Dodd v. State Ind. Acc. Comm., (1957) 211 Or 99, 310 P2d 324, 311 P2d 458, 315 P2d 138; Bandy v. Norris, Beggs and Simpson, (1959) 222 Or 1, 342 P2d 839; White v. State Ind. Acc. Comm., (1961) 227 Or 306, 362 P2d 302; Buell v. State Ind. Acc. Comm., (1964) 238 Or 492, 395 P2d 442; Shore v. St. Paul Fire & Marine Ins. Co., (1965) 242 F Supp 164; Neet v. State Comp. Dept., (1966) 244 Or 331, 417 P2d 996; Barr v. State Comp. Dept., (1970) 1 Or App 432, 463 P2d 871; Williamson v. State Acc. Ins. Fund, (1971) 92 Or App Adv Sh 1775, 487 P2d 110.

LAW REVIEW CITATIONS: 13 OLR 256; 1 WLJ 187-190, 192; 2 WLJ 69, 71, 86-89.

**656.283**

NOTES OF DECISIONS

Memorandum containing quotes from medical texts from a doctor who had not examined claimant was properly received by hearing officer. Lucke v. State Comp. Dept., (1969) 254 Or 439, 461 P2d 269.

FURTHER CITATIONS: Romero v. State Comp. Dept., (1968) 250 Or 368, 440 P2d 866; Peterson v. State Comp. Dept., (1970) 257 Or 369, 477 P2d 216; Watson v. Georgia-Pac. Corp., (1971) 5 Or App 353, 478 P2d 431, 484 P2d 1115.

ATTY. GEN. OPINIONS: Appearance at hearing by non-lawyer representative, (1968) Vol 34, p 91.

**656.289**

NOTES OF DECISIONS

There was no dispute over compensability of a claim, only the extent of the disability. Schulz v. State Comp. Dept., (1968) 252 Or 211, 448 P2d 551.

A compromise settlement under subsection (4) did not bar subsequent proceedings by claimant as a matter of election of remedies, estoppel or res judicata. Johnson v. Dave's Auto Center, Inc., (1970) 257 Or 34, 476 P2d 190.

**656.295**

NOTES OF DECISIONS

Testimony taken erroneously by the circuit court could not be considered on appeal and case was remanded for remand to the hearing officer for taking of additional testimony. Sahnow v. Fireman's Fund Ins. Co., (1970) 3 Or App 164, 470 P2d 378, Sup Ct **review allowed.**

The board is limited to a review of the record. McManus v. State Acc. Ins. Fund., (1970) 3 Or App 373, 474 P2d 31.

FURTHER CITATIONS: Romero v. State Comp. Dept., (1968) 250 Or 368, 44 P2d 866; Larson v. State Comp. Dept., (1968) 251 Or 478, 445 P2d 486; Schulz v. State Comp. Dept., (1968) 252 Or 211, 448 P2d 551; Cunningham v. State Comp. Dept., (1969) 1 Or App 127, 459 P2d 892; Barr v. State Comp. Dept., (1970) 1 Or App 432, 463 P2d 871; Audas v. Galaxie, Inc., (1970) 2 Or App 520, 467 P2d 654, Sup Ct **review denied;** Mansfield v. Caplener Bros., (1970) 3 Or App 448, 474 P2d 785; Peterson v. State Comp. Dept., (1970) 257 Or 369, 477 P2d 216; Place v. Friesen Lbr. Co., (1971) 258 Or 98, 481 P2d 617.

**656.298**

NOTES OF DECISIONS

1. In general
2. Under former similar statute
   (1) In general
   (2) Constitutionality
   (3) Compliance with statute
   (4) Appealable orders
   (5) Time for appeal

**1. In general**

*This section requires a de novo review on the record.* Coday v. Willamette Tug & Barge Co., (1968) 250 Or 39, 440 P2d 224; Hannan v. Good Samaritan Hosp., (1970) 4 Or App 178, 471 P2d 831, 476 P2d 931, Sup Ct **review denied;** McManus v. State Acc. Ins. Fund, (1970) 3 Or App 373, 474 P2d 31.

Statutory costs are recoverable in circuit court reviews of workmen's compensation cases. Cunningham v. State Comp. Dept., (1969) 1 Or App 127, 459 P2d 892; McManus v. State Acc. Ins. Fund, (1970) 3 Or App 373, 474 P2d 31.

Reviewing court must decide in each case to what extent it will be persuaded by the administrative findings. State ex rel. Cady v. Allen, (1969) 254 Or 467, 460 P2d 1017; Hannan v. Good Samaritan Hosp., (1970) 4 Or App 178, 471 P2d 831, 476 P2d 931, Sup Ct **review denied;** Blisserd v. State Ind. Acc. Fund, (1971) 92 Or App Adv Sh 1786, 486 P2d 312.

It is proper for the reviewing court to take into account the administrative agency's expertise; it is not proper to consider special talents or knowledge of any individual officer. State ex rel. Cady v. Allen, (1969) 254 Or 467, 460 P2d 1017; Hannan v. Good Samaritan Hosp., (1970) 4 Or App 178, 471 P2d 831, 476 P2d 931, Sup Ct **review denied.**

In so far as the resolution of an issue turns upon the credibility of witnesses the court should give weight to the findings of the hearing officer who saw and heard those witnesses. Hannan v. Good Samaritan Hosp., (1970) 4 Or App 178, 471 P2d 831, 476 P2d 931, Sup Ct **review denied;** Wilson v. Gilchrist Tbr. Co., (1971) 92 Or App Adv Sh 1779, 487 P2d 104.

It was error for circuit court to receive additional evidence which was obtainable at the time of the hearing. Beagle v. Rudie Wilhelm Whse. Co., (1970) 2 Or App 533, 463 P2d 875, 470 P2d 386; Sahnow v. Fireman's Fund Ins. Co., (1970) 3 Or App 164, 470 P2d 378, Sup Ct **review allowed.**

Review of the board's decisions under this section is a review of the decision of a tribunal, and on such review, the court may award costs and disbursements under ORS 20.020 and 20.120. Cunningham v. State Comp. Dept., (1969) 1 Or App 127, 459 P2d 892.

*Order of Workmen's Compensation Board remanding a* report of the medical board to a hearing officer was not an appealable order. Barr v. State Comp. Dept., (1970) 1 Or App 432, 463 P2d 871.

The word "order" as used in subsection (1) refers to final orders which adjudicate a right or impose a duty on a party. Id.

In so far as the issues presented to the court can be measured by objective criteria it should give little or no weight to the administrative findings. Hannan v. Good Samaritan Hosp., (1970) 4 Or App 178, 471 P2d 831, 476 P2d 931, Sup Ct **review denied.**

Further evidence taking under subsection (6) permits taking only evidence that was not available at the hearing. Mansfield v. Caplener Bros., (1970) 3 Or App 448, 474 P2d 785.

Subsection (1) is a venue statute, not jurisdictional. Place v. Friesen Lbr. Co., (1971) 258 Or 98, 481 P2d 617, rev'g 2 Or App 6, 463 P2d 596. **Contra,** Cunningham v. State Comp. Dept., (1969) 1 Or App 127, 459 P2d 892.

**2. Under former similar statute**

**(1) In general.** When the jurisdiction of the court had attached, the commission had no more control over the controversy than any other litigant in court. Maroulas v. Ind. Acc. Comm., (1926) 117 Or 406, 244 P 317.

The term "appeal" was not used in the restricted sense of an appeal from an inferior court to a superior court, but in the sense of calling upon a competent court for determination of the claim. Roles Shingle Co. v. Bergerson, (1933) 142 Or 131, 19 P2d 94; Conley v. State Ind. Acc. Comm., (1954) 200 Or 474, 266 P2d 1061; Burkholder v. State Ind. Acc. Comm., (1965) 242 Or 276, 409 P2d 342.

The right to the aid of a constitutional court was not waived by accepting the remedy provided by the workmen's compensation law. Roles Shingle Co. v. Bergerson, (1933) 142 Or 131, 19 P2d 94.

The jurisdiction of the commission to adjust from time to time the monthly compensation based on changes in the condition of the injured workman continued in spite of an appeal by the workman and recovery of a judgment therein. State v. Ind. Acc. Comm., (1934) 145 Or 443, 28 P2d 237.

