

1939

## Administrative Findings and the Kentucky Workmen's Compensation Board

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### Recommended Citation

Oberst, Paul Leo (1939) "Administrative Findings and the Kentucky Workmen's Compensation Board," *Kentucky Law Journal*: Vol. 27: Iss. 4, Article 6.

Available at: <https://uknowledge.uky.edu/klj/vol27/iss4/6>

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A border line case is *In re Gibbon's Estate*<sup>28</sup> in which the testator provided that any checks outstanding at his death should be treated as valid claims against his estate and paid by his executor. The provision was held to be invalid. Writing checks is disposing of property, but it is not disposing of property after death. The fact that they are outstanding is not deliberate, but purely a matter of chance. The reasoning of the court was that they were testamentary since neither names nor amounts were mentioned in the will. But if there can be a valid gift without one, there might just as well be a valid gift without both. In the cases involving wills neither the beneficiary nor the amount is given. The method of identification is just as proper when applied to both as to one.

In conclusion, provision for subsequent acts whose only reason for existence is the disposition of property after death is not valid because the acts are testamentary and unattested and so invalid.<sup>29</sup> The identification as the result of the acts must be reasonably certain.<sup>30</sup> It is not necessary that the act be absolutely devoid of testamentary intent, but probably the principal reason for its performance should be non-testamentary.

BETTIE GILBERT

#### ADMINISTRATIVE FINDINGS AND THE KENTUCKY WORKMAN'S COMPENSATION BOARD

The increasing complexities of government have caused the development in comparatively recent years of a new type of governmental unit—the administrative body.<sup>1</sup> It was discovered that a government operating upon a classical separation of powers was unable to cope adequately with the new demands upon government.<sup>2</sup>

To this new type of body, created by the legislative branch, were intrusted functions, legislative, judicial, and executive, to enable it to act with the requisite efficiency. The advantage of such bodies became readily apparent—they acted speedily, informally, and rapidly became expert.<sup>3</sup>

<sup>28</sup> 139 Misc. 658, 249 N. Y. S. 753 (1931).

<sup>29</sup> *Thomas v. Anderson*, 245 Fed. 642 (1917); *In re Perry's Will*, 125 Misc. 616, 214 N. Y. S. 461 (1926).

<sup>30</sup> *Early v. Arnold*, 119 Va. 500, 89 S. E. 900 (1916).

<sup>1</sup> "Administrative tribunals, often spoken of as bureaus, boards or commissions, did not come because anyone wanted them to come. They came because there seemed to be no other practical way of carrying on the affairs of government and discharging the duties and obligations which an increasingly complex social organization made it necessary for the government to perform." Rosenberg, *Administrative Law and the Constitution* (1929) 23 *American Political Science Review* 32.

<sup>2</sup> "It is a common-places that the exigencies of effective administration permit little more than lip service to the classic notion that all government activity should be chopped into blocks and handed out, like Gaul, to three separate custodians." Hyneman, *Administrative Adjudication: An Analysis* (1936) 51 *Pol. Science Quart.* 383.

<sup>3</sup> "The ideal which has been presented in justification of these new administrative agencies . . . is the ideal of specific knowledge, flexibility,

There was a fear, however unfounded, that these bodies would get out of hand and act in an arbitrary manner. Being at once the enactors, enforcers, and judges of the law—it was feared that they might become biased. And in their very informality and summary procedure, there was danger of arbitrary action.

To prevent this,<sup>4</sup> forms of procedure were enjoined upon the administrative bodies—sometimes by the legislature in creating the body and sometimes by the courts in declaring that unless they acted in some certain way there would be a denial of due process of law.<sup>5</sup>

Not the least important form is the requirement of a "finding".<sup>6</sup> Whether or not a finding shall be required, and the nature of the finding if required is largely a matter of balancing of interests. On the one hand there is the interest in having a fair order or award and one in such form that appeal to the courts may be had from it if necessary—an award that is not arbitrary and unfounded and which will reveal to the parties the reason behind the action taken by the board.<sup>7</sup>

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disinterestedness, and sound judgment in applying broad legislative principles that are essential to the protection of the community and of every useful enterprise affected, to the intricate situations created by expanding enterprise." Hughes, Address before N. Y. Bar Assn. (1916) 39 N. Y. Bar Assn. Rep 266, 270.

