California Law Review

Volume XXVII MARCH, 1939 Number 3

Power of the Industrial Accident Commission to Settle Disputes Arising Under Workmen's Compensation Legislation by the Several Acts of its Members and Deputies

INTRODUCTORY STATEMENT

IN THE quarter century that measures the present age of the Industrial Accident Commission of California there has developed gradually a system of adjudication having certain aspects which seem to be of very doubtful validity, and to invite elucidation and discussion. It is the writer's purpose to describe this system in some detail, to set forth the underlying constitutional and legislative enactments, and to examine the aspects of the system that seem most questionable: (a) The frequent delegation to a "deputy commissioner" of the Board's power of adjudication, and (b) the failure of the Board to exercise its power in noticed and assembled meetings. The fact that these weaknesses in the judicial process of the Commission have not been more widely recognized and sharply attacked is due, in the writer's opinion, to the lack of information as to what the internal machinery of adjudication is, and to the knowledge on the part of the bar that a successful attack would in most instances be a Pyrrhic victory, in the light of the Commission's continuing jurisdiction to amend its orders and decisions for "good cause."[1]

I

THE PROCEDURE OF ADJUDICATION

The Industrial Accident Commission is a board of three members, having control of the Division of Industrial Accidents and Safety[2] and invested with power to settle disputes arising under workmen's compensation legislation. The Commission has a wide range of re-

[1] CAL. LABOR CODE § 5803, formerly CAL. WORKMEN'S COMPENSATION ACT § 20(d).

[2] CAL. LABOR CODE §§ 111, 3205.

sponsibilities, administrative and judicial. On the administrative side is the adoption of needful measures "for securing safety in places of employment," "for adequate insurance coverage against the liability to pay or furnish compensation," "for regulating such insurance coverage in all its aspects, including the establishment and management of" the State Compensation Insurance Fund, and "for otherwise securing the payment of compensation...." The quotations recite some of the enabling clauses from the creative statute,[3] and in practice cover a broad administrative field.

On the judicial side, the Industrial Accident Commission is a court which determines chiefly the rights of injured workers and of dependents of deceased workers to receive compensation. The judicial field is extraordinarily wide and complex, embracing incidental questions in every branch of jurisprudence: domestic relations, partnerships, corporations, contracts, insurance, suretyship, conflict of laws, constitutional law, maritime law, interstate commerce, etc. That the Industrial Accident Commission is a court in the fully accepted legal sense of the word was established by Supreme Court decision as early as 1916[4] and has been confirmed by a uniform line of subsequent decisions.[5] It is with respect primarily to the judicial functions of the Commission that this paper is written.

In its early life the members of the Industrial Accident Commission heard personally the comparatively few claims that were filed for adjudication. As the years hastened on, the filed claims multiplied in number[6] and complexity until it became physically impossible for the members of the Commission personally to hear evidence and decide claims; so a referee system grew into an effective instrument for the prompt disposition of controversies. It is now a number of years since any member of the Commission has himself listened to the evidence in any case. A referee,[7] who is an attorney selected under civil service rules, hears the evidence and "recommends" a decision.[8]

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[3] Cal. Stats. 1913, p. 279, c. 176, as amended Cal. Stats. 1917, p. 831, c. 586 § 1, formerly CAL. WORKMEN'S COMPENSATION ACT § 1.

[4] Western Metals Supply Co. v. Pillsbury (1916) 172 Cal. 407, 156 Pac. 491.

[5] General Acc. Fire & Life v. Industrial Acc. Comm. (1925) 196 Cal. 179, 237 Pac. 33; Hartford Acc. & Indem. Co. v. Industrial Acc. Comm. (1932) 216 Cal. 40, 13 P. (2d) 699; Bankers Indemnity Co. v. Industrial Acc. Comm. (1935) 4 Cal. (2d) 89, 47 P. (2d) 719; Columbia Cas. Co. v. Industrial Acc. Comm. (1936) 5 Cal. (2d) 770, 56 P. (2d) 527.

[6] There are currently about seven hundred new claims filed per month.

[7] There are now twenty industrial accident referees in the state of California.

[8] CAL. LABOR CODE §§ 115, 5315, formerly CAL. WORKMEN'S COMPENSATION ACT §§ 4, 59.

Not all cases are decided by the same procedure. In practice the Commission has established two procedures, distinguished in the internal language of the Commission as "referee decisions" and "commission decisions." This is a faulty terminology for under the statute all decisions must be made by the Commission. The "referee decision" is no more than a proposal which receives its force and effect as a decision by its approval and adoption by the Commission.[9] The procedure in so-called "referee decisions" will be stated first.

In the San Francisco office, after hearing a case fully, a referee writes a memorandum (equivalent to an unpublished, confidential "opinion") which summarizes the evidence, discusses and evaluates it, and recommends a particular decision; and at the same time he prepares and signs a decision consistent with the recommendation made in the memorandum. He transmits the memorandum to another referee, who has been designated to review it and who, if the case is unusual or difficult, may discuss it briefly with a member of the Commission. The original referee sends the proposed decision (as distinguished from his memorandum) to the clerical force for probable filing and mailing. If the memorandum is approved (as it is in perhaps ninety-five per cent of the cases), this approval is communicated to the clerical force, and the proposed decision is then stamped "filed" and copies of it are mailed.[10]

In the Los Angeles office of the Commission the referees' memoranda are reviewed in only a very limited class of cases; otherwise the practice is essentially the same as in San Francisco. It may be noted that the office in Los Angeles has been conducted quite independently by a staff composed of one member of the Commission,[11] a deputy commissioner and a force of referees and necessary clerical assistants.

"Commission decision" is the name given to that type of decision which is signed by two members of the Commission, or by one mem-

[9] *Ibid.*

[10] Below the referee's signature the stenographer types the secretary's attestation that the decision "was approved, confirmed, ordered filed and made the decision of the Industrial Accident Commission on," the date of filing and mailing. This attestation is seldom faithful to the fact, at least in San Francisco, since the signatures which purport to confirm it are never written until the following day at earliest, and sometimes not for several weeks.