The lack of the appointment of a guardian ad litem in a workmen's compensation proceeding was a mere irregularity in procedure of which the employe could not complain after judgment had been duly and regularly entered on a verdict duly and properly found. Round v. Ind. Acc. Comm., (1936) 154 Or 400, 60 P2d 601.

When a judgment had been entered and further appeals to the court were desired from subsequently entered orders of the commission, the appealing party had to again comply with the statutory requisites to perfect an appeal. Simmons v. Ind. Acc. Comm., (1942) 168 Or 256, 122 P2d 793.

Instruction that plaintiff in Workmen's Compensation Act case had no burden of proof was contrary to law and prejudicial to defendant. Dimitroff v. State Ind. Acc. Comm., (1957) 209 Or 316, 306 P2d 398.

On an appeal to the courts, claimant was limited to same theory of case as presented to commission. Burrows v. State Ind. Acc. Comm., (1957) 209 Or 352, 306 P2d 395.

Successful plaintiff was only allowed the amount recommended by the minimum fee schedule of the Oregon State Bar for professional services rendered on appeal, in the absence of unusual circumstances. Kehoe v. State Ind. Acc. Comm., (1958) 214 Or 629, 332 P2d 91.

Appealable orders include those entered in a claim opened on the commission's own motion. Buell v. State Ind. Acc. Comm., (1964) 238 Or 492, 395 P2d 442.

The appeal was properly dismissed when the claim was pending, having been reopened on motion of the commission. Pate v. State Ind. Acc. Comm., (1964) 238 Or 499, 395 P2d 438.

Action by employe against employer-insured who had rejected the Workmen's Compensation Act was not removable to federal court when employe was entitled to recover that which he could have received under the Act. Colvin v. Weyerhaeuser Co., (1964) 229 F Supp 1022.

**(2) Constitutionality.** The peculiar procedure provided for on appeals did not render the statute invalid. Butterfield v. Ind. Acc. Comm., (1924) 111 Or 149, 223 P 941, 226 P 216.

The statute as it existed prior to the 1925 amendment was not unconstitutional under Ore. Const. Art. VII(A), §1, vesting judicial power. Roles Shingle Co. v. Bergerson, (1933) 142 Or 131, 19 P2d 94.

**(3) Compliance with statute.** Strict compliance with the requirements of the law was essential to the jurisdiction of the appellate court. Demitro v. Ind. Acc. Comm., (1924) 110 Or 110, 223 P 238; Graves v. Ind. Acc. Comm., (1924) 112 Or 143, 223 P 248; Jackson v. Ind. Acc. Comm., (1925) 114 Or 373, 235 P 302; Gerber v. Ind. Acc. Comm., (1940) 164 Or 353, 101 P2d 416.

In a proceeding for additional compensation, strict compliance with the statute was essential to appellate jurisdiction. Graves v. Ind. Acc. Comm., (1924) 112 Or 143, 223 P 248.

**(4) Appealable orders.** A final decision upon an application for an increase of compensation was a prerequisite to appeal. Degidio v. Ind. Acc. Comm., (1922) 105 Or 642, 207 P 176.

A letter reciting proceedings in a compensation case was not an appealable decision. Iwanicki v. Ind. Acc. Comm., (1922) 104 Or 650, 205 P 990, 29 ALR 682.

The designation of a physician and hospital for injured workmen by the commission, was within its discretion and its decision thereto was not appealable. Smith v. Ind. Acc. Comm., (1922) 104 Or 640, 208 P 746.

If a proceeding for allowance, rearrangement or termination of compensation involved a final action of the commission, an appeal would lie. Chebot v. Ind. Acc. Comm., (1923) 106 Or 660, 212 P 792.

A decision that no claim had been presented was a final action of the commission. Rohde v. Ind. Acc. Comm., (1923) 108 Or 426, 217 P 627.

The use of the word "considered" in letters from the commission to a claimant's attorney indicated that the tribunal had heard and judicially determined matters submitted to it. Meaney v. Ind. Acc. Comm., (1925) 113 Or 371, 227 P 305, 232 P 789. **Distinguished In** Reed v. Hunter, (1935) 150 Or 524, 46 P2d 595.

A letter by the claims agent of the commission to the attorney of the claimant to the effect that the members of the commission had reviewed the evidence pertaining to the claim and had found no grounds for reopening the same, was not an appealable order. Reed v. Hunter, (1935) 150 Or 524, 46 P2d 595.

An order diminishing the additional award which the commission had previously made sua sponte was not appealable. Garner v. Ind. Acc. Comm., (1939) 162 Or 256, 92 P2d 193.

**(5) Time for appeal.** An appeal from an order denying the rehearing of a compensation claim was too late where a copy of the order denying the rehearing was filed on September 28, and the notice of appeal and the complaint were filed by the claimant on October 29, service in both cases being made by mail. Sevich v. Ind. Acc. Comm., (1933) 142 Or 563, 20 P2d 1085.

In computing the time within which an appeal could be prosecuted, the day following the entry of the final order was to be excluded. Payne v. Ind. Acc. Comm., (1935) 150 Or 520, 46 P2d 581.

An appeal was taken in time, in view of ORS 16.790, where a copy of the notice of appeal was properly deposited in a post office on the day preceding the last day for taking an appeal and the next day the mail left the place of deposit. Id.

FURTHER CITATIONS: Miller v. Ind. Acc. Comm., (1917) 84 Or 507, 159 P 1150, 165 P 576; Raney v. Ind. Acc. Comm., (1917) 85 Or 199, 166 P 523; Grant v. Ind. Acc. Comm., (1921) 102 Or 26, 201 P 438; Landberg v. Ind. Acc. Comm., (1923) 107 Or 498, 215 P 594; McDermott v. Ind. Acc. Comm., (1923) 107 Or 526, 215 P 591; Meaney v. Ind. Acc. Comm., (1925) 113 Or 371, 227 P 305, 232 P 789; Bratt v. Ind. Acc. Comm., (1925) 114 Or 644, 236 P 478; West v. Ind Acc. Comm., (1925) 115 Or 404, 237 P 980; Holst v. Ind. Acc. Comm., (1926) 117 Or 370, 244 P 319; Maroulas v. Ind. Acc Comm., (1926) 117 Or 406, 244 P 317; Bergerson v. Ind. Acc. Comm., (1927) 121 Or 314, 253 P 1052; Paul v. Ind. Acc. Comm., (1928) 127 Or 599, 272 P 267, 273 P 337; Monahan v. Ind. Acc. Comm., (1932) 139 Or 417, 10 P2d 605; Brothers v. Ind. Acc. Comm., (1932) 139 Or 658, 12 P2d 302; Cicrich v. Ind. Acc. Comm., (1933) 143 Or 627, 23 P2d 534; Helton v. Ind. Acc. Comm., (1933) 142 Or 49, 18 P2d 831; Hilger v. Ind. Acc. Comm., (1938) 158 Or 591, 76 P2d 972; White v. Ind. Acc. Comm., (1939) 163 Or 476, 96 P2d 772, 98 P2d 955; Wooldridge v. Arens, (1940) 164 Or 410, 98 P2d 1, 102 P2d 717; Dickison v. Ind. Acc. Comm., (1940) 165 Or 306, 107 P2d 104; Heuchert v. Ind. Acc. Comm., (1942) 168 Or 74, 121 P2d 453; Tice v. Ind. Acc. Comm., (1948) 183 Or 593, 195

P2d 188; Larson v. State Ind. Acc. Comm., (1957) 209 Or 389, 307 P2d 314; Bandy v. Norris, Beggs and Simpson, (1959) 222 Or 1, 342 P2d 839; White v. State Ind. Acc. Comm., (1961) 227 Or 306, 362 P2d 302; Holmes v. State Ind. Acc. Comm., (1961) 227 Or 562, 362 P2d 371, 363 P2d 563; Crouch v. State Ind. Acc. Comm., (1965) 239 Or 442, 398 P2d 197; Turner v. State Ind. Acc. Comm., (1965) 240 Or 247, 401 P2d 8; Shore v. St. Paul Fire & Marine Ins. Co., (1965) 242 F Supp 164; Munger v. State Ind. Acc. Comm., (1966) 243 Or 419, 414 P2d 328; Boatwright v. State Ind. Acc. Comm., (1966) 244 Or 140, 416 P2d 328; Neet v. State Comp. Dept., (1966) 244 Or 331, 417 P2d 996; Neeley v. State Comp. Dept., (1967) 246 Or 522, 426 P2d 460; Harp v. State Comp. Dept., (1967) 247 Or 129, 427 P2d 981; Romero v. State Comp. Dept., (1968) 250 Or 368, 440 P2d 866; Lorentzen v. State Comp. Dept., (1968) 251 Or 92, 444 P2d 946; Lucke v. State Comp. Dept., (1969) 254 Or 439, 461 P2d 269; Mayes v. State Comp. Dept., (1969) 1 Or App 234, 461 P2d 841; Warden v. No. Plains Lbr. Co., (1970) 2 Or App 82, 466 P2d 620; Audas v. Galaxie, Inc., (1970) 2 Or App 520, 467 P2d 654, Sup Ct **review denied.**

LAW REVIEW CITATIONS: 12 OLR 249; 1 WLJ 161, 190, 200.