<sup>4</sup>"In the development of our liberty insistence upon procedural regularity has been a large factor." Brandeis, J., dissenting in *Burdeau v. McDowell*, 256 U. S. 465, 477 (1921).

<sup>5</sup>Compare the situation in England. "There remain two checks upon the abuse of judicial or quasi-judicial powers by a Government department. In the first place, every department in the exercise of any power possessed by it must conform precisely to the language of any statute by which the power is given to the department and if any department fails to observe this rule the courts of justice may treat its action as a nullity. . . in the second place, a Government department must exercise any power which it possesses, and above all any judicial power, in the spirit of judicial fairness and equity, though it is not bound to adopt rules appropriate to the procedure of the law courts." Dicey, *The Development of Administrative Law in England* (1915) 30 *Law Quarterly Rev.* 148. *Board of Education v. Rice* [1911] A. C. 179, *Local Government Board v. Arlidge* [1915] A. C. 120.

<sup>6</sup>"The advantages of carefully drawn findings are immense. They induce a sense of responsibility on the part of the administrative officer; they limit the issues to be decided on review and save the time of litigants and courts. All these advantages flow from findings carefully drawn; if they are merely perfunctory they are completely useless." Feller, *Prospectus for the Study of Federal Administrative Law* (1938) 47 *Yale Law Journal* 647, at 666.

<sup>7</sup>"It is believed that the Supreme Court is right in urging that the commission's (Workman's Compensation) orders more clearly express the basis of decision. The parties to the proceedings, particularly the unlettered and uninformed injured employee, are entitled to be informed how the commission found as to the facts in controversy and why it decided as it did. . . Lastly, it is believed that the practice of writing decisions, opinions, orders, clearly setting forth the basis of the Commission's judgment is one of the best guarantees existing against ill-considered and unordered action." Brown, *The Administration of*

On the other hand there is the interest in speedy and efficient government, and in not hampering the functioning and efficiency of an administrative tribunal by requiring too detailed findings.

It should be pointed out at the outset that the necessity for a finding is directly relative to the function that the board performs and the particular act that it is doing. A given administrative body may be required to make a finding in performing one function, but not in performing another. While another administrative body, created for a different type of function, will never be required to make a finding.

Just when findings are necessary and when they are not is still an open question in some of its aspects. If the action of the board is adjudicative, generally it is held that its orders must be accompanied by a finding, even though the statute does not require it.<sup>8</sup> On the other hand, it was generally considered in the absence of statutory injunction, that no finding was necessary for a legislative order to have effectiveness, and that if legislative power was delegated to be exercised upon an executive determination no finding was required, but recent Supreme Court decisions have left the matter in some doubt.<sup>9</sup>

This note is limited to a discussion of administrative findings required of one administrative body, the Workman's Compensation Board in Kentucky.

The Kentucky Workman's Compensation Board is one of the oldest administrative boards in the state.<sup>10</sup> It can act executively,<sup>11</sup> and has a limited rule-making power,<sup>12</sup> but it acts principally in an adjudicative capacity.<sup>13</sup> Such being the case, we naturally expect to find that it follows to some degree a judicial procedure.

Workman's Compensation in Wisconsin, (1915) 10 Wis. L. R. 431, 470, See *Cornett v. Fordson Coal Co.*, 236 Ky. 209 at 210, 32 S. W. (2d) 984, 985 (1930).

<sup>8</sup>"It is only in recent years that it [the Supreme Court] has required the Federal district courts to make findings of fact and conclusions of law. While the Constitution is thus lenient with respect to the courts, it is much harder on administrative agencies. When the latter act in an adjudicative capacity they *must* make findings or else their action becomes void, irrespective of whether or not the statute requires the making of findings." Feller, *op. cit. supra* note 6, at 665, citing *Wichita Railroad & Light Co. v. Public Utilities Comm.*, 260 U. S. 48 (1922); *Mahler v. Eby*, 264 U. S. 32, 44 (1924).

<sup>9</sup>Feller, *ibid.* pp. 667-9. Note, (1935) 19 Minn. L. R. 763.

<sup>10</sup>The present Board dates back to the act of 1916. The 1914 Act was declared unconstitutional.

