

HOW DID WE GET HERE?



The Development of Arizona Workers' Compensation Law

by Sandra A. Day

Under the common law, employer responsibility to workers was limited to the minimal obligation of exercising reasonable care.¹ The employer was not an insurer of the employee's safety. "The possibility of the injured workman's recovery...was restricted further by the unholy trinity of common law defenses..."² These defenses were:

1. Assumption of the risk—the worker could not recover for injuries which arose from inherently hazardous working conditions.³

2. Contributory negligence—barring recovery if the worker's unreasonable conduct contributed to the injury.⁴

3. Fellow servant doctrine—an exception to the rule of a master's vicarious liability for torts by servants acting within the scope of employment which precluded recovery from the employer for injuries caused by a negligent co-worker.⁵

As the largely agrarian American economy moved into the Industrial Revolution, it became evident that neither the economic nor the medical needs of persons injured in the workplace were being protected. Public policy studies undertaken in the early 1900s reported that a vast majority of workplace accident victims went totally uncompensated.⁶ Since the common law failed to provide a certain, prompt and adequate remedy, the injured worker was typically left

to his own resources or forced to become a burden for the community to care for and support.

Delegates to the Arizona Constitutional Convention were mindful of the significant tort law and employer liability concerns of that era. The Convention, which concluded on December 9, 1910, adopted Article XVIII, Labor, to include provisions designed to address the unsuitability of traditional common law tort concepts to workplace injuries. The provisions, added through intervention of progressive and labor interests,⁷ proscribed any agreement an employer might require as a condition for employment to release the employer from liability for any personal injury sustained in the employment.⁸ The common law doctrine of fellow servant was abrogated.⁹ The defenses at common law of contributory negligence and assumption of the risk were legally classified as questions of fact for the jury in all cases.¹⁰ The right of action to recover damages for injuries could neither be abrogated nor the recovery subjected to statutory limitation.¹¹ These employer liability laws were an early-day tort reform. The statutory changes were intended to remove barriers to common law recoveries against employers.

Despite the significance of the substantive changes, the employer liability enactments could not effectively resolve all of the continuing problems arising from workplace injuries. Under those statutes, an injured worker would still have to successfully litigate to prove employer negligence. A civil cause of action would only be economically feasible for serious workplace injuries. Pursuit of damages against the employer for an industrial injury caused antagonism between the parties. Delay, uncertainty, imposition, costs and the risk of non-recovery were other adverse factors. If the tort remedy were not successfully pursued, the worker might still require charity or public assistance. An Arizona Constitutional Convention delegate, who rep-

As the largely agrarian American economy moved into the Industrial Revolution, it became evident that neither the economic nor the medical needs of persons injured in the workplace were being protected.

resented mining and railroad interests, advocated workers' compensation as a more comprehensive alternative to civil litigation under the employer liability reforms.¹²

Nationwide, workers' compensation acts became the legislative response when "the coincidence of increasing industrial accidents and decreasing remedies produced in the United States a situation ripe for radical change."¹³ Workers' compensation program objectives were thus inspired by the weaknesses of the common law and anticipated ineffectiveness of employer liability legislation.

Workers' compensation was created as an alternative to the civil tort system. By design, workers' compensation is a form of strict liability. Benefits would be payable without regard to negligence. A compensable claim would automatically be established by filing an administrative claim for injuries arising out of business operations. The workers' compensation benefits were to be "predetermined and adequate"¹⁴ with payment to be "prompt and certain, primarily to eliminate wasteful litigation."¹⁵ Only limited disputes were anticipated to require adjudication. An early commentator on workers' compensation legislation stated that:

[T]he result has been most satisfactory in that injured employees receive immediate relief, a fruitful source of friction between employer and employee has been eliminated...a tremendous amount of burden and expensive litigation has been eliminated, and a more harmonious relation between employer and employees exists than was possible under the old system.¹⁶

The social philosophy behind workers' compensation has been a "belief in the wisdom of providing in the most efficient, most dignified,

and most certain form, financial and medical benefits" to the injured worker.¹⁷ The focus of the workers' compensation reforms was to secure "social protection rather than righting a wrong."¹⁸