## 656.301

NOTES OF DECISIONS
1. In general
2. Compliance with statute
3. Commission as party
4. Scope of review

**See also** cases under ORS 656.298.

**1. In general**

An undertaking on appeal need not be filed by the commission [now State Accident Insurance Fund] on its appeal. Miller v. Ind. Acc. Comm., (1917) 84 Or 507, 159 P 1150, 165 P 576; Enneberg v. Ind. Acc. Comm., (1918) 88 Or 436, 167 P 310, 171 P 765.

When a judgment has been entered and further appeals to the court are desired from subsequently entered orders of the commission [now fund], the appealing party should again comply with statutory requisites to perfect an appeal. Simmons v. Ind. Acc. Comm., (1942) 168 Or 256, 122 P2d 793.

A claimant, injured prior to 1966, electing to proceed under the new Act, is entitled to attorney fees under this section. Larson v. State Comp. Dept., (1968) 251 Or 478, 445 P2d 486.

Appellate court may remand a particular case or dispose of it. Beagle v. Rudie Wilhelm Whse. Co., (1970) 2 Or App 533, 463 P2d 875, 470 P2d 386.

Claimant is entitled to attorney fees in occupational disease cases appealed under this section. Beaudry v. Winchester Plywood Co., (1970) 255 Or 503, 469 P2d 25.

**2. Compliance with statute**

Strict compliance with the requirements of the law is essential to the jurisdiction of the appellate court. Butterfield v. Ind. Acc. Comm., (1924) 111 Or 149, 223 P 941, 226 P 216.

**3. Commission as party**

The same right to appeal as in other cases is given the commission, and where the commission is one of the appellants the Supreme Court has jurisdiction. Dragicevic v. Ind. Acc. Comm., (1924) 112 Or 569, 230 P 354.

The commission is a party to litigation arising under this law, and the Attorney General may appeal in its name. Butterfield v. Ind. Acc. Comm., (1924) 111 Or 149, 223 P 941, 226 P 216.

When jurisdiction of the court has attached, the commission has no more control over the controversy than any other litigant in court. Maroulas v. Ind. Acc. Comm., (1926) 117 Or 406, 244 P 317.

**4. Scope of review**

The appellate court examines the record de novo as triers of fact. Coday v. Willamette Tug & Barge Co., (1968) 250 Or 39, 440 P2d 224; Ryf v. Hoffman Constr. Co., (1969) 254 Or 624, 459 P2d 991; Lucke v. State Comp. Dept., (1969) 254 Or 439, 461 P2d 269; Melius v. Boise Cascade Corp., (1970) 2 Or App 206, 466 P2d 624; Warden v. No. Plains Lbr. Co., (1970) 2 Or App 82, 466 P2d 620; Hannan v. Good Samaritan Hosp., (1970) 4 Or App 178, 471 P2d 831, 476 P2d 931, Sup Ct **review denied.**

It is proper for the Supreme Court to consider the expertise of a government agency as a whole, whether an administrative body or a trial court. Ryf v. Hoffman Constr. Co., (1969) 254 Or 624, 459 P2d 991; Lucke v. State Comp. Dept., (1969) 254 Or 439, 461 P2d 269; State ex rel. Cady v. Allen, (1969) 254 Or 467, 460 P2d 1017; Melius v. Boise Cascade Corp., (1970) 2 Or App 206, 466 P2d 624.

In an appeal under this law, the appellate court gives weight to the findings of the hearing officer on the matter of credibility of witnesses. Moore v. U.S. Plywood Corp., (1969) 1 Or App 343, 462 P2d 453; Satterfield v. State Comp. Dept., (1970) 1 Or App 524, 465 P2d 239; Lisoski v. The Embers, (1970) 2 Or App 60, 465 P2d 888; Melius v. Boise Cascade Corp., (1970) 2 Or App 206, 466 P2d 624; Bailey v. Morrison-Knudsen Co., (1971) 5 Or App 592, 485 P2d 1254.

The appellate court properly may and does give respectful consideration to the findings of the circuit court but is not in any way bound by those findings. Hannan v. Good Samaritan Hosp., (1970) 4 Or App 178, 471 P2d 831, 476 P2d 931, Sup Ct **review denied;** Surratt v. Gunderson Bros. Engr. Corp., (1971) 259 Or 65, 485 P2d 410, modifying 3 Or App 228, 471 P2d 817.

When the situation calls for the appellate court to give weight to the findings of the individual who saw and heard the witnesses or to defer to administrative expertise based on repetitive performance of specialized functions, it must look back, not to the findings of the circuit court, but to administrative findings. Hannan v. Good Samaritan Hosp., (1970), 4 Or App 178, 471 P2d 831, 476 P2d 931, Sup Ct **review denied.**

When the record is such that after reviewing it the court cannot say with any degree of conviction what the proper result should be, the court defers to the administrative agency and affirms the result reached by it. Surratt v. Gunderson Bros. Engr. Corp., (1970) 3 Or App 228, 471 P2d 817, modified, 259 Or 65, 485 P2d 410.

FURTHER CITATIONS: Grant v. Ind. Acc. Comm., (1921) 102 Or 26, 201 P 438; Stark v. Ind. Acc. Comm., (1922) 103 Or 80, 204 P 151; Farrin v. Ind. Acc. Comm., (1922) 104 Or 452, 205 P 984; Hart v. Ind. Acc. Comm., (1934) 148 Or 692, 38 P2d 698; King v. State Ind. Acc. Comm., (1957) 211 Or 40, 309 P2d 159, 315 P2d 148, 318 P2d 272; Mikolich v. State Ind. Acc. Comm., (1957) 212 Or 36, 316 P2d 812, 318 P2d 274; Burkholder v. State Ind. Acc. Comm., (1965) 242 Or 276, 409 P2d 342; Uris v. State Comp. Dept., (1967) 247 Or 420, 430 P2d 861; Cunningham v. State Comp. Dept., (1969) 1 Or App 127, 459 P2d 892; Borman v. State Comp. Dept., (1969) 1 Or App 136, 459 P2d 885; Audas v. Galaxie, Inc., (1970) 2 Or App 520, 467 P2d 654, Sup Ct **review denied;** Sahnow v. Fireman's Fund Ins. Co., (1970) 3 Or App 164, 470 P2d 378, Sup Ct **review allowed;** Peterson v. State Comp. Dept., (1970) 257 Or 369, 477 P2d 216.

656.307

NOTES OF DECISIONS

As soon as the determination is made that the claimant suffered a compensable injury in covered employment, after providing for prompt commencement of compensation payments by initial designation of an employer, the board then shall proceed to determine who the true employer or employers are and how much of the burden each shall bear. Oremus v. Oregonian Publ. Co., (1970) 3 Or App 92, 470 P2d 162, Sup Ct review denied.

656.310

NOTES OF DECISIONS

Memorandum containing quotes from medical texts from a doctor who had not examined claimant was properly received by hearing officer. Lucke v. State Comp. Dept., (1969) 254 Or 439, 461 P2d 269.