<sup>11</sup>*e. g.* Ky. Stat. (Carroll—1936) Sec. 4931 (where the employer and employee agree).

<sup>12</sup>Ky. Stat. Sec. 4930. "The board may make rules not inconsistent with this Act for carrying out provisions of this Act."

<sup>13</sup>See Freund, *Administrative Powers over Persons and Property* (1928) p. 409, n. 1, where he notes that the functions performed by compensation boards "are so much judicial in their nature as to set them entirely apart from other administrative powers. . . . they rather deserve a place in a study of forms and methods of administering remedial relief". See also Dodd, *Administration of Workman's Compensation* (1936) p. 320, where he points out that most jurisdictions

The Kentucky Workman's Compensation Act specifically requires that the board make findings of fact.<sup>14</sup> Furthermore, the awards and orders of the Board are made conclusive<sup>15</sup> as to all questions of fact, although on appeal to the circuit court (and thence to the Court of Appeals) review is permitted to include "if findings of fact are in issue, whether such findings of fact support the order, decision, or award."<sup>16</sup> A finding of fact, therefore, is necessary first, because of specific statutory injunction,<sup>17</sup> and second, because unless there is a finding of fact the review court will be unable to determine whether or not the facts as found support the award, where the statutory appeal is taken under section 4935.

A third reason for requiring a finding could be found in the *inherent* power<sup>18</sup> of our courts to determine if an award of a commission is based on competent evidence, and if it finds none to set the award aside.<sup>19</sup> This examination of facts and rejection of the award, if not supported by sufficient evidence, is similar to the power exercised by the courts to set aside a court verdict or decision which is not based on sufficient evidence.<sup>20</sup> The question, on this state of the case, is treated as one of law, not of fact.<sup>21</sup> Unless some finding is made the reviewing court will be unable to determine if the evidence supports it.

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insist on the essential judicial nature of the Workman's Compensation Board hearing, although some, to preserve the flexibility of its procedure, have had to emphasize the view that the compensation commission is not a court, and that its proceeding is not a trial at law. Cf. *Frank Nega v. Chicago Rys. Co.*, 317 Ill. 483, 148 N. E. 250 (1925). "The industrial commission is a non-judicial body", and yet a few sentences later the court says that the commission's functions ". . . are judicial in character and the findings of fact of the commission are in no way lacking in analogy to the verdict of a jury".

<sup>14</sup> Ky. Stat. Sec. 4933.

<sup>15</sup> That there is no denial of due process of law in statutes denying review of facts on an appeal from a commission established under Workman's Compensation Law, see *Hawkins v. Bleakly*, 243 U. S. 210 (1917) and Note, 39 A. L. R. 1064.

<sup>16</sup> Ky. Stat. Sec. 4935.

<sup>17</sup> In the absence of specific statutory injunction, it would still be necessary under the due process clause of the Constitution that there be a finding. See n. 8, *supra*.

<sup>18</sup> "We are in no doubt that the very structure of the law of the land, and the inherent power of the courts, would enable them to interfere, if what we have defined to be the jurisdiction conferred upon the arbitrary committee were by it exceeded." *Hawkins v. Bleakly*, 243 U. S. 210, 215 (1917) (quoting opinion of lower court).

<sup>19</sup> "The door through which a way is properly opened for judicial interference with administrative application of standards is the well-established doctrine that a determination will be set aside which is without evidence to support it; or differently expressed, which could not rationally have been reached by fair minded men from the evidence". Dickinson, *Administrative Justice and the Supremacy of Law* (1927) 320; Dodd, *Administration of Workmen's Compensation* (1936) 374.

<sup>20</sup> Dickinson, *op. cit.* 320.

<sup>21</sup> Dickinson, *op. cit.* Chap. XI, p. 307 ff.

The first award set aside by the Court of Appeals specifically for lack of any finding was that in *South Mountain Coal Co. v. Haddix*.<sup>22</sup> In this case the Board made an award without a finding as to what extent the injury was caused by the work, and to what extent by pre-existing disease. This omission made the award "fatally defective", the court said, not only because of failure to observe a statutory requirement, but also because a finding is a necessary basis for any review, since the court's review of evidence is limited to determining whether or not the board's finding is supported by some substantial evidence.