[11] Written in 1938. There is not now any resident commissioner in Los Angeles.

ber and a deputy commissioner.[12] The preparatory procedure is not materially different in the two offices. The referee who heard the evidence draws up a memorandum and decision as for a "referee" case, except that the decision is phrased suitably for "Commission" adjudication and carries lines for two signatures. At San Francisco the memorandum and proposed decision go together to the Chief of the Compensation Bureau (the referees' superior officer) who, if he approves, carries the decision to a member of the Commission and in fifty words or so digests for the enlightenment of the commissioner the facts, issues and recommendation. If no reason for disagreement occurs to the commissioner, he signs the decision, which is then taken to the adjoining office of another commissioner, or of a deputy commissioner, who, in the usual case, signs as a matter of course, thus supposedly making the decision the instant and effective act of the Industrial Accident Commission. The decision then goes to the clerical force for filing and mailing.

We have now traced both "referee" and "Commission" decisions to the clerical "get-out" force. After mailing copies of the decision, a typist lists the cases on a sheet headed "Minutes of the Industrial Accident Commission," dated the day of mailing, and bearing an introductory paragraph as follows:

"In the following cases it is ordered that the orders or Findings and Award prepared and rendered by the Commission or referee be approved and confirmed as prepared, and it is further ordered that said orders or Findings and Award be filed in the office of this Commission and the parties be notified of said confirmation."

At San Francisco decisions signed by referees and those signed by two members of the Commission are listed on the same sheet; decisions signed by Commissioner *A* and a deputy commissioner are

[12] A wholly arbitrary rule determines which decisions must be "Commission" ones. All others may be referee decisions. Thus in San Francisco decisions for signature by two members of the Commission (or a member and a deputy) include those involving claims for death benefits, claims based on alleged serious and wilful misconduct of the employer or the employee, closing orders, etc. Under this rule a claim involving a difficult question of insurance coverage, or any other legal problem, of perhaps far-reaching consequence, is signed by a referee, while closing orders which have no greater effect than removing the claim temporarily from the active calendar, and death claims, which may be uncontested, or involve but a few hundred dollars, and which usually present issues of fact only, must go to two members of the Commission (or a member and deputy) for signatures. It is probably the purpose and general effect of the rule, however, to insure that certain types of cases, regarded as more important, be made more likely to receive the personal consideration of the members of the Commission or of a commissioner.

listed on a second sheet; and decisions signed by Commissioner *B* and a deputy commissioner are listed on a third sheet, etc. These "minutes," now prepared, are taken to certain officials for signature. The page which lists the decisions which were signed by referees or by two members of the Commission is carried to the office of one member of the Commission, who signs it at the foot of the last page, then to the office of a second member of the Commission, who signs it in like place; but the page of "minutes" which lists the decisions signed by Commissioner *A* and a deputy commissioner is taken to the same commissioner and same deputy, in turn, for signatures; and similarly to Commissioner *B* and a deputy is taken, in turn, the page of "minutes" listing the decisions signed by them. When the "minutes" are thus signed, usually from one to three days after the date attested on the decision and recorded on the page of "minutes," but sometimes several weeks after, the routine is complete.

At Los Angeles, all decisions are listed indiscriminately on the same page, both "referee" type and the member-deputy class of the "commission" type, and these "minutes" are approved by the signatures, severally affixed, of the member of the commission resident at Los Angeles and a deputy commissioner.

This described informality of signature of the so-called "minutes" at San Francisco and Los Angeles, constitutes the approval and confirmation "by the Commission" referred to in section 4 of the Workmen's Compensation Act.[13]

About once a month the members of the Commission assemble on notice and hold a formal meeting. A deputy commissioner, as such, never participates in these meetings. About three or four times a year a compensation case is discussed in meeting. During the latter half of 1937 it became customary to include among resolutions of a meeting a blanket approval of all acts done as "Commission" acts by two commissioners, or by a member and a deputy, between meetings, and to adopt and ratify them as the acts of the Commission. About February, 1938, this short-lived custom was abandoned.[14]

As a practical matter, no cases are ever given consideration in assembled formal meetings of the Commission; nor are the "minutes" which list the decisions of the referees, of the several members of the Commission, and of a member and a deputy, ever given consideration or approved and confirmed at such a meeting.

[13] CAL. LABOR CODE § 115, formerly CAL. WORKMEN'S COMPENSATION ACT § 4.

[14] Restored at summarily called meeting held January 12, 1939, three days before end of one member's term as commissioner and another member's term as chairman.

II

THE UNDERLYING ENACTMENTS

From what has been related, it appears that the validity of all decisions of the Industrial Accident Commission is based on the adequacy of a procedure in three parts: (1) Consideration of the evidence by referees and in a minority of cases by a member of the Commission; (2) Signature of a decision by a referee, or, upon being taken from office to office, by two members of the Commission, or by a member of the Commission and a deputy commissioner; (3) The listing of the decisions on a page headed "Minutes of the Industrial Accident Commission," to which are severally affixed the signatures of two members of the Commission, or of a member and a deputy commissioner.

Empowered by section 21 of article XX of the California Constitution, the legislature created in 1913 "*a board* to consist of three members ... which shall be known as the 'industrial accident commission' and shall have the powers, duties and functions hereinafter conferred,"[15] and further provided as follows:

"A majority of the commission shall constitute a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power or authority of the commission.... *The act of the majority of the commission, when in session as a commission,* shall be deemed to be the act of the commission, but any investigation, inquiry or hearing, which the commission has power to undertake or to hold, may be undertaken or held by or before any member thereof or any referee appointed by the commission for that purpose, and every finding, order, decision, or award made by any commissioner or referee, pursuant to such investigation, inquiry or hearing, *when approved and confirmed by the commission* and ordered filed in its office, shall be deemed to be the finding, order, decision or award of the commission."[16]

"The commission shall have full power and authority ... to appoint, and it shall appoint, a secretary.... It shall be the duty of the secretary to keep a full and true record of all the proceedings of the commission ... and generally to perform such other duties as the commission may prescribe. The commission may also appoint such assistant secretaries as may be necessary and such assistant secretaries may perform any duty of the secretary, when so directed by the commission."[17]

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[15] Cal. Stats. 1913, p. 279, c. 176, § 3, formerly CAL. WORKMEN'S COMPENSATION ACT § 3.

[16] CAL. LABOR CODE § 115, formerly CAL. WORKMEN'S COMPENSATION ACT § 4. (Italics added.)

[17] CAL. LABOR CODE § 120; formerly CAL. WORKMEN'S COMPENSATION ACT § 7(2).