656.313

CASE CITATIONS: Leech v. Georgia-Pac. Corp., (1969) 254 Or 351, 458 P2d 438, 460 P2d 359; Larson v. State Comp. Dept., (1969) 1 Or App 329, 462 P2d 694; Watson v. Georgia-Pac. Corp., (1971) 5 Or App 353, 478 P2d 431, 484 P2d 1115.

656.319

NOTES OF DECISIONS

To harmonize the notice provisions of subsection (6) of ORS 656.262 and paragraph (a), subsection (2) of this section, "notified" is construed to mean when notice is deposited in the mail. Norton v. State Comp. Dept., (1968) 252 Or 75, 448 P2d 382.

FURTHER CITATIONS: Boatwright v. State Ind. Acc. Comm., (1966) 244 Or 140, 416 P2d 328; Printz v. State Comp. Dept., (1969) 253 Or 148, 453 P2d 665.

656.325

NOTES OF DECISIONS

The words "reasonably essential" are used in a relative sense, and the right to compensation is suspended only where an injured employe refuses to submit to an operation to which an ordinary reasonable man would submit if similarly situated. Grant v. Ind. Acc. Comm., (1921) 102 Or 26, 201 P 438.

FURTHER CITATIONS: Pykonen v. State Acc. Ins. Fund, (1970) 3 Or App 74, 471 P2d 855; Dalton v. Cape Arago Lbr. Co., (1970) 4 Or App 249, 478 P2d 433.

LAW REVIEW CITATIONS: 1 WLJ 188.

656.382

NOTES OF DECISIONS

Subsection (2) applies to occupational disease cases. Beaudry v. Winchester Plywood Co., (1970) 255 Or 503, 469 P2d 25.

Where claimant rather than the employer or the board initiates the appeal to circuit court, there is no provision allowing claimant attorney fees if he prevails. Bailey v. Morrison-Knudsen Co., (1971) 5 Or App 592, 485 P2d 1254.

FURTHER CITATIONS: Shupe v. State Comp. Dept., (1967) 248 Or 129, 432 P2d 793; Norton v. State Comp. Dept., (1968) 252 Or 75, 448 P2d 382; Larson v. State Comp. Dept., (1969) 1 Or App 329, 462 P2d 694; Watson v. Georgia-Pac. Corp., (1971) 5 Or App 353, 478 P2d 431, 484 P2d 1115.

656.384

NOTES OF DECISIONS

This section does not give a third party the right to appeal from a trial court's denial of his challenge under OCLA 102-1729 [ORS 656.324] of a plaintiff's right of action. Ahern v. Settergren, (1947) 180 Or 287, 176 P2d 645.

The findings of the trial court as to the amount of the attorney fee will not be set aside on appeal unless not supported by any substantial evidence. Parker v. State Ind. Acc. Comm., (1965) 242 Or 78, 408 P2d 94.

The Oregon State Bar fee schedule is advisory only and not binding on the courts. Id.

An appeal was authorized from finding of lower court that evidence was insufficient to sustain allegations of answer filed by commission and dismissing answer with prejudice. Manke v. Nehalem Logging Co., (1956) 211 Or 211, 301 P2d 192, 315 P2d 539.

FURTHER CITATIONS: Ramseth v. Maycock, (1956) 209 Or 66, 304 P2d 415; Ellis v. Fallert, (1957) 209 Or 406, 307 P2d 283.

656.386

NOTES OF DECISIONS

The right to an attorney fee under subsection (1) is dependent on establishing the right to compensation after an original rejection of the claim. Peterson v. State Comp. Dept., (1970) 257 Or 369, 477 P2d 216, rev'g 2 Or App 412, 467 P2d 976; Grudle v. State Acc. Ins. Fund, (1970) 4 Or App 326, 479 P2d 250.

The commission rather than the court shall determine the amount to be allowed a claimant for attorney's fees. Franklin v. State Ind. Acc. Comm., (1954) 202 Or 237, 274 P2d 279.

An award of attorney fees is contingent on claimant's prevailing in an appeal. Leech v. Georgia-Pac. Corp., (1969) 254 Or 351, 458 P2d 438, 460 P2d 359.

Claimant who successfully appeals board's decision must pay attorney's fees from his award of compensation. Bailey v. Morrison-Knudsen Co., (1971) 5 Or App 592, 485 P2d 1254.

Allowing larger attorney fees than was alleged by plaintiff to be reasonable was error. Parker v. State Ind. Acc. Comm., (1965) 242 Or 78, 408 P2d 94.

FURTHER CITATIONS: King v. State Ind. Acc. Comm., (1957) 211 Or 40, 309 P2d 159, 315 P2d 148, 318 P2d 272; Uris v. State Comp. Dept., (1967) 247 Or 420, 427 P2d 753, 430 P2d 861; Shupe v. State Comp. Dept., (1967) 248 Or 129, 432 P2d 793.

656.388

NOTES OF DECISIONS

1. Approval of fee
2. Dispute of fee
3. Payment of fee in lump sum from award
4. Fee as a lien

**1. Approval of fee**

The fee schedules approved by the state bar governors assist courts in determining fees in compensation cases. Hinkle v. Ind. Acc. Comm., (1940) 163 Or 395, 97 P2d 725; Cox v. Ind. Acc. Comm., (1942) 168 Or 508, 121 P2d 919, 123 P2d 800.

Fixing a fee in a different manner or to a greater extent than the statute provides the workman shall be paid is not

within the authority of the court or commission. Carr v. Ind. Acc. Comm., (1936) 153 Or 517, 57 P2d 1278.

A fee in addition to the compensation allowed by the commission is not authorized by this section. Davis v. Ind. Acc. Comm., (1937) 156 Or 393, 64 P2d 1330, 66 P2d 279, 68 P2d 118.

The courts fix the manner of paying attorney's fees, exercising discretion in each case. Cox v. Ind. Acc. Comm., (1942) 168 Or 508, 121 P2d 919, 123 P2d 800.

The nature and extent of a workman's injury should be considered in determining the reasonableness of his attorney's fees. Id.

The court should consider the purpose of the law and the fact that fees were made subject to supervision by the commission and the courts in determining the reasonableness of a fee. Id.

The commission rather than the court had the power to determine the amount to be allowed a claimant for attorney's fees. Franklin v. State Ind. Acc. Comm., (1954) 202 Or 237, 274 P2d 279.

**2. Dispute of fee**

Only where the client and attorney have agreed upon the amount of the fee may the courts or commission approve under this statute; if a dispute arises, then the court may adjust the dispute after the parties have submitted statements. Davis v. Ind. Acc. Comm., (1936) 156 Or 393, 64 P2d 1330, 66 P2d 279, 68 P2d 118.

Where a plaintiff has repudiated her letter manifesting satisfaction of an attorney's fees, a motion for the approval of the fee should be denied. Id.

**3. Payment of fee in lump sum from award**

Where the reasonableness of the attorney's fee is not challenged and there are accrued instalments sufficient to pay it without prejudice to the beneficiary, the court may order a lump sum payment. Cox v. Ind. Acc. Comm., (1942) 168 Or 508, 121 P2d 919, 123 P2d 800.

The commission could raise the question of the circuit court's authority to award attorney's fees in a lump sum for gaining additional compensation to a claimant on appeal to the circuit court. Verban v. Ind. Acc. Comm., (1942) 168 Or 394, 123 P2d 988.

Where an award was increased through the attorney's efforts on appeal to the circuit court, the court could not award his fee in a lump sum although the parties had so agreed; but the fee was required to be paid in monthly instalments when the additional compensation was paid to the workman. Id.

An attorney was not entitled to a lump sum payment for procuring additional compensation unless a sufficient amount of the additional payments had accrued at the time of judgment. Id.

**4. Fee as a lien**

Attorney's fees when approved become a lien upon the award with respect to which the attorney performed services. Verban v. Ind. Acc. Comm., (1942) 168 Or 394, 123 P2d 988.

Attorney's fees are not a lien on the reserve fund but upon compensation. Id.

An attorney was not entitled to payment out of the reserve fund accumulated from monthly payments awarded by the commission, and further compensation gained on appeal to the circuit court had not yet become due. Id.