Where an application for compensation is summarily dismissed "without specific findings of fact on every essential and vital feature of the case" the court will remand the case to the board.<sup>23</sup> And if the board dismissed the application without a finding, the circuit court on appeal should not make a substantial award, but should remand the case to the board for findings.<sup>24</sup> The requirement of a finding is especially insisted on where there has been evidence of a pre-existing disease, since Ky. Stat. 4880 requires the board exclude the result of pre-existing disease from its award.<sup>25</sup>

No finding is necessary when the facts on which the award and the amount of compensation depends are stipulated by agreement of the parties, or if the evidence is undisputed.<sup>26</sup> In the *Stakes* case<sup>27</sup>, however, the court said: "Where there is any dispute on the facts or the inferences to be drawn therefrom, and the applicable law turns on what conclusion of facts the board comes to, it is absolutely necessary that they make a finding of fact so that the reviewing court may know whether the law has been properly applied by the board to the facts as found."

#### THE FORM OF THE FINDING

Although the Statutes require a finding of the board, they in no way indicate what form the findings must take, what they must contain, or how extensive they must be. Accordingly, it has been left to the board itself to determine this, within the limits set by the Court of

<sup>22</sup> 213 Ky. 568, 281 S. W. 493 (1926).

<sup>23</sup> *Yeager v. Mengel Co.*, 242 Ky. 583, 46 S. W. (2d) 1076 (1932); *Stokes v. Black Hawk Coal Co.'s Rec.* 242 Ky. 489, 47 S. W. (2d) 740 (1932); *Aden Mining Co. v. Hall*, 252 Ky. 168, 49 S. W. (2d) 330 (1932).

<sup>24</sup> *Consolidation Coal Co. v. Fields*, 243 Ky. 488, 49 S. W. (2d) 330 (1932); *Hardy-Burlingham Mining Co. v. Hurt*, 238 Ky. 589, 38 S. W. (2d) 460 (1931); *Yeager v. Mengel Co.*, 242 Ky. 543, 46 S. W. (2d) 1076 (1932).

<sup>25</sup> Ky. Stat. Sec. 4880.

<sup>26</sup> *South Mountain Coal Co. v. Haddix*, 213 Ky. 568, 281 S. W. 493 (1926) (dictum); *Ashland Limestone Co. v. Wright*, 219 Ky. 691, 294 S. W. 159 (1927) (Board should ordinarily set out facts, but does not have to if they are undisputed); *Fordson Coal Co. v. Alsbrook*, 233 Ky. 793, 26 S. W. (2d) 1030 (All facts were either stipulated or undisputed in the evidence).

<sup>27</sup> 242 Ky. 489, 47 S. W. (2d) 740 (1932).

Appeals, taking as a standard the opinions of the Court on the awards and decisions appealed to it on formal grounds

Examination of the Reports of the Board and the opinions of Court reveals that in the majority of cases the board has enumerated formal "Findings of Fact" of some description. In other cases, however, the decisions merely state informally what the evidence tended to show in the opinion of the board, and then make an award without specifically enumerating the findings of fact. Either form satisfies the statutory requirements, but the enumerated findings are perhaps preferable because of their greater definiteness and clarity.<sup>28</sup>

Although the court has indicated that "specific findings of fact on every essential and vital feature of the case" are necessary, it has been very liberal in regard to the form in which the Board must put its findings of fact. On several occasions the Court has refused to reverse an award or decision merely for lack of a formal finding on a specific disputed point.<sup>29</sup> Where the finding of the Board on a given point can be *implied*, says the court, no *express* findings will be required.<sup>30</sup> And in another case the court failed to reverse for lack of a finding, because from the denial of the award, and with the record before it, it had "no doubt" as to what the finding of the board on the question must have been.<sup>31</sup> These exceptions are applicable only to cases where the

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<sup>28</sup> But Cf. Henderson, The Federal Trade Commission (1924) sec. 334. "It seems to me that the most important single step which the (Federal Trade) Commission could take toward enhancing the value and the authority of its decisions would be to abandon the formal and legalistic "findings" to which it is now addicted, and to adopt instead the narrative and descriptive reports and signed opinions of the kind employed for generations in the Courts of England and of the United States."