Section 21 of article XX of the constitution, as last amended in 1918, reads in part as follows:

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

"The legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this state...." (Italics added.)

The next important legislative step was an amendment adopted in 1929 to the section of the Act dealing with the requirement and duties of secretary, as follows:

"The Commission may authorize its secretary or any assistant secretary, but not more than one assistant secretary at any one time, to act as a deputy commissioner or commissioners for such period or periods of time as it shall prescribe, and it may delegate such portion of its authority and duties to such deputy commissioner or commissioners as it shall prescribe, and he or they may perform any duty so delegated; *provided, however,* that not more than two deputy commissioners shall act at any one time and that no act of any deputy commissioner shall be valid unless it is concurred in by at least one commissioner."[18]

III

DECIDED CASES NOT CONCLUSIVE

In a case pending in the Industrial Accident Commission four years ago, an employer's defense of the statute of limitations was rejected in a decision signed by a member of the Commission and a deputy commissioner. A petition for rehearing, addressed to the Commission, was denied in an order signed by two of the three members of the Commission. The (First) District Court of Appeal reviewed and annulled the decision in a written opinion[19] which sustained the

[18] Cal. Stats. 1913, p. 279, c. 176, as amended Cal. Stats. 1929, p. 556, c. 257, now in CAL. LABOR CODE § 121, formerly CAL. WORKMEN'S COMPENSATION ACT § 7(2). (Italics added.)

[19] Market St. Ry. Co. v. Industrial Acc. Comm. (1935) 80 Cal. App. Dec. 1072.

employer's defense of the statute of limitations but ignored other contentions set up in the application for review, for the reason, doubtless, that the other contentions became moot in the light of the ground for annulment of the award. The respondent carried the case to the supreme court where the district court of appeal's annulment was first affirmed and, on rehearing, reversed in a written opinion which rejected the employer's defense of the statute of limitations, adding that "this is the only issue"[20] presented for determination. The employer petitioned for rehearing, urging that *"the court is in error in stating that"* the statute of limitations *"is the only issue,* because . . . *petitioner has at all times contended . . . that the purported award or order is not a valid order of the Industrial Accident Commission . . . for the reason that said order was only signed by one of the three members of the Industrial Accident Commission instead of by a majority of the members of said Commission. . . . 'Said purported Order shows on its face that it is not the act of the majority of the members of the . . . Commission.'* "[21] The petition for rehearing was denied without benefit of written opinion.

More recently the same contention was raised in an application to the supreme court for review of a decision, or purported decision, of the Industrial Accident Commission, based on the contention (among others) that the decision, being signed by only one member of the Commission, together with a deputy commissioner, was defective. The application for a writ was denied, without written opinion.[22]

The contention presented in the first case[23] that the purported order was not a valid order of the Industrial Accident Commission for the reason that it was signed by only one of the three members of the Commission, was not brought specifically to the attention of the supreme court or considered by that court until the case had reached a stage where the employer was petitioning for "Rehearing of Order of the Supreme Court Reversing Previous Decision of Supreme Court . . ."[24] which had affirmed the decision of the district court of appeal. By this time the court was possibly weary and in a mind to

[20] Market St. Ry. Co. v. Industrial Acc. Comm. (1936) 6 Cal. (2d) 344, 345, 57 P. (2d) 499, 500.

[21] Market St. Ry. Co. v. Industrial Acc. Comm., Petitioner's petition for rehearing of order of the Supreme Court reversing previous decision of Supreme Court and District Court of Appeal (1936) S. F. No. 15440, at pp. 3, 5.

[22] Union Oil Co. v. Industrial Acc. Comm. (1937) 2 Cal. Compensation Cases 30.

[23] Market St. Ry. Co. v. Industrial Acc. Comm., *supra* note 20.

[24] Petitioner's petition for rehearing, *supra* note 21, at p. 1.

heed the respondent's plea that "we cannot believe that this Court would require the claimant and the Commission to perform such an idle act as to go back merely for the purpose of having two Commissioners sign the Order . . . ."[25] Nor could the Court have overlooked the force of the respondent's point that two members of the Commission had signed the order denying rehearing while the dispute was still before that body, and thus apparently cured the defect.

In the second case[26] the employer devoted only two of its thirty-one pages of argument to the general contention now under consideration, and cited no authority. The respondent referred to and merely copied its answer filed in the earlier case. The petition for review was denied.

It is apparent, therefore, that as the situation stands the supreme court of this state has twice affirmed decisions signed by one member of the Industrial Accident Commission and a deputy commissioner. In both cases, however, the question of validity of a decision so executed was beclouded by procedural considerations or lost as a minor contention in a host of supposedly more important issues and arguments. It is unfair to conclude, therefore, that the question has yet been squarely presented or finally decided.

Later this paper will discuss the question whether a decision signed by two commissioners acting not in conference and never confirmed by board action, is a valid decision under the constitution and statutes. First, discussion will be presented of the anomalous position of a deputy and of the doubtfulness of those decisions which purport to be Commission decisions by virtue of the signatures of one commissioner and a deputy.

IV

THE 1929 AMENDMENT CANNOT BE REASONABLY OR LOGICALLY INTERPRETED AS AUTHORIZING DELEGATION OF ANY BUT NON-ADJUDICATIVE FUNCTIONS OF THE COMMISSION

(a) *What Is a Deputy?*

It is true that there is a statute which authorizes deputation. It is the 1929 amendment to section 7 of the Workmen's Compensation Act, and has been previously quoted in full. Under this authority the

[25] Market St. Ry. Co. v. Industrial Acc. Comm. Respondent's answer to petitioner's petition for rehearing of order of the Supreme Court reversing previous decision of Supreme Court and District Court of Appeal (1936) S. F. No. 15440, at p. 12.

[26] Union Oil Co. v. Industrial Acc. Comm., *supra* note 22.

Commission has appointed two "deputies," the maximum number allowed. From the language of this statute, it cannot readily be discerned whether each appointee is deputy to the Commission as a board, or is deputy to the persons who comprise the Commission, or whether the word "deputy" is used loosely to embrace some other concept.