FURTHER CITATIONS: White v. State Ind. Acc. Comm., (1961) 227 Or 306, 362 P2d 302; In re Lee, (1965) 242 Or 302, 409 P2d 337; Peterson v. State Comp. Dept., (1970) 257 Or 369, 477 P2d 216, rev'g 2 Or App 412, 467 P2d 976; Bailey v. Morrison-Knudsen Co., (1971) 5 Or App 592, 485 P2d 1254.

ATTY. GEN. OPINIONS: Proceedings involving legal services in respect to claims for compensation as not subject to filing or court fees, 1934-36, p 105.

LAW REVIEW CITATIONS: 13 OLR 34, 36.

**656.401**

CASE CITATIONS: Cutright v. Am. Ship Dismantler, (1971) 92 Or App Adv Sh 1687, 486 P2d 591.

**656.405**

ATTY. GEN. OPINIONS: Imposition of retaliatory tax on insurer who pays employer's assessments, 1966-68, p 392; charging administrative costs of handling securities deposited with State Treasurer by direct responsibility employers, 1966-68, p 594.

**656.442**

CASE CITATIONS: Berry v. State Ind. Acc. Comm., (1964) 238 Or 39, 393 P2d 184.

LAW REVIEW CITATIONS: 37 OLR 87.

**656.504**

NOTES OF DECISIONS

An employer has not such financial interest in a compensation proceeding, by virtue of 1933, (2d s.s.) amendment, that his admissions against interest are admissible in evidence. Wise v. Ind. Acc. Comm., (1934) 148 Or 461, 35 P2d 242.

FURTHER CITATIONS: M & M Wood Working Co. v. State Ind. Acc. Comm., (1954) 201 Or 603, 271 P2d 1082; Bos v. State Ind. Acc. Comm., (1957) 211 Or 138, 315 P2d 172; State Comp. Dept. v. Beaver Creek Lbr. Co., Inc., (1971) 5 Or App 1, 480 P2d 441, Sup Ct **review denied.**

ATTY. GEN. OPINIONS: Rate of contribution by employer engaged in mining, who employs men to maintain ditches and repair buildings, and also blacksmiths, 1934-36, p 487; fixing wage for compensation not in cash, 1962-64, p 111; crediting interest on invested funds, 1964-66, p 31.

**656.506**

ATTY. GEN. OPINIONS: Computing employe's contribution on basis of days actually on the job, 1940-42, p 531; compulsory contribution to fund by justices and judges, 1960-62, p 7; crediting interest on invested funds, 1964-66, p 31; authority of legislature to extend use of Second Injury Reserve funds to rehabilitation facilities, (1971) Vol 35, p 571.

**656.508**

ATTY. GEN. OPINIONS: Authority of commission to deviate from rates established, 1930-32, p 661; rate of coverage in connection with coast bridges to be constructed by State Highway Commission, 1932-34, p 621; fixing wage for compensation not in cash, 1962-64, p 111.

LAW REVIEW CITATIONS: 1 WLJ 192.

**656.522**

LAW REVIEW CITATIONS: 1 WLJ 193, 194.

**656.524**

LAW REVIEW CITATIONS: 1 WLJ 194, 195.

**656.526**

CASE CITATIONS: Lucas v. State Ind. Acc. Comm., (1960) 222 Or 420, 353 P2d 223.

ATTY. GEN. OPINIONS: Disposition of dividends on premiums paid from particular funds of certain state agencies or divisions, (1971) Vol 35, p 504.

**656.530**

ATTY. GEN. OPINIONS: Authority of legislature to extend use of Second Injury Reserve funds to rehabilitation facilities, (1971) Vol 35, p 571.

**656.552**

NOTES OF DECISIONS

This section and ORS 656.554 were not intended to authorize the use of the injunction to coerce an employer to pay an existing indebtedness arising from his failure to pay contributions, but to permit its use to prevent a financially irresponsible employer from incurring future indebtedness without first securing its payment by making a deposit or filing a bond in a sum equal to the contributions due upon his estimated payroll for a period of three months. Ind. Acc. Comm. v. Miller, (1945) 177 Or 310, 162 P2d 146.

Under this section and ORS 656.554, a positive duty is imposed on the court to grant injunctive relief when the conditions set forth in the statutes are made to appear. Id.

ATTY. GEN. OPINIONS: Meaning of "contributions," 1940-42, p 659.

**656.554**

NOTES OF DECISIONS

See cases under ORS 656.552.

**656.560**

NOTES OF DECISIONS

The commission [now fund] is a body corporate for the purpose of collecting money upon default of the employer. Butterfield v. Ind. Acc. Comm., (1924) 111 Or 149, 223 P 941, 226 P 216.

A discharge in bankruptcy did not discharge a judgment theretofore rendered against an employer for unpaid, overdue exactions which were required under the workman's compensation law, and constituted a tax levied by the state within an exemption in the bankruptcy Act. Ind. Acc. Comm. v. Aebi, (1945) 177 Or 361, 162 P2d 513, 161 ALR 211.

In the absence of a requirement that the demand be made within a definite time after the payments are due, it must have been intended by the legislature that the usual billing to the employer by the state upon no payment having been made by the due date constituted the contemplated demand. State Comp. Dept. v. Beaver Creek Lbr. Co., (1971) 5 Or App 1, 480 P2d 441, Sup Ct **review denied.**

FURTHER CITATIONS: Allen v. State Ind. Acc. Comm., (1954) 200 Or 521, 265 P2d 1086.

**656.562**

NOTES OF DECISIONS

A discharge in bankruptcy did not discharge a judgment theretofore rendered against an employer for unpaid, overdue exactions which were required under the workman's compensation law, and constituted a tax levied by the state within an exemption in the bankruptcy Act. Ind. Acc. Comm. v. Aebi, (1945) 177 Or 361, 162 P2d 513, 161 ALR 211.

**656.564**

NOTES OF DECISIONS

This provision is not unconstitutional as taking property without due process of law. White's Market v. Dixie Creek Min. Co., (1938) 159 Or 406, 80 P2d 712.

Lien by the commission upon unsatisfied judgment in favor of bankrupt imposed independent liability on debtor even if bankrupt was found not to be liable. Northeast Clackamas County Elec. Corp. v. Continental Cas. Co., (1955) 140 F Supp 903.

A lien created by this section is not prior to a lien for unpaid federal taxes assessed after notice of the state lien is filed but before a decree to foreclose it is entered. Bank of Lebanon v. J & W Lbr. Co., (1968) 252 Or 407, 448 P2d 367.

FURTHER CITATIONS: State Comp. Dept. v. Beaver Creek Lbr. Co., (1971) 5 Or App 1, 480 P2d 441, Sup Ct **review denied.**

ATTY. GEN. OPINIONS: Notation on certificate of title of motor vehicle by Secretary of State of existence of lien created by this section, 1948-50, p 302.

LAW REVIEW CITATIONS: 3 WLJ 91.

**656.566**

ATTY. GEN. OPINIONS: Authority of commission to charge unpaid balance due to loss and gain, 1938-40, p 725; notation on certificate of title of motor vehicle by Secretary of State of existence of lien created by this section, 1948-50, p 302.

LAW REVIEW CITATIONS: 3 WLJ 91.

**656.576 to 656.595**

NOTES OF DECISIONS

An agreement, between an employe and an employer rejecting the Act, that limited compensation to the employe if injured to the amount afforded by the Act was valid. Lowe v. Socony Mobil Oil Co., (1963) 222 F Supp 624.

FURTHER CITATIONS: Johnson v. Dave's Auto Center, Inc., (1970) 257 Or 34, 476 P2d 190.

**656.576**

CASE CITATIONS: Newell v. Taylor, (1958) 212 Or 522, 321 P2d 294; Lowe v. Socony Mobil Oil Co., (1963) 222 F Supp 624.

**656.578**

NOTES OF DECISIONS

When an election has once been made to take under the law, the cause of action automatically inures to the state and no longer abides with the injured workman; thereafter the state alone can sue and that for the benefit of the accident fund. King v. Union Oil Co., (1933) 144 Or 655, 24 P2d 345, 25 P2d 1055; Holmes v. Henry Jenning & Sons, (1921) 7 F2d 231.