In Arizona, from shortly after statehood, our legal scheme permitted workers' compensation as an optional remedy for an injured worker or survivors. After the work injury had been sustained, it was optional to receive medical and wage replacement (or death) benefits under the industrial system or to sue the employer.¹⁹ The business community vigorously sought to require election of remedy prior to injury.²⁰ However, labor support for necessary constitutional and statutory changes was only obtained in exchange for vastly liberalized benefits and the assurance that compensation could not be reduced except by vote of the people.²¹

These two remedies, tort law under the employer liability reforms²² and workers' compensation,²³ have continued to the present time. The tort remedy, however, is rarely available to any injured Arizona workers. That is because the 1925 reforms, which provided the most generous state compensation benefits nationally for that era, required pre-injury election of remedies in most work injury situations. By statute, the failure of a worker to formally reject industrial coverage, by giving written notice to the employer prior to injury, will typically constitute an election to accept workers' compensation benefits as the exclusive remedy against an employer²⁴ and any co-worker.²⁵ Only in the instances of employer failure to insure for workers' compensation liability or give notice of and maintain rejection forms,²⁶ or exemptions from coverage²⁷ or in instances involving injury²⁸ occasioned by willful misconduct of the employer or a co-worker, would a worker (or survivors) have the option of a civil action instead of workers' compensation benefits.

The workers' compensation sys-
(Continued on page 45)

How Did We Get Here? (Continued from page 11)

tem, effectively substituted for the tort system in workplace injuries, was intended to dispense, so far as possible, with litigation between workers and their employers.²⁹ The Industrial Commission of Arizona was established as the forum to which workers would have recourse as needed. The Commission organized a Claims Division "for the purpose of advising injured workmen...of the amount of compensation to which they were entitled."³⁰ Workers' compensation enactments generally contemplate that "relief shall...[come], not through the courts or with the aid of lawyers, but through the machinery provided by the act itself."³¹ Any conflict between an employer and employee was to be resolved in an informal administrative setting designed to ensure the quickest and most direct route to any required decision-making.

As originally envisioned, Arizona workers' compensation was largely a lawyerless system. Of the 149,627 Arizona workers' compensation claims filed during 1996, only 3,770 claimants had retained legal counsel by October 1997.³² This number represents only 2.5 percent of all 1996 claimants. A full 97.5 percent of workers injured in 1996 were working their own way through the industrial system. Of total claims, a vast majority in any year are accepted without dispute by the compensation insurer (or self-insured employer). Most industrial claims involve only limited medical benefit liability and little, if any, wage replacement "compensation" benefits. The 151,492 claims in the 1998 calendar year included only 15,154 claims classified as "time lost" involving eight or more days off work.³³ Evidently, the administrative system provides an efficient means to process tens of thousands of limited liability claims.

In the fiscal year 1997-1998, there were 9,071³⁴ workers' compensation case disputes referred for hearing to the Administration Law Judge Division. Hundreds of those disputes were resolved through compromise and

settlement. Pre-hearing conferences were conducted in 3,280 matters and 7,127 hearings were held.³⁵ The annual filings of new workers' compensation cases have approximated 150,000 for a number of years.³⁶ With massive numbers of matters, potential for claim re-openings and even lifetime medical or compensation liability, it may seem somewhat surprising that litigation is comparatively rare.

Arizona Rev. Stat. Sec. 23-110 (A) mandates the office of Industrial Commission Ombudsman. The ombudsman is employed to provide assistance to worker compensation benefit recipients. The ombudsman is empowered to provide information pertaining to "the worker compensation system and rules governing commission proceedings" and to give assistance to clarify "the methods used to determine" benefits.³⁷ The ombudsman is precluded from providing legal advice.³⁸ The traditional roles of an ombudsman, conducting investigations and engaging in fact-finding, are also not part of the Arizona system.

The large number of claims, combined with increased complexity of industrial disputes as well as skyrocketing medical costs have been identified as causing workers' compensation claims to become "much more time consuming and expensive."³⁹ The subject matter of workers' compensation law has become increasingly esoteric and, in potentially high dollar cases, intensely litigated as well. A recognized area of substantive legal expertise, effective workers' compensation practice demands extensive knowledge of medical information and of distinctive statutes, case law and procedures. The unrepresented worker is often overwhelmed. So too are those lawyers, who are not certified specialists in workers' compensation, or at least regular practitioners before the Industrial Commission. Hopefully, the articles that follow will not only provide some useful information for workers' compensation attorneys, but will also, perhaps even more importantly, provide other practitioners with an introduction to

this not-so-surprisingly fascinating field of law. 