In its simplest application, a deputy is one who has authority to act for his superior officer. But a deputy connotes something more than this. As deputy, he is empowered to perform not some (unless the statute clearly so permits), but all of his principal's duties.[27]

In California this definition is confirmed by Political Code section 865, which reads: "In all cases not otherwise provided for, each deputy possesses the powers and may perform the duties attached by law to the office of his principal." Obviously, to "possess the power," unlimited, means to possess *all* of the power; and "perform the duties," unlimited, means to perform *all* of the duties. Political Code section 4315 provides that "whenever the official name of any principal officer is used in any law conferring power, or imposing duties or liabilities, it includes deputies."

(b) *The Anomaly of a Deputy to a Multiple Body*

Presumably the legislature employed the word "deputy" in the 1929 amendment in the same sense in which it is used in all the legal literature and in the California statutes. That would mean that the Commission's appointee is deputy to it, as a board and tribunal, for the act expressly authorizes the Commission to "*delegate* such portion of *its* authority and duties to such deputy . . . as it shall prescribe. . . ."[28] This connotation is corroborated by Political Code section 876, which reads: "All assistants, deputies, and other subordinate officers, whose appointments are not otherwise provided for, must be appointed by the officer or body to whom they are respectively subordinate." Since the deputy commissioner receives his appointment from the Commission, he is subordinate to it, and presumably deputy to it.

It is perhaps begging the question to argue that the appointee cannot in this instance be intended by the legislature to be a deputy

[27] COMYN'S DIGEST, title "Officer," D.3; Erwin v. United States (S.D. Ga. 1889) 37 Fed. 470, 2 L. R. A. 229; Opinions of Justices (1868) 12 Fla. 651, 652; Willingham v. State (1886) 21 Fla. 761; People v. Barker (1895) 14 Misc. 360, 35 N. Y. Supp. 727; Steinke v. Graves (1898) 16 Utah 293, 52 Pac. 386.

[28] Cal. Stats. 1929, p. 556, c. 257 § 7(2); CAL. LABOR CODE § 121.

to his appointing power because his appointing power is not a public officer, but is a multiple tribunal. Yet every application of the word "deputy" that the writer has discovered has been with reference to his association with a personal principal.[29] This sense finds some corroboration in Political Code section 910, which reads: "Deputies . . . must . . . take and file an oath in the manner required of their principals," a provision which carries an implication that the principal must be a person, and must be such an individuality as can subscribe to an oath.

The act of a deputy, as before stated, is the act of his principal, not in a measure only, but fully.[30] Yet it seems highly improbable that the legislature, having established a *board* of three members

"vested with full power, authority and jurisdiction . . . and charged with the duties defined by the provisions of this act. . . ."[31] [a majority of the board to] "constitute a quorum for the transaction of business, for the performance of duty, or the exercise of power of the Commission, . . . the act of the majority of the commission, when in session as a commission. . . ." [to be deemed] "the act of the commission. . . ."[32]

would intend to empower the Commission to delegate to a deputy all the power, all the authority, all the jurisdiction and all the duties vested in the Commission, so long as the deputy acts with the concurrence of one member of the board; or that his acts (with such concurrence) are of equal force with those of the Commission;[33] or that whenever the law confers a power on the Commission, it confers it equally upon him, if he acts with the concurrence of a member of the Commission.[34] Such an interpretation would confer on the deputy more authority than that enjoyed by a commissioner for it would enable him, with the concurrence of a member of the board, to perform every duty and exercise every authority which the Commission has power to perform or exercise, without even the need of an assem-

[29] A deputy commissioner under the LONGSHOREMEN'S & HARBOR WORKERS' COMPENSATION ACT (44 STAT. (1927) 1424, 33 U.S.C. (1934) § 901) is only an apparent exception, the title being a misnomer, because he receives his authority directly from Congress and not by deputation from the Board.

[30] CAL. POL. CODE § 865. The appointments of deputies by the Industrial Accident Commission have all been general and unlimited in language, although the functions of the deputies have been limited in practice.

[31] Cal. Stats. 1917, p. 831, c. 586, formerly CAL. WORKMEN'S COMPENSATION ACT § 5*.

[32] CAL. LABOR CODE § 115, formerly CAL. WORKMEN'S COMPENSATION ACT § 4.

[33] CAL. POL. CODE § 865.

[34] CAL. POL. CODE § 4315.

bled or formal meeting which would be required of the members themselves.

(c) *The Anomaly of a Deputy at Large Acting as an Additional Commissioner*

If the legislature meant to sanction the use of an official to share the Commission's essential adjudicative functions, it seems more likely that it intended to permit the appointment of one (whether or not properly denominated "deputy") who would enjoy, with the concurrence of a member of the Commission, the same authority as if he himself were one of the three members of the Commission; not a deputy to any certain commissioner, but a "deputy at large." The language, taken as a whole, adapts itself to this construction. "The Commission may authorize its secretary ... *to act as* a deputy commissioner ... provided, ... that no act of any deputy commissioner shall be valid unless it is concurred in by at least one commissioner."[35]

Even to this interpretation there are inherent objections. Such a construction of the amendment destroys the concept of a board as a board, of a multiple judicial tribunal as a majority institution. In effect it creates a five-man commission, and causes a minority of such group to become the Commission. It contemplates valid commission acts and effective decisions by a minority composed of any two of the five. With one breath it creates a tribunal of three members, and with another breath it destroys it by stating that a non-member of the Commission, acting with a member, can make himself the Commission.

If the legislature has authorized the appointment of two deputy commissioners, it can authorize the appointment of fifty-two, each one able, with the concurrence of a single member of the Commission, to be the Commission. The result would not be one Commission, "a majority" of which shall "constitute a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power or authority of the commission .... The act of the majority of the commission, when in session as a commission," to be "deemed to be the act of the commission,"[36] but on the contrary the result would be several commissions, each in quorum if two, a deputy and a member, are present, and each "the Commission." The picture is not highly drawn. The situation actually exists in fact. Two members of the Commission, or a member and a deputy commissioner at

[35] Cal. Stats. 1929, p. 557; CAL. LABOR CODE § 121.

[36] CAL. LABOR CODE § 115, formerly CAL. WORKMEN'S COMPENSATION ACT § 4.

San Francisco purport daily to act as "the Commission" while a member of the Commission and a deputy commissioner at Los Angeles are simultaneously doing the same thing there, and sometimes to opposite purpose.

An interpretation so destructive of the original creation of a board of three members should not be adopted, it is believed, if an interpretation more reasonable in operation can be offered, without undue strain on the usual limitations of language.