The complaint of a workman injured away from the plant

of his employer against a third person not in the same employ who negligently caused the injury need not allege facts bringing his cause within the exception to the rule confining his remedy for compensation to the workmen's compensation law. Walter v. Turtle, (1934) 146 Or 1, 29 P2d 517.

ORS 656.312 to 656.324 [now ORS 656.578 to 656.595] permit an employe to sue a third person even after he has received an award of compensation from the commission. Kosmecki v. Portland Stevedoring Co., (1950) 190 Or 85, 223 P2d 1035.

Neither the injured workman nor his beneficiaries must elect at their peril whether to take under the Act or sue delinquent employer or third party. Manke v. Nehalem Logging Co., (1957) 211 Or 211, 301 P2d 192, 315 P2d 539.

Plaintiff, who had received an award from State Industrial Accident Commission, unless she denied receiving benefits, must allege and show she comes under one of these exceptions in order to bring action against her employer. Bandy v. Norris, Beggs and Simpson, (1959) 222 Or 1, 342 P2d 839.

Acceptance of benefits under the Act amounts to an election not to proceed against a third party. Wimer v. Miller, (1963) 235 Or 25, 383 P2d 1005.

Workman who elected to receive benefits under the Act and assigned claim to the commission was not estopped from bringing common law action without reassignment of the claim. Newell v. Taylor, (1958) 212 Or 522, 321 P2d 294.

An employe who accepted compensation for the malpractice of a physician before the final award and for injuries sustained in the course of his employment, was not entitled to maintain an action against the physician for malpractice. McDonough v. Nat. Hosp. Assn., (1930) 134 Or 451, 294 P 351.

FURTHER CITATIONS: Holmes v. State Ind. Acc. Comm., (1961) 227 Or 562, 582, 362 P2d 371, 363 P2d 563; Oregon Farm Bureau v. Thompson, (1963) 235 Or 162, 378 P2d 563, 384 P2d 182.

LAW REVIEW CITATIONS: 13 OLR 72; 23 OLR 202; 2 WLJ 48-55.

**656.580**

CASE CITATIONS: Wimer v. Miller, (1963) 235 Or 25, 383 P2d 1005; Oregon Farm Bureau v. Thompson, (1963) 235 Or 162, 378 P2d 563, 384 P2d 182.

LAW REVIEW CITATIONS: 2 WLJ 51, 57.

**656.583**

CASE CITATIONS: Wimer v. Miller, (1963) 235 Or 25, 383 P2d 1005.

LAW REVIEW CITATIONS: 2 WLJ 57.

**656.587**

FURTHER CITATIONS: Wimer v. Miller, (1963) 235 Or 25, 383 P2d 1005.

**656.591**

NOTES OF DECISIONS

**See also** cases under ORS 656.578.

Workman who elected to receive benefits under the Act and assigned claim to the commission was not estopped from bringing common law action without reassignment of the claim. Newell v. Taylor, (1958) 212 Or 522, 321 P2d 294.

FURTHER CITATIONS: Williamson v. Weyerhaeuser Tbr. Co., (1955) 221 F2d 5; Wimer v. Miller, (1963) 235 Or 25, 383 P2d 1005.

LAW REVIEW CITATIONS: 2 WLJ 52, 57.

**656.593**

CASE CITATIONS: Dewitz v. Columbia R. Paper Co., (1964) 237 Or 623, 391 P2d 613; Peterson v. State Farm Mut. Auto. Ins. Co., (1964) 238 Or 106, 393 P2d 651.

ATTY. GEN. OPINIONS: Authority of commission to allow an injured employe to retain portion of compensation advanced to reimburse him for expenses he incurred in a third-party action, 1944-46, p 244.

LAW REVIEW CITATIONS: 39 OLR 132; 2 WLJ 53, 57.

**656.595**

NOTES OF DECISIONS

An order denying a third party's challenge of a plaintiff's right to maintain an action is not final, hence not appealable in absence of statutory authorization by this section or ORS 656.582 [now ORS 656.384]. Ahern v. Settergren, (1947) 180 Or 287, 176 P2d 645.

When the question of coverage is presented as an affirmative defense, the trial court should resolve that question before trial upon the issues. Pruett v. Lininger, (1960) 224 Or 614, 356 P2d 547.

This section did not violate Ore. Const. Art. I, §17 or Art. VII(A), §3, guaranteeing the right to jury trial. Cornelison v. Seabold, (1969) 254 Or 401, 460 P2d 1009.

On appeal of proceedings under subsection (3), the court is bound by findings of trial court supported by the evidence and will not review the findings de novo. Id.

In an action for personal injuries resulting from an automobile and bus collision, the trial court properly overruled plaintiff's objection to the introduction in evidence of his application for compensation made to the commission which was offered to disclose to the jury that plaintiff made statements therein inconsistent with his testimony in court. Cavett v. Pac. Greyhound Lines, (1946) 178 Or 363, 167 P2d 941.

Where the amended complaint directly alleged defendant was the employer of plaintiff, a third-party action was not involved and the defendant's challenges were insufficient under this section. Bandy v. Norris, Beggs and Simpson, (1959) 222 Or 1, 342 P2d 839.

Admission into evidence of fee paid to plaintiff's doctor in an attempt to show claimed doctor's fees were unreasonable was reversible. Burnett v. Hernandez, (1959) 263 F2d 212.

FURTHER CITATIONS: Plummer v. Donald M. Drake Co., (1958) 212 Or 430, 320 P2d 245; Long v. Springfield Lbr. Mills, Inc., (1958) 214 Or 231, 327 P2d 421; Stout v. Derringer, (1959) 216 Or 1, 337 P2d 357; Byers v. Hardy, (1959) 216 Or 42, 337 P2d 806; Claussen v. Ireland, (1959) 216 Or 289, 338 P2d 676; Beers v. Chapman, (1962) 230 Or 553, 370 P2d 941; Childers v. Schaecher Lbr. Co., (1963) 234 Or 230, 380 P2d 993; Wimer v. Miller, (1963) 235 Or 25, 383 P2d 1005; Dewitz v. Columbia R. Paper Co., (1964) 237 Or 623, 391 P2d 613; Peterson v. State Farm Mut. Auto. Ins. Co., (1964) 238 Or 106, 393 P2d 651; Hadeed v. Willamette Hi-Grade Concrete Co., (1964) 238 Or 513, 395 P2d 553; Dlouhy v. Simpson Tbr. Co., (1967) 247 Or 571, 431 P2d 846; Carlston

v. Greenstein, (1970) 256 Or 145, 471 P2d 806; Green v. Market Sup. Co., (1971) 257 Or 451, 479 P2d 736.

LAW REVIEW CITATIONS: 2 WLJ 51.

**656.602**

NOTES OF DECISIONS

The manner provided by this section for payments from the accident fund does not render the compensation law unconstitutional. Butterfield v. Ind. Acc. Comm., (1924) 111 Or 149, 223 P 941, 226 P 216.

That the commission is a mere agency of the state with none of the usual functions of a corporation, except to sue and be sued, is indicated by this and other sections. In re C.O. Pick Co., (1925) 9 F2d 207.

FURTHER CITATIONS: Lucas v. State Ind. Acc. Comm., (1960) 222 Or 420, 353 P2d 223.

**656.612**

ATTY. GEN. OPINIONS: Fee for examining and reviewing files and furnishing report, 1954-56, p 222; imposition of retaliatory tax on insurer who pays employer's assessments, 1966-68, p 392.

**656.616**

CASE CITATIONS: Lucas v. State Ind. Acc. Comm., (1960) 222 Or 420, 353 P2d 223.

ATTY. GEN. OPINIONS: Vocational rehabilitation programs under State Industrial Accident Commission and State Board of Education, 1958-60, p 30; vocational rehabilitation services by State Industrial Accident Commission, 1958-60, p 30; vocational rehabilitation by commission as mandatory, 1962-64, p 449.

LAW REVIEW CITATIONS: 45 OLR 49.

**656.622**

CASE CITATIONS: Mansfield v. Caplener Bros., (1970) 3 Or App 448, 474 P2d 785.

ATTY. GEN. OPINIONS: Authority of legislature to extend use of reserve to rehabilitation facilities, (1971) Vol 35, p 571.

