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## Administrative Law - Workmen's Compensation Proceedings - Use of Lay Representatives

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## RECENT DECISIONS

ADMINISTRATIVE LAW—WORKMEN'S COMPENSATION PROCEEDINGS—USE OF LAY REPRESENTATIVES—The West Virginia Bar Association sued to enjoin the defendant, a layman, from representing claimants before the State Compensation Commission. Lay representation was authorized by the commission under its power to make rules of procedure. The injunction was granted by the circuit court. On appeal, *held*, affirmed. Neither the legislature nor the commission can authorize a layman to represent claimants before an administrative agency, since this would encroach upon the judiciary's inherent power to control the practice of law. *West Virginia State Bar v. Earley*, (W. Va. 1959) 109 S.E. (2d) 420.

The specific holding that the commission cannot authorize lay representation, under its power to make rules of procedure, seems generally accepted by state courts.<sup>1</sup> Congress, on the other hand, vested the function of adjudication in the hands of administrative agencies and did not in most cases accompany this vesting with any prohibition against representation by a non-lawyer. As a consequence, federal agencies, such as the Interstate Commerce Commission, have allowed laymen to appear before them.<sup>2</sup> Furthermore, Congress has specifically authorized lay representation before other federal agencies.<sup>3</sup> The West Virginia court, however, not limiting its decision to the powers of the commission, in strong dictum indicated that the legislature lacked the power to authorize lay representation.<sup>4</sup> The majority of states, relying on the separation of powers doctrine, follow this dictum, holding that the legislature may raise the minimum standards of admittance to the practice of law but cannot lower them.<sup>5</sup> They reason that the exclusion of laymen assures the public of adequate protection in the administration of justice, while maintaining the minimum standards of the profession, by preventing the intrusion of incompetent, unlearned persons in the practice of law and that such exclusion is therefore within the sole competence of the judiciary.<sup>6</sup> But a significant minor-

<sup>1</sup> E.g., *People v. Goodman*, 366 Ill. 346, 8 N.E. (2d) 941 (1937), cert. den. 302 U.S. 728 (1937); *State v. Childe*, 139 Neb. 91, 295 N.W. 381 (1941). See, generally, comment, 35 MICH. L. REV. 442 (1937).

<sup>2</sup> See 49 C.F.R. (1957 Supp.) §1.8, regulating practitioners before the ICC, and 35 C.F.R. (1958 Supp.) §2.12, regulating practitioners in Patent Office hearings. The matters before commissions which allow lay representation are usually of a technical nature where the talents of an accountant, scientist, or some other specialist are of particular value.

<sup>3</sup> An example is the Tax Court. "No qualified person shall be denied admission to practice before the Tax Court because of his failure to be a member of any profession or calling." I.R.C., §7452.

<sup>4</sup> Principal case at 438.

<sup>5</sup> Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935). *Accord*, *In re Day*, 181 Ill. 73, 54 N.E. 646 (1899). In the *Day* case, the court admitted that under the English common law, Parliament had the power to control the practice of law. But because our government is divided into three separate branches by the Constitution, the court reasoned that English practice is not applicable here.

<sup>6</sup> *State v. Wells*, 191 S.C. 468, 5 S.E. (2d) 181 (1939); *People v. Goodman*, note 1 *supra*; Opinion of the Justices, note 5 *supra*.

ity, finding that the policies surrounding appointment of legal representation are within the proper scope of legislative power, have approved statutes authorizing lay representation.<sup>7</sup> According to a New York committee report, it was supposed, when laymen were authorized to practice before the Industrial Board, that working people would thus have the personal services of individuals with a sense of social responsibility more sympathetically adjusted to the needs of labor than that of lawyers.<sup>8</sup> Under the majority view, if the claimant does not want to plead his case himself, a lawyer is required in proceedings before the workmen's compensation commissions. This often imposes a hardship. Numerous claimants for compensation are indigent and in many cases the compensation allowed by the commission is so small as not to justify the engagement of a lawyer.<sup>9</sup> The great majority of claims for compensation are for temporary disabilities, for which the maximum award in West Virginia is \$30 a week.<sup>10</sup> From this, the attorney's fees, which are unrestricted in amount,<sup>11</sup> must be paid. Other states, recognizing that the laborer cannot afford unrestricted attorney's fees, but not wanting to allow laymen to practice law, have solved the problem in different ways. In some, the insurer must pay the claimant's attorney fee, provided the claimant wins the case;<sup>12</sup> in others, the commission itself will represent the claimant;<sup>13</sup> and in still other states a reasonable limit is set