(d) *What Could Have Been the Reasonable Intendment?*

It appears to the writer that what the framers of the amendment of 1929 had in mind was this, that a deputy commissioner could with the concurrence of a member, exercise such of the authority and perform such of the Commission's duties as would not (under the broad rule that powers dependent on use of judgment and discretion cannot be delegated) have to be exercised or performed in a formal, noticed and assembled meeting of the board; in other words, many types of executive and administrative acts. This interpretation is given weight by five considerations: (1) The general rule itself that, in the absence of *clear* legislative authority, judicial power cannot be delegated; (2) The limitation of appointment to secretary and assistant secretaries, whose duties as a class are commonly administrative and seldom if ever judicial; whose duties in the particular instance, as enumerated in the Workmen's Compensation Act,[37] are exclusively administrative, unless the amendment now under consideration be an exception; (3) Nothing in the amendment attempts expressly to limit or modify the provisions of section 4[38] of the Act which prescribe that

"a majority of the commission shall constitute a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power or authority of the commission.... The act of the majority of the commission, when in session as a commission, shall be deemed to be the act of the commission....";

and nothing in the amendment attempts expressly to confer on the deputy any right to participate in a formal session of the Commission, nor states that a deputy and a commissioner shall constitute a quorum for the transaction of all Commission business, a natural form of statement if this was the intention; (4) The members of the

[37] § 7(2); now CAL. LABOR CODE §§ 120, 121.

[38] Found also in CAL. LABOR CODE § 115.

Commission have never, even once, allowed a deputy commissioner, as such, to be a participant in a formal Commission meeting, thus evidencing the understanding that has existed since the amendment was adopted that the duties of the deputy commissioner were limited to extra commission, *i.e.*, executive activities, or activities which they assumed, rightly or otherwise, were such as did not require noticed and assembled consideration and action;[39] (5) Only such an interpretation of the amendment of 1929 (*i.e.*, limitation of deputies' activities to participation in administrative and executive acts), would seem to save the amendment from unconstitutionality. Unless such an interpretation be applied, it is urged that the amendment is unconstitutional.

(e) *The Unconstitutionality of Attempted Delegation of the Commission's Obligation to Settle Disputes*

As last amended in 1918, section 21 of article XX of the California constitution authorizes the legislature to make "full provision for vesting power, authority and jurisdiction in an administrative

[39] The respondent in the Market Street Railway case, *supra* note 25, at p. 5, urged before the supreme court the same growing multiplicity aud complexity of work as the occasion for the 1929 amendment which created the "deputy commissioner" as compelled the adoption of a referee system: "Just as it became impossible for the Commissioners to actually hold all the hearings, so it became impossible for a majority of the Commissioners themselves to be available and present for the approval of all orders and decisions issued by the Commission. It was for this reason that the" 1929 Amendment "was added to the Act...." See CAL. LABOR CODE § 121, formerly CAL. WORKMEN'S COMPENSATION ACT § 7(2). The reason given is misleading and is historically inaccurate. The deputy commissioner is not in practice permitted by the Commission to approve orders and decisions issued by the Commission, but he is permitted, at least recently, to join with a member of the Commission in the issuance of so-called Commission decisions. The latter practice is at variance with what seems to have been the original purpose of the enactment. This amendment was first proposed in 1929 at a time when, it is believed, the director of that day felt unequal to the demand for his constant presence fifty-two weeks a year to sign routine documents. His most trusted subordinate was the then secretary. The director's thought seems to have been that he could repose in this secretary the responsibility of signing very infrequent documents which otherwise would require his own signature, and in another member of the staff a similar authority with respect to the other commissioners, for special use only when the commissioner himself was unavailable. It was an extraordinary device for emergency use. It was not intended nor foreseen that the deputy would sign decisions at will, nor did he do so until after the retirement of the then secretary in 1932. As the practice grew, however, the appointment of the second deputy, which had theretofore reposed inactively in an assistant secretary at San Francisco, was transferred to an assistant secretary at Los Angeles so as to enable "commission" decisions and "minutes" to be executed independently of San Francisco, by a commissioner and a deputy commissioner resident there.

body ... to *determine* any dispute or matter arising under" workmen's compensation legislation, and adds, in part:

"The legislature is vested with plenary powers, to provide for the settlement of any disputes arising under ... [workmen's compensation laws] by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute...."

Obviously, the constitution provides that if the legislature chooses to have industrial disputes settled otherwise than by arbitration or the courts, the legislature *must* vest the jurisdiction in a Commission, either alone or in combination with the other two types of agency.

Acting comformably, the legislature chose to provide for the settlement of disputes arising under such laws by an Industrial Accident Commission, and not by arbitration, nor by the courts, nor by any combination of these agencies, except in so far as the appellate courts are given a limited power of review. The Industrial Accident Commission is the "administrative body with all requisite governmental functions to determine any dispute or matter" authorized by the first paragraph of section 21 of article XX of the constitution.

Having chosen to utilize an Industrial Accident Commission for the settlement of disputes, the legislature nowhere finds in the constitutional provisions authority for sanctioning some different or foreign machinery for the settlement of disputes. Nowhere in the constitutional provisions is there any language which could justify the legislature in conferring on any single commissioner, or any single deputy, or any combination of them except as the "Commission," jurisdiction requisite to determine such matters.

The referee system established by statute is wholly consistent with the constitution. A referee may be required to hold hearings and collect evidence[40] or a referee may be required to "report" to the Commission his findings and conclusions of law,[41] but, in either case, "the Commission" is to render the decision.[42] The referee is like a court's referee; he collects the evidence and makes a recommendation of a decision. This is authorized in section 115 of the Labor Code. This is the chief legislative provision defining the Commission's procedure. It is here specifically provided, "The act of the majority of the commission, *when in session* as a commission, is the act of the

[40] CAL. LABOR CODE § 5314, formerly CAL. WORKMEN'S COMPENSATION ACT § 59.
[41] *Ibid.* § 5313.
[42] *Ibid.* § 5315.

commission," and that "every finding, order, decision or award made by *any commissioner* or *referee . . . when approved and confirmed by the commission* and ordered filed in its office, *is* the finding, order, decision, or award of the commission."[43]

While the constitution of the state is silent as to referees, or possible functions of members of the Commission, acting individually, it does not preclude legislative provision for administrative detail, nor provision for referees or individual commissioners or deputies performing the preparatory work in the adjudicative process. The legislature cannot and has not attempted to vest in them the essential adjudicative function which the constitution expressly contemplates shall be vested in a board or commission acting as a board or commission.