**656.624**

ATTY. GEN. OPINIONS: Fees of expert witnesses, 1954-56, p 222; per diem and mileage of nonresident witness, 1954-56, p 222.

**656.632**

NOTES OF DECISIONS

For the purpose of supporting an action in its name as a party to a case involving a claim against this fund the commission is a corporation, though not in the ordinary sense of the word. Butterfield v. Ind. Acc. Comm., (1924) 111 Or 149, 223 P 941, 226 P 216.

The fund is a trust fund which must be administered in accordance with statutory provisions. Middlebusher v. Ind. Acc. Comm., (1934) 147 Or 459, 34 P2d 325.

Lumber companies were proper parties to question validity of a law authorizing the use of this fund for the construction of state office buildings. Eastern & Western Lbr. Co. v. Patterson, (1928) 124 Or 112, 258 P 193, 264 P 441.

ATTY. GEN. OPINIONS: Fund as "public money of the state," 1964-66, p 23; crediting interest on invested funds, 1964-66, p 31; validity of transfer of funds, 1964-66, p 205.

LAW REVIEW CITATIONS: 7 OLR 344.

**656.634**

NOTES OF DECISIONS

Ore. Const. Art. XI, §6 is not violated by the investment of moneys from the fund in corporate stocks. Sprague v. Straub, (1969) 252 Or 507, 451 P2d 49.

ATTY. GEN. OPINIONS: Authority of commission to furnish services or expend money for or to employers who have rejected the workmen's compensation law, 1942-44, p 104; charge for cost of care in State Tuberculosis Hospital, 1962-64, p 72; statement of dollar cost of initiative amendment, 1964-66, p 23; crediting interest on invested funds, 1964-66, p 31.

**656.636**

NOTES OF DECISIONS

The fund provided by this provision amounts to nothing more than setting up a reserve to meet a contingent liability. Until money is actually paid out to the claimant no cost has been incurred, unless it be in some technical, accounting sense. Bell v. Ind. Acc. Comm., (1937) 157 Or 653, 74 P2d 55; Verban v. Ind. Acc. Comm., (1942) 168 Or 394, 123 P2d 988.

Attorney fees are not a lien on the reserve fund created by this section which does not become compensation until paid to the workman, Verban v. Ind. Acc. Comm., (1942) 168 Or 394, 123 P2d 988.

An attorney was not entitled to a lump sum payment out of this fund accumulated from monthly payments awarded by the commission, and the further compensation gained for the workman by the attorney on appeal to the circuit court had not become due. Id.

FURTHER CITATIONS: State ex rel. Sprague v. Straub, (1965) 240 Or 272, 400 P2d 229, 401 P2d 29.

ATTY. GEN. OPINIONS: Crediting interest on invested funds, 1964-66, p 32; effective date of benefits under 1965 Act, 1964-66, p 228.

**656.638**

ATTY. GEN. OPINIONS: Authority of legislature to extend use of reserve to rehabilitation facilities, (1971) Vol 35, p 571.

**656.642**

CASE CITATIONS: Lucas v. State Ind. Acc. Comm., (1960) 222 Or 420, 353 P2d 223.

**656.704**

CASE CITATIONS: Lawton v. State Acc. Ins. Fund, (1971) 5 Or App 539, 485 P2d 1104.

**656.712**

NOTES OF DECISIONS

The constitutionality of the Act creating the commission was upheld under Ore. Const. Art III, §1, relating to separation of powers. Evanhoff v. Ind. Acc. Comm., (1915) 78 Or 503, 154 P 106.

This is not a special Act creating a corporation in contra-

vention of Ore. Const. Art XI, §2, as the commission is not a municipal corporation. Butterfield v. Ind. Acc. Comm., (1924) 111 Or 149, 223 P 941, 226 P 216.

The commission is a mere agency of the state, not a corporation. In re C.O. Pick Co., (1925) 9 F2d 207.

FURTHER CITATIONS: Ramseth v. Maycock, (1956) 209 Or 66, 304 P2d 415.

ATTY. GEN. OPINIONS: Governor's power to apply for federal loan for fund, 1956-58, p 290.

**656.716**

ATTY. GEN. OPINIONS: Limitations on political activities of committee members, 1966-68, p 473.

**656.718**

NOTES OF DECISIONS

That the commission had acted upon a claim could not be inferred from the fact that one member discussed it and turned it over to the clerk for filing. Wooldridge v. Arens, (1940) 164 Or 410, 98 P2d 1, 102 P2d 717.

**656.722**

NOTES OF DECISIONS

The commission is not estopped from denying compensation by the unauthorized acts of officers charged with administration of the fund. Allen v. State Ind. Acc. Comm., (1954) 200 Or 521, 265 P2d 1086.

ATTY. GEN. OPINIONS: Physician employed by commission as not entitled to compensation for expert testimony in hearing against commission, 1920-22, p 328; eligibility of dean of medical school as supervisor of physiotherapy for the commission, 1920-22, p 348; oath of office of assistants, 1930-32, p 475; eligibility of chief medical director of the commission as member of the Board of Medical Examiners, 1936-38, p 528.

**656.724**

CASE CITATIONS: Schulz v. State Comp. Dept., (1968) 252 Or 211, 448 P2d 551.

**656.726**

NOTES OF DECISIONS

Commissioners can act only on the basis prescribed by statute and they cannot depart from the line of their duty. Rohde v. Ind. Acc. Comm., (1923) 108 Or 426, 217 P 627.

The incidental judicial function of the commission in carrying out its duty to administer the law does not render the law unconstitutional. Butterfield v. Ind. Acc. Comm., (1924) 111 Or 149, 223 P 941, 226 P 216.

The commission is a creature of the legislature and is a body corporate for the purpose of supporting a proceeding against it. Butterfield v. Ind. Acc. Comm., (1924) 111 Or 149, 223 P 941, 226 P 216; State ex rel Kleinsgorge v. Reid, (1960) 221 Or 558, 352 P2d 466. Butterfield v. Ind. Acc. Comm., supra, **distinguished in** In re C. O. Pick Co., (1925) 9 F2d 207.

The commission is not a corporation included within the definition of "any person" in the Federal Bankruptcy Act. In re C.O. Pick Co., (1925) 9 F2d 207.

A claim pending before the commission cannot be submitted to arbitration before an appeal from its decision. Maroulas v. Ind. Acc. Comm., (1926) 117 Or 406, 244 P 317.

ATTY. GEN. OPINIONS: Authority of commission to compromise claims where there is a doubt as to their validity or ability to collect them in full, or other circumstances making it beneficial for commission to do so, 1942-44, p 218; fee for examining and reviewing files and furnishing report, fees of expert witnesses, per diem and mileage of nonresident witness, 1954-56, p 222.

LAW REVIEW CITATIONS: 1 WLJ 155, 188.

**656.728**

ATTY. GEN. OPINIONS: Vocational rehabilitation programs under State Industrial Accident Commission and State Board of Education, 1958-60, p 30; vocational rehabilitation services by State Industrial Accident Commission, 1958-60, p 30; conformance to the "single agency" rule, responsibility for vocational rehabilitation, 1962-64, p 449.

**656.732**

LAW REVIEW CITATIONS: 1 WLJ 188.

**656.752**

CASE CITATIONS: Neet v. State Comp. Dept., (1966) 244 Or 331, 417 P2d 996; Harp v. State Comp. Dept., (1967) 247 Or 129, 427 P2d 981.

ATTY. GEN. OPINIONS: Attorney General as counsel for the department, 1966-68, p 449.

**656.754**

ATTY. GEN. OPINIONS: Attorney General as counsel for the department, 1966-68, p 449.

**656.758**

NOTES OF DECISIONS

That a foreign vessel is not subject to the Oregon workmen's compensation law is indicated by this and other sections. Spitzer v. "Annette Rolph," (1924) 110 Or 461, 218 P 748, 223 P 253.

ATTY. GEN. OPINIONS: Duty to permit inspection although records cover employes whom employer considers not subject to law, 1920-22, p 83.

**656.790**

ATTY. GEN. OPINIONS: Limitations on political activities of committee members, 1966-68, p 473.