<sup>7</sup> In *Eagle Indemnity Co. v. Industrial Accident Commission*, 217 Cal. 244, 18 P. (2d) 341 (1933), the court upheld what is now Cal. Labor Code Ann. (Deering, 1953) §5700, which permits representation by an attorney or "any other agent." However, this statute is based on CAL. CONST., art. 20, §21, granting the legislature such power. See also 64 N.Y. Consol. Laws (McKinney, 1946) §24a; Wis. Stat. (1957) §102.17 (1) (am). While the New York statute has never been tested, it rests on the firm foundation of *In the Matter of the Application of Cooper*, 22 N.Y. 67 (1860), where at 90 the court states: "It is plain, therefore, that although the appointment of attorneys has usually been entrusted in this state to the courts, it has been nevertheless, both here and in England, uniformly treated, not as a necessary or inherent part of their judicial power, but as wholly subject to legislative action."

<sup>8</sup> Report to the Honorable Thomas E. Dewey by William F. Bleakley and Herman T. Stichman, as Commissioners under section 8 of the Executive Law, on Administration of the Workmen's Compensation Law in the State of New York, p. 9 (1944).

<sup>9</sup> The principal case conceded that laymen may prepare pleadings and file forms for claims since they do not constitute the practice of law. But on this point see *Opinion of the Justices*, note 5 *supra*, at 613-614. But once the hearing is contested a lawyer must represent the claimant. W.Va. Code (1955) §2545 (4) states that if a contested claim is finally determined while pending before the commission and no appeal is filed thereon with the appeal board, the attorney shall be protected in the collection of his fee up to \$150. Thus, with a limitation of \$30 a week for compensation, the temporarily disabled employee must be disabled for more than five weeks if he wants to be sure of keeping much of the award.

<sup>10</sup> W.Va. Code (1955) §2531.

<sup>11</sup> In *Billingslea v. Tartell*, 127 W.Va. 750, 35 S.E. (2d) 89 (1945), the court held that W.Va. Code (1955) §2545 (4) could not limit the fees of the attorney because this would seriously abridge the claimant's freedom of contract.

<sup>12</sup> *Otter v. Dept. of Labor*, 11 Wash. (2d) 51, 118 P. (2d) 413 (1941) (commission had the same authority, as a court, to award costs and counsel fees). See also *Ahmed's Case*, 278 Mass. 180, 179 N.E. 684 (1932).

<sup>13</sup> *U.S. Fidelity and Guaranty Co. v. Cruce*, 129 Okla. 60, 263 P. 462, 56 A.L.R. 879 (1928).

on the amount that a lawyer may receive for his services, and any contracts between the client and the attorney calling for greater compensation are void.<sup>14</sup> If West Virginia does not want to adopt one of these remedies, then perhaps it should be more lenient concerning lay representation. If tests are given and only competent and morally acceptable persons admitted, such representation seems unobjectionable.<sup>15</sup> Furthermore, practice before the workmen's compensation commission is a specialty. Proceedings are traditionally informal and free from technical rules of evidence.<sup>16</sup> As one expert has said, most of what the lawyer has learned in school and in general practice has little application to workmen's compensation principles and problems.<sup>17</sup>

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<sup>14</sup> *Yeiser v. Dysart*, 267 U.S. 540 (1925).

<sup>15</sup> 35 U.S.C. (1958) §31 states: "The Commissioner [of the Patent Office] . . . may require them [laymen], before being recognized as representatives of applicants . . . to show that they are of good moral character and reputation and are possessed of the necessary qualifications to render . . . valuable service, advice, and assistance. . . ." The Report of the Commission on the Organization of the Executive Branch of the Government on Legal Services and Procedure (March, 1955) at 316 says that 254 laymen since 1943 have taken the Tax Court admission test and only 48 have passed.

<sup>16</sup> 2 LARSON, WORKMEN'S COMPENSATION §7810 (1952).

<sup>17</sup> Zimmer (Director, Division of Labor Standards, U.S. Dept. of Labor), in HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS, xii of introduction (1944).