The amendment of 1929, on the other hand, is wholly inconsistent with a construction of the constitution which limits the power of the legislature to provide for settlement of industrial disputes, if not by arbitration or the courts, then exclusively by a *commission*, an administrative *body*, either alone or in combination with the other two types of agency. The amendment, in providing that a non-member of the board may "act as a deputy commissioner" and may receive and perform such portion of the board's authorities and duties as it shall prescribe, and that his act shall be valid if concurred in by a member of the Commission, permits the essential functions of the Commission to be performed by persons who are not the Commission or administrative body specified in the Constitution.

It is therefore submitted that when the legislature confines workmen's compensation problems to the care of an Industrial Accident Commission, it cannot extend the authority for the settlement of disputes beyond the Commission itself which, as presently constituted, is a board of three members. The legislature has no authority to permit the Commission to delegate its explicit function of settlement of disputes. If the 1929 Amendment is interpreted to authorize delegation of essential adjudicative functions, it is to that extent unconstitutional; if valid at all, it must be limited to authorization of deputies' participation in executive and administrative actions. It is believed that the cases heretofore discussed[44] cannot be regarded as having established the correctness of a contrary view.

[43] CAL. LABOR CODE § 115, formerly CAL. WORKMEN'S COMPENSATION ACT § 4. The decisions of the referees are as a matter of practice adopted as the decisions of the Commission, with a very few exceptions.

[44] Market St. Ry. Co. v. Industrial Acc. Comm., *supra* note 20; Union Oil Co. v. Industrial Acc. Comm., *supra* note 22.

V

NEED OF ASSEMBLED MEETING FOR EFFECTIVE BOARD ACTION

In the earlier of the two cases previously discussed there is a contention in the petition for writ of review, addressed to the District Court of Appeal, that the order "was signed by only one member of the . . . [three members of the] Commission . . . and has not been approved, or confirmed by a majority of the members of said Industrial Accident Commission."[45] Apparently the only point the petitioner was urging was that the order failed to bear the signatures of more than one member of the Commission.

Conceding for the purposes of argument that a deputy commissioner and a member of the Commission can exercise the power of the Commission to adjudicate a claim, yet neither decision was reached at a noticed and assembled meeting of the Commission; on the contrary, each was signed severally and informally.[46] Yet no contention was addressed to the court that this absence of formality invalidated the decision. The point is therefore not involved in the court's actions.

The absence of assembled action is, nevertheless, characteristic in the Industrial Accident Commission's adjudication of cases and is closely associated with the question of delegation that was presented, even though obscurely, to the supreme court,[47] and therefore merits discussion. It presents the question whether the Industrial Accident Commission has the power to act effectively by the several acts of its unassembled members.[48]

The law seems clear that a board, having three or more members, can act only in assembly, with notice to all members and opportunity to participate. A majority of the whole number may convene, and a majority of those convening may effect the formal act of the board or court.

Mechem, in his work on *Public Officers,* says:

"Where . . . a trust or agency is created by law or is public in its nature and requires the exercise of deliberation, discretion or judgment, whether

[45] Market St. Ry. Co. v. Industrial Acc. Comm., Petition for Writ of Review (1934) 1st Civil No. 9691, at p. 13.

[46] This fact, of course, did not appear affirmatively in the record.

[47] Market St. Ry. Co. v. Industrial Acc. Comm., *supra* note 20; Union Oil Co. v. Industrial Acc. Comm., *supra* note 22.

[48] See DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION (1936) 259. See Hackley-Phelps-Bonnell Co. v. Cooley (1921) 173 Wis. 128, 179 N. W. 590.

it be judicial or *quasi*-judicial in its character, . . . while all the trustees, agents or officers, except where the law makes a less number a quorum, must *be present* to deliberate, or, what is the same thing, must be duly notified and have an opportunity to be present, yet, except where the law clearly requires the joint action of them all, it is well settled that a majority of them, where the number is such as to admit of a majority, *if present*, may act and that their act will be deemed the act of the body. . . .

"The act of the majority can only be upheld, however, when the conditions named exist. For if the minority took no part in the transaction, were ignorant of what was done, gave no implied consent to the action and were neither consulted nor had any opportunity to exert their legitimate influence in determining the course to be pursued, the action of the majority will be unavailing."[49]

The same author says in section 577:

"Inasmuch as the law thus contemplates that all will meet together and that the public will have the benefit of their combined judgment and discussion, it follows that their previous individual agreement as to how they will act when they meet as a body is opposed to public policy and void."

Accordingly, it has been held that where several persons are authorized to perform public service and do acts of a public nature as an organized body, they must be convened in body;[50] and dividing the work between the individual members or commissioners, though planned as an effort in the interest of efficiency, is contrary to the provisions of a law which requires the board to act.[51] Nor can the board act unless a majority of its members are present,[52] nor, even so, if one or more absent members took no part, were ignorant of what was done, gave no implied consent to the action of the others, and were neither consulted by the others nor given opportunity to exert their legitimate influence in the determination of the course to be pursued.[53] All members must be summoned to attend, or be given notice of the time and place of meeting.[54]

On the other hand, if a member is notified but fails to attend, it

[49] MECHEM, PUBLIC OFFICERS (1890) § 572. (Italics added.)

[50] Barnhardt v. Gray (1936) 12 Cal. App. (2d) 717, 56 P. (2d) 254, *rev'd*, (1936) 15 Cal. App. (2d) 307, 59 P. (2d) 454, Sup. Ct. *hearing den.*, Sept. 4, 1936; State v. Alexander (1930) 158 Miss. 177, 130 So. 754.

[51] State v. Schuffenhauer (1933) 213 Wis. 29, 250 N. W. 767.

[52] State v. Porter (1887) 113 Ind. 79, 14 N. E. 883; Crocker v. Crane (N. Y. 1839) 21 Wend. 211, 34 Am. Dec. 228.

[53] Schenck v. Peay (E. D. Ark. 1868) Fed. Cas. No. 12,450.