**656.802 to 656.824**

CASE CITATIONS: White v. State Ind. Acc. Comm., (1961) 227 Or 306, 362 P2d 302; Pavlicek v. State Ind. Acc. Comm., (1963) 235 Or 490, 385 P2d 159; Evoniuk v. Great Am. Ins. Co., (1967) 246 Or 75, 424 P2d 216; Barr v. State Comp. Dept., (1970) 1 Or App 432, 463 P2d 871; Johnson v. State Acc. Ins. Fund, (1971) 5 Or App 201, 483 P2d 472; Lawton v. State Acc. Ins. Fund, (1971) 5 Or App 539, 485 P2d 1104.

**656.802**

NOTES OF DECISIONS

An occupational disease may arise from familiar harmful elements present in an unusual degree. Beaudry v. Winchester Plywood Co., (1970) 255 Or 503, 469 P2d 25; Sowell v. Workmen's Comp. Bd., (1970) 2 Or App 545, 470 P2d 953.

The scope and meaning of occupational disease are matters of law not fact and are proper matters for the cogni-

zance of the circuit court. Beaudry v. Winchester Plywood Co., (1970) 255 Or 503, 469 P2d 25.

An occupational disease within the meaning of this statute is not limited in scope to disease or infection caused by actual work exertion, or which had its inception in the employment. Id.

The sufficiency of evidence to overcome the presumption stated by subsection (2) is a question of fact for the medical board of review. Johnson v. State Acc. Ins. Fund, (1971) 5 Or App 201, 483 P2d 472.

FURTHER CITATIONS: Blalock v. Portland, (1955) 206 Or 74, 291 P2d 218; Dodd v. State Ind. Acc. Comm., (1957) 211 Or 99, 310 P2d 324, 311 P2d 458, 315 P2d 138; Lawton v. State Acc. Ins. Fund, (1971) 5 Or App 539, 485 P2d 1104.

LAW REVIEW CITATIONS: 2 WLJ 16, 20-23.

**656.804**

NOTES OF DECISIONS

Subsection (2) exempts rejecting employers from the Employer's Liability Law if the action arose out of occupational disease. Concannon v. Ore. Portland Cement Co., (1968) 252 Or 1, 447 P2d 290.

FURTHER CITATIONS: Dodd v. State Ind. Acc. Comm., (1957) 211 Or 99, 310 P2d 324, 311 P2d 458, 315 P2d 138; White v. State Ind. Acc. Comm., (1961) 227 Or 306, 362 P2d 302; Beaudry v. Winchester Plywood Co., (1970) 255 Or 503, 469 P2d 25; Sowell v. Workmen's Comp. Bd., (1970) 2 Or App 545, 470 P2d 953.

ATTY. GEN. OPINIONS: Recovery for a second attack of the disease, 1944-46, p 122; second attack of disease as a new injury, 1944-46, p 122.

LAW REVIEW CITATIONS: 2 WLJ 16-24.

**656.807**

NOTES OF DECISIONS

The review of the circuit court and appellate courts is limited to questions not within the cognizance of the medical board of review. Beaudry v. Winchester Plywood Co., (1970) 255 Or 503, 469 P2d 25; Johnson v. State Acc. Ins. Fund, (1971) 5 Or App 201, 483 P2d 472.

The exception in subsection (4) was intended only to encompass a review of the hearing officer's determination; the balance of the subsection authorizes review of a circuit court decision by an appellate court. Beaudry v. Winchester Plywood Co., (1970) 255 Or 503, 469 P2d 25.

The scope and meaning of the statutory definition of occupational disease is a proper matter for review by the circuit court. Id.

FURTHER CITATIONS: Hiles v. State Comp. Dept., (1970) 2 Or App 506, 470 P2d 165; Lawton v. State Acc. Ins. Fund, (1971) 5 Or App 539, 485 P2d 1104.

**656.808**

NOTES OF DECISIONS

A final order is one which determines the rights of the parties so that no further questions can arise before the tribunal rendering it, except those necessary to be determined in carrying it into effect. Hiles v. State Comp. Dept., (1970) 2 Or App 506, 470 P2d 165.

FURTHER CITATIONS: Beaudry v. Winchester Plywood Co., (1970) 255 Or 503, 469 P2d 25; Sowell v. Workmen's Comp. Bd., (1970) 2 Or App 545, 470 P2d 953; Johnson v. State Acc. Ins. Fund, (1971) 5 Or App 201, 483 P2d 472; Lawton v. State Acc. Ins. Fund, (1971) 5 Or App 539, 485 P2d 1104.

**656.810**

NOTES OF DECISIONS

The procedural sections for review are not severable from the remainder of the Occupational Disease Law. Pavlicek v. State Ind. Acc. Comm., (1963) 235 Or 490, 385 P2d 159.

All questions to be considered on appeal should be specified in the original notice of appeal. Beaudry v. Winchester Plywood Co., (1970) 255 Or 503, 469 P2d 25.

The circuit court does not acquire jurisdiction to review the order of a hearing officer unless that order is final. Hiles v. State Comp. Dept., (1970) 2 Or App 506, 470 P2d 165.

The order of the hearing officer was not a final order. Id.

FURTHER CITATIONS: White v. State Ind. Acc. Comm., (1961) 227 Or 306, 362 P2d 302; Chetney v. Western Foundry Co., (1970) 255 Or 165, 464 P2d 833; Sowell v. Workmen's Comp. Bd., (1970) 2 Or App 545, 470 P2d 953; Johnson v. State Acc. Ins. Fund, (1971) 5 Or App 201, 483 P2d 472; Lawton v. State Acc. Ins. Fund, (1971) 5 Or App 539, 485 P2d 1104.

**656.812**

NOTES OF DECISIONS

Mandamus is proper remedy to require the medical board of review to answer questions required by this section. Sowell v. Workmen's Comp. Bd., (1970) 2 Or App 545, 470 P2d 953; Lawton v. State Acc. Ins. Fund, (1971) 5 Or App 539, 485 P2d 1104.

The medical board's duties and jurisdiction were limited to an examination of the claimant and answering the statutory questions. White v. State Ind. Acc. Comm., (1961) 227 Or 306, 362 P2d 302.

The procedural sections for review are not severable from the remainder of the Occupational Disease Law. Pavlicek v. State Ind. Acc. Comm., (1963) 235 Or 490, 385 P2d 159.

The findings of the medical board of review are final and binding as to factual matters relating to the field of medicine but not as to matters of law. Beaudry v. Winchester Plywood Co., (1970) 255 Or 503, 469 P2d 25.

In an occupational disease case, the hearing officer is not required to make the findings specified by this section. Id.

The sufficiency of evidence to overcome the presumption stated by ORS 656.802 (2) is a question for the board. Johnson v. State Acc. Ins. Fund, (1971) 5 Or App 201, 483 P2d 472.

LAW REVIEW CITATIONS: 2 WLJ 20-23.

**656.814**

NOTES OF DECISIONS

The legislature did not intend a dissatisfied claimant to have right of appeal with a jury trial de novo. Dodd v. State Ind. Acc. Comm., (1957) 211 Or 99, 310 P2d 324, 311 P2d 458, 315 P2d 138.

The medical board's duties and jurisdiction were limited to an examination of the claimant and answering the statutory questions. White v. State Ind. Acc. Comm., (1961) 227 Or 306, 362 P2d 302.

The procedural sections for review are not severable from the remainder of the Occupational Disease Law. Pavlicek v. State Ind. Acc. Comm., (1963) 235 Or 490, 385 P2d 159.

FURTHER CITATIONS: Chetney v. Western Foundry Co., (1970) 255 Or 165, 464 P2d 833; Beaudry v. Winchester Plywood Co., (1970) 255 Or 503, 469 P2d 25; Sowell v. Work-

men's Comp. Bd., (1970) 2 Or App 545, 470 P2d 953; Lawton v. State Acc. Ins. Fund, (1971) 5 Or App 539, 485 P2d 1104.

**656.816**

CASE CITATIONS: Hiles v. State Comp. Dept., (1970) 2 Or App 506, 470 P2d 165.

ATTY. GEN. OPINIONS: Enlargement to two years of limitation that permanent total disability occur within one year, by proviso, 1950-52, p 22.

LAW REVIEW CITATIONS: 2 WLJ 16.

**656.818**

LAW REVIEW CITATIONS: 2 WLJ 16.