Sandra Day, a certified specialist in workers' compensation, is a partner in the Tempe law firm of Day, Kavanaugh & Blommel, P.C. She performs state and federal administrative litigation and the mediation and arbitration of employment and disability matters.

ENDNOTES:

1. *Armour v. Hahn*, 111 U.S. 313, 4 S. Ct. 433, 28 L.Ed. 440 (1884).
2. W. Prosser, *LAW OF TORTS*, 3rd ed. sec. 81, 550-551 (1964).
3. *Cruden v. Fentham*, 2 Esp. 685, 170 Eng. Rep. 496 (1799); *Russell v. Minneapolis & St. Louis Ry.*, 32 Minn. 230, 20 N.W. 147 (1884).
4. *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809); *Smith v. Smith*, 2 Pick. 621 (Mass. 1924).
5. *Priestly v. Fowler*, 3 M. & W. 1, 150 Eng. Rep. 1030 (1837); *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49 (Mass. 1842).
6. A New York study identified non-recovery workplace injuries at 87% while an Ohio report found 94% of workplace injuries uncompensated. New York Employers' Liability Commission, 1st Report 25 (1910); OHIO EMPLOYERS' LIABILITY COMMISSION REPORT, xxxv-xliv (1911).
7. J. Wagoner, *ARIZONA TERRITORY 1863-1912; A POLITICAL HISTORY*, 460-464 (1970).
8. Az. Const. art. 18, sec. 3.
9. Az. Const. art. 18, sec. 4.
10. Az. Const. art. 18, sec. 5.
11. Az. Const. art. 18, sec. 6.
12. R. Davis, J. Ferdon, R. Lundmark, *ARIZONA WORKERS' COMPENSATION HANDBOOK*, sec. 1.3.1, at 1-5 (1992).
13. *REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 34*, U.S. Government Printing Office (1972).
14. M. Berkowitz & J. Burton, *PERMANENT DISABILITY BENEFITS IN WORKERS' COMPENSATION 18* (1987).
15. *Id.*
16. Schneider, *WORKMEN'S COMPENSATION*, 2nd ed. 6 (1932).
17. A. Larson, *THE LAW OF WORKMEN'S COMPENSATION*, sec. 2.20 at 1-5 (19).
18. *Id.* sec. 2.00, at 1-5.
19. *Consolidated Arizona Smelting Co. v. Ujack*, 15 Ariz. 382, 139 Pac. 465 (1914).
20. *WORKERS' COMPENSATION HANDBOOK*, Sec. 1.3.2, at 1-7 to 1-8.
21. Ariz. Sess. Laws 1925, ch. 83; Ariz. Const. Art. 18, sec. 8.
22. Ariz. Rev. Stat. Sec. 23-801 et seq.
23. Ariz. Rev. Stat. Sec. 23-901 et seq.
24. Ariz. Rev. Stat. Sec. 23-906
25. Ariz. Const. Art. 18, sec. 8.
26. Ariz. Rev. Stat. Sec. 23-906 (A), (E).
27. See Ariz. Rev. Stat. Sections 23-902 (C), (E); 23-909; and 23-910.
28. Ariz. Rev. Stat. Sec. 23-1022—"wilful misconduct...means an act done knowingly and purposefully with the direct object of injuring another."
29. *Pressley v. Industrial Commission*, 73 Ariz. 22, 29, 239 P.2d 1011, 1015, (1951) (construing Ariz. Const. article 18, sec. 8).
30. *ARIZONA INDUSTRIAL COMMISSION, ANNUAL REPORT*, 2-3 (1926).
31. *Comingore v. Shenandoah Artificial Ice, Power, Heat & Light Co.*, 208 Iowa 430, 226 N.W. 124, 127 (1929).
32. Telephone conversation with Karen Hamilton Ellerman, Manager, Claims Division, Industrial Commission, Phoenix, Arizona.
33. Telephone conversation with Noreen Thorsen, Assistant Manager, Claims Division, Industrial Commission, Phoenix, Arizona.
34. *ARIZONA INDUSTRIAL COMMISSION, ANNUAL REPORT* at 4-5 (1998).
35. *Id.*
36. *Id.* 3.
37. Ariz. Rev. Stat. Sec. 23-110 (B).
38. *Id.*
39. L. Larson, *Mediation of Industrial Commission Cases*, 17 *CAMPBELL LAW REVIEW* 395 (1995).