<sup>29</sup> Standard Elkhorn Coal Co. v. Reffett, 248 Ky. 287, 58 S. W. (2d) 619 (1933) (cause of injury); Aden Mining Co. v. Hall, 252 Ky. 168, 66 S. W. (2d) 41 (1933) (apportionment); January-Wood Co. v. Bremel, 252 Ky. 258, 67 S. W. (2d) 14 (1934) (cause of death).

<sup>30</sup> In Aden Mining Co. v. Hall, 252 Ky. 168, 66 S. W. (2d) 41 (1933), the employee was injured and died later of heart trouble, allegedly resulting from the injuries. The Board found that "death was the result of pre-existing disease, which disease was not the natural and direct result of a traumatic injury by accident" and made no award. The Court held that on the question of apportionment between injury and natural cause (on which a finding is specifically required by Ky. Stat. 4880) that the decision was in effect a finding that the injuries to the employee did not *in any way* contribute to his death. In January-Wood Co. v. Bremel, 252 Ky. 258, 67 S. W. (2d) 14 (1934), where the employee died after an injury and the evidence was that the death was from pneumonia. On the question of the cause of death the Board's finding was merely that "Bremel received an injury that resulted in his death and that the injury arose out of and in the course of his employment with the defendant, the January-Wood Co." It is doubtful if either finding should be held sufficient as a matter of ordinary practice.

<sup>31</sup> Cornett v. Fordson Coal Co., 236 Ky. 209, 32 S. W. (2d) 984 (1930). The order merely recited that after the consideration of the record of the hearing and being sufficiently advised, the Board orders the claim dismissed.

issue was simple—restricted perhaps to a single point—and where by the fact that the Board made or refused the award its finding sufficiently appears.

On the other hand, if several issues are involved, or if the facts are such that the court is unable to determine which of several possible fact situations the court adopted and acted upon, the decision must be remanded.<sup>32</sup>

It is not enough, however, merely that some findings be made. Their real value depends directly upon their content. Formal findings have been made which on the surface may appear sufficient, but which inspection reveals are worthless. An illustration will show this very clearly. In *Yeager v. Mengel Co.*<sup>33</sup> the board dismissed the claimant's application because of its finding that she ". . . had failed to meet the burden of proof in establishing that James J. Sheffield, deceased, sustained a personal injury by accident arising out of and in the course of his employment, resulting in death." Claimant had introduced evidence that deceased, while at work, was struck behind the ear with a wooden block, which caused an injury, from which he died. The company claimed that death was from blood poisoning from natural causes. The "finding" of the board is obviously insufficient to show either the parties or the reviewing court just what was the board's decision on any of the questions of fact raised by the evidence of claimant.

Contrast this with the finding in *Rusch v. Louisville Water Co.*<sup>34</sup> There the issue was whether the employee's death had been caused from traumatic injury at work or from natural causes. The board made this brief but complete finding: "Findings of Fact. 1. The death of the decedent was not the result of traumatic injury by accident, but was due to pre-existing disease of the heart. 2. Over-excitement and hurry at a critical moment, taken in connection with the diseased heart, caused the heart to fail." Claim dismissed.

It is true that to make the latter type of finding may take a little more time, but to fulfill its purpose the finding of fact must be more than a mere recitation of the statutory essentials in the statutory language.<sup>35</sup> It should take up the issues of the case and make a ruling on each one, because the finding of fact properly made is one of the simplest and most effective safeguards against arbitrary and capricious decisions of administrative officials.<sup>36</sup>

PAUL OBERST

<sup>32</sup> *Stokes v. Black Hawk Coal Co.'s Res.*, 242 Ky. 849, 47 S. W. (2d) 740 (1932).

<sup>33</sup> 242 Ky. 583, 46 S. W. (2d) 1076 (1932).

<sup>34</sup> Claim No. 246, 2 Workmen's Compensation Board Reports (Ky.) 152 (1919).

<sup>35</sup> See Henderson, *The Federal Trade Commission* (1924) 334, ". . . an opinion which deals impartially with the respondent's case and meets the arguments which he has presented is much more likely to dispose of the controversy and satisfy the parties. Nothing is so exasperating to a lawyer as to find that a tribunal has ignored his carefully prepared defense."

<sup>36</sup> See Henderson, *ibid.* "Where an examiner must in his report