[54] People v. Batchelor (N. Y. 1858) 28 Barb. 310.

is the same as if he had attended and dissented from the act of the majority.[55]

In a Kansas case a statutory provision that, " 'Words giving a joint authority to three or more public officers . . . shall be construed as giving such authority to a majority of them, unless it be otherwise expressed in the act giving the authority,' "[56] was held to apply to boards or tribunals whose membership is full, and not to one in whose proceedings the minority is given no opportunity to participate.

Such California law as has been found on the subject always assumes, and sometimes states, the need of an assembled meeting as a prerequisite to effective action by a multiple body; but there is language which would seem to belie the requirement of notice to absent members. The necessity of giving notice was nowhere, however, specifically raised, as it appeared that in such cases all members either participated or, if they absented themselves, did so for other reasons than lack of notice and opportunity to attend.[57]

A case which seems to diverge from the rule that all members of the board must have notice of intended meeting and opportunity to attend, is one which recognizes the requirement of a meeting of the majority in assembly, but can be construed to infer that consultation with a minority is unnecessary. The court quotes the local statute:[58] " 'All words purporting to give a joint authority to three or more public officers or other persons, shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority,' " and held valid the funding of certain bonds done at a meeting of loan commissioners at which only two members were present, "the third member being absent from the territory, and not in any manner con-

[55] Horton v. Garrison (N. Y. 1856) 23 Barb. 176. It is no longer the general rule, as it once was, that where a board composed of three or more persons is empowered by statute to do any public act, it is necessary that all should be present. See Parrott v. Knickerbocker (N. Y. 1869) 8 Abb. Pr. (N. S.) 234, 38 How. Pr. 508; Slicer v. Elder (1859) 2 Ohio Dec. 218.

[56] Leavenworth v. Meyer (1897) 58 Kan. 305, 310, 49 Pac. 89, 91.

[57] People v. Harrington (1883) 63 Cal. 257; People v. Hecht (1895) 105 Cal. 621, 38 Pac. 941, 45 Am. St. Rep. 96; Coffey v. Superior Ct. (1906) 2 Cal. App. 453, 83 Pac. 580. A somewhat related case is one in which the three members of a reclamation board assembled and acted, the complaint being that one of them was interested. Obviously, the facts do not present our problem. The court quotes the language of People v. Hecht, *supra*. Reclamation District v. Sherman (1909) 11 Cal. App. 399, 105 Pac. 277. See also Fitts v. Superior Court (1936) 6 Cal. (2d) 230, 57 P. (2d) 510, *reh'g den.*, May 28, 1936.

[58] Schuerman v. Territory (1900) 7 Ariz. 62, 66, 60 Pac. 895, *aff'd*, (1902) 184 U. S. 342.

sulted with reference to such funding." However, the Supreme Court of the United States, in affirming the decision, adds the very significant paragraph: "The record does not show that the absent commissioner had not been notified to attend the meeting at which the bonds were funded. It is not to be presumed that notice of the intended meeting was not given."[59] The implication is plain.

In a New Mexico case there was some evidence that a certain board held assembled meetings, but one of its members made up the minutes and carried them around to the individual members of the board and procured their signatures. The evidence was conflicting. The court said:[60] "Where a duty is intrusted to a board composed of different individuals, that board can act officially only as such, in convened session, with the members, or a quorum thereof, present.... There was substantial evidence before the jury of the fact that there had been such a meeting, and such evidence is sufficient to support the verdict."

In most jurisdictions it is provided by law that words giving a joint authority to three or more public officers shall be construed as giving such authority to a majority of them, unless it be otherwise expressed in the act giving the authority. Thus in California it is provided in Political Code, section 15:

> "Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority."

This statute does not, however, liberalize the rule that a multiple board or tribunal can act only in a convened assembly at which a majority of the members are present.

In an early California case a board of harbor commissioners, composed of three members, voted two to one in favor of paying a bill. The court followed Political Code section 15, saying:[61] "The complaint in this case shows that all the members of the Board were present; and we are of the opinion that the action of the majority was sufficient. . . ."

The need of assembled action to assert the will of a multiple body was decided by the district court of appeal in a particularly interest-

[59] 184 U. S. at 353.

[60] State v. Kelly (1921) 27 N. M. 412, 434, 202 Pac. 524, 532, (1922) 21 A. L. R. 156, 170, *reh'g den.*, Oct. 31, 1921.

[61] Talcott v. Blanding (1880) 54 Cal. 289, 294.

ing case[62] that merits specific mention. It appeared that Political Code section 1589-C, authorized boards of trustees of elementary school districts to unite in the employment of a joint supervising principal. Elsewhere the law authorized the principal of a high school district to act also as principal of an elementary school "if so desired by the trustees of said elementary school district or districts and the high school board of trustees."[63] The trustees of the elementary school district and the members of a certain high school board of trustees met in joint assembly and by secret ballot authorized a joint session of the two bodies, and then in joint session and again by secret ballot and by a majority vote of the joint session, three dissenting, purported to authorize the employment of such a principal for joint benefit. The three dissenters were numerically enough to have been a majority of the high school board of trustees; or, in other words, it was possibly only a minority of the high school board who joined with the trustees of the elementary school district to create a majority of the joint session. *Later a majority of each board signed the principal's contract of employment.* The court held the contract was invalid. "In the absence of evidence as to how the members voted, it cannot be inferred from the result of the vote that a majority of the members of the high school board voted in favor of such organization as a joint board, and clearly the high school board could not delegate the power of determining that question to the members of the elementary school board. (Webster v. Board of Education, 140 Cal. 331, [73 P. 1070.]). Upon the question of employing defendant as teacher, . . . the high school board could not delegate to the elementary school board the power to employ . . ., but the law contemplates that each board must determine for itself. . . . The alleged contract was signed by a majority of the members of each board. . . . The contract was . . . signed after 'the meeting' . . . . The contract was neither authorized nor signed at a session of the high school board and therefore it was not valid . . . ."[64]

The prevailing practice of deciding and signing Industrial Accident Commission decisions "in chambers," so to speak, finds no support in the language of the Workmen's Compensation Act section 4, which reads:

"The commission shall organize by choosing one of its members as chairman. A majority of the commission shall constitute a quorum for the trans-

[62] Cloverdale v. Peters (1928) 88 Cal. App. 731, 264 Pac. 273, cited and followed in Barnhardt v. Gray, *supra* note 50.

[63] Now CAL. SCHOOL CODE § 5.561.

[64] 88 Cal. App. at 737, 264 Pac. at 277.

action of any business, for the performance of any duty, or for the exercise of any power or authority of the commission. . . . The act of the majority of the commission, when in session as a commission, shall be deemed to be the act of the commission. . . ."

The implication seems clear that an act of a minority of the Commission, or an act done out of session, shall not be deemed to be the act of the Commission.

The language just quoted from the Act is not affected by the 1929 amendment found in section 7(2),[65] because the latter creates no irreconcilable inconsistency or repugnancy. The language of the amendment is consistent with the need of a noticed and assembled session of the Commission.[66]

It is conceded, of course, that "it is not to be presumed that notice of the intended meeting was not given";[67] or, as Mechem expresses it: "It will be presumed . . . that all met and deliberated or were duly notified. . . .";[68] and: "The law constantly presumes that public officers charged with the performance of official duty have not neglected the same but have duly performed it at the proper time and in the proper manner. In the absence of evidence to the contrary, this presumption will prevail, but it is not an indisputable one and may be overcome by countervailing evidence."[69]

VI

SUMMARY

In conclusion, it is submitted that:

1. The Industrial Accident Commission is a court, subject to the general rule that in the absence of legislative authority it cannot delegate its adjudicative powers.

2. The statutory authorization of delegation of authority to a deputy commissioner of the Industrial Accident Commission is supportable if it means the delegation of executive and ministerial functions. Against this interpretation is the absence of restrictive language in the amendment to express it. In favor of the restrictive interpretation are (a) the general rule against delegation; (b) the special and

[65] Now in CAL. LABOR CODE § 121.

[66] Riley v. Forbes (1924) 193 Cal. 740, 227 Pac. 768, 770; Matter of Petition of Johnson (1914) 167 Cal. 142, 138 Pac. 740.

[67] Schuerman v. Territory, *supra* note 58, at 354.

[68] MECHEM, *op. cit. supra* note 49, § 573.

[69] *Ibid.* § 579.

narrow situation which prompted the proposal of the amendment in the first instance; (c) the limited and infrequent use to which it was put between 1929 and 1934; (d) the non-participation of a deputy commissioner, as such, in any single formal meeting of the Industrial Accident Commission since the passage of the amendment of 1929; (e) the fact that the authorized appointees are secretary and assistant secretaries whose duties, pertaining generally to such an office, and as elsewhere particularly enumerated in the Workmen's Compensation Act with respect to their particular office,[70] are exclusively executive and ministerial; (f) the improbability that the legislature meant to permit either the unlimited appointment of a deputy to the board, or the unlimited appointment of a deputy at large to the members thereof, because one alternative would allow a delegation of all the Commission's essential functions without even the need for noticed and assembled meeting, contrary to other expressed provisions of the Act, while the second alternative destroys the concept of the board as a majority institution, substitutes the judgment of a minority for the majority, and permits the creation of several boards *de facto,* all at complete variance with the earlier creation "of a board to consist of three members"; (g) the need of such restrictive interpretation to save the amendment from unconstitutionality.

3. Unless the amendment can be accorded the restricted meaning indicated by paragraph 2, it violates the constitutional provision which, while authorizing the creation of an Industrial Accident Commission, nevertheless failed to empower the legislature to vest adjudicative power in an Industrial Accident "Commission" other than as a "body."

4. All decisions of the Industrial Accident Commission which are supported only by the signatures of a member of the Commission and a deputy commissioner, being expressions of an unauthorized or invalid delegation of adjudicative power, are void, and the decisions discussed earlier in this article[71] cannot fairly be interpreted to establish a contrary rule.

5. So-called "minutes" of the Industrial Accident Commission which are signed by a member and a deputy commissioner stand in no better position than the purported decisions themselves, and do not serve to confirm or validate the decisions.

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[70] CAL. LABOR CODE § 120, formerly in CAL. WORKMEN'S COMPENSATION ACT § 7(2).

[71] Market St. Ry. Co. v. Industrial Acc. Comm., *supra* note 20; Union Oil Co. v. Industrial Acc. Comm., *supra* note 22.

6. Decisions signed severally by two members of the board stand in no stronger position than "referees'" decisions.

7. So-called approval of "minutes" of the board signed severally by two members of the Commission, confirming and adopting the decisions of referees and of members of the board, adds nothing to these documents. Indeed, no machinery for decision, or for approval and confirmation, is valid which does not contemplate action in a noticed and assembled meeting of the Commission as a board.

It is clear that hundreds of decisions are issued every month as the decisions of the Commission to which no member has given any consideration at all; hundreds more to which no member has given more than the most cursory attention. Few are issued to which any member gives full and adequate attention; and almost none are issued to which the Commission, as an assembled body, gives any attention.[72]

A query presents itself: How much consideration must the Commission give to the records in cases in which the evidence was taken, recommendations made, and decisions prepared by subordinates?

This article is already too long to discuss this question in detail, but it should be observed that the tremendous volume of adjudications, about 1,000 original and supplemental orders and decisions a month, makes any attempt at examination and conscientious consideration by the Commission humanly impossible.

It is hard to evaluate the situation in which the Commission is placed by the decision of the United States Supreme Court in *Morgan v. United States*,[73] which remanded a stockyard rate case for a determination of fact as to whether the Secretary of Agriculture, in whom specifically Congress had vested authority to act, had personally accorded the plaintiffs opportunity to be heard, and had given the record personal examination and study. In the decision of the court, Chief Justice Hughes remarks that

> "The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations. . . . If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given. . . . The one who decides must hear."[74]

[72] These remarks are not written disparagingly. As noted lower in the text, it is beyond any board's human capacity to give consideration to all the matters which the Industrial Accident Commission is required to adjudicate.

[73] (1936) 298 U. S. 468.

[74] *Ibid.* at 480.

While the *Morgan* case raises a very serious question whether the Industrial Accident Commission as authorized by the constitution and as now organized can possibly comply with the requirements which Chief Justice Hughes states are indispensable, the Commission can use its continuing jurisdiction to amend its orders and decisions to prevent the question in any particular case from reaching a higher court for determination.

Eventually, a constitutional amendment may be required which will give to the officials who hear the evidence and arguments the authority to decide in their sphere, for the Commission, in a manner analogous to the power invested by section 6 of article VI of the state constitution in each of the several superior court judges of a county to issue the orders and decision of the court.

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