Workmen's Compensation—Election of the Employee to Accept the Benefits of the Act—Power of Board to Deny Motion to Dismiss.

Held, under the facts stated in the opinion, that the employee in question elected to be bound by the provisions of the Workmen's Compensation Act and that the Board had the power to deny the motion to dismiss the application.

Jerome G. Locke, Esq.,
Chairman Industrial Accident Board,
Helena, Montana.

My dear Mr. Locke:

You have submitted to me a motion of one Stojan Babich for dismissal without prejudice of his claim for compensation under the Workmen's Compensation Act, and request advice as to your power to dismiss such claim over the objection of the employer. The facts, as set forth in your letter, are as follows:

Stojan Babich, an employee of the Butte and Superior Mining Company, met with an injury on March 23, 1920. The employer was operating under Plan 1 of the Workmen's Compansation Act. The employee filed a claim for compensation, which was allowed, and he received compensation up to May 24, 1920, when he returned to work, notifying the Industrial Accident Board of that fact.

On March 1, 1922, he filed a claim for further compensation, claiming that the disability had continued and become aggravated. Before this claim had been acted upon by the Industrial Accident Board, the employee commenced action against the employer in the courts for damages resulting from the accident. The employer set up as a defense to this action the fact that a claim for compensation was pending before the Industrial Accident Board, whereupon the employee filed this motion to dismiss without prejudice.

It cannot be denied that the employee in filing this claim accepted the provisions of the Workmen's Compensation Act. He had the privilege of either method of relief, viz., through the Industrial Accident Board or through the courts, but could not pursue both at the same time, and having elected to take the relief through the Board, he was estopped from an action in Court.

Sec. 2839, Rev. Codes of 1921;
Shea v. North-Butte Mining Co., 55 Mont. 522, 179 Pac. 499.

The question, therefore, is: May he, after having so elected, abandon that method by withdrawing his claim against the objection of the employer and proceed by the action in court for damages?

We find a New York case closely in point with the case before us, to wit; Pavis v. Petroleum Iron Works Co. of Pennsylvania, 164 N. Y. Supp. 790.

The New York Workmen's Compensation Law is nearly identical with that of Montana, in so far as it limits the employee to one or the other rights to compensation; that is, he may proceed under the Act or may rely on his common-law remedy in an action for damages before the courts.

The employee, in the above case, filed his claim with the Industrial Commission, which corresponds with our Industrial Accident Board, and an award was made in his favor. This award he refused to accept, and filed a withdrawal of his claim for compensation under the Act, stating that it was his intention to prosecute his common-law remedy in the courts. The Commission declined to allow the withdrawal, and, in sustaining the action of the Commission, the court said:

> "With full knowledge of the situation, therefore, before an award was made, and with competent counsel to guide and advise him, the claimant permitted an award to be made in his favor, and thereby most effectually confirmed his election to accept such remedy as was afforded him by the Workmen's Compensation Law. There is no pretense that he did not fully understand his rights before the award was made. A party cannot experiment with the Commission for the purpose of ascertaining how much compensation may be awarded him, and then, if dissatisfied, repudiate the award and seek the other remedy permitted by the statute. His election once made, intelligently and with knowledge of the facts, should be conclusive. The Commission was clearly right in denying the application to discontinue the claim."

The only difference between the foregoing case and that now before us, is that here the award has not been made.

The sole question here seems to be whether the claimant, by filing his application for a reopening of his case and a further award of compensation, has by that act elected to proceed under the Workmen's Compensation Law. If he has, then under the authority of the above cited New York case (which is the only authority along that line we are able to find), the Industrial Accident Board has the power to deny his motion to dismiss.

The purpose of the Workmen's Compensation Act is to enable the injured employee to receive redress for any injury suffered by him in the course of his employment without the expense and delay of an action in court.

Section 2841, Revised Codes of Montana of 1921, provides the method by which an employer accepts the provisions of the Act. Under Section 2842, every employee of an employer accepting the provisions of the Act, in the manner prescribed in Section 2841, becomes subject to and bound by the provisions of the plan adopted by the employer, "unless such employee shall elect not to be bound by any of the compensation provisions of this act, and until such employee shall have made such election. Such election shall be made by written notice in the form prescribed by the board, served upon the employer, and a copy filed with the board, together with the proof of such service."

In the case before us the employee has not only not elected not to be bound by the provisions of the Act, but has affirmed the election to be so bound by applying for, receiving and accepting the compensation awarded to him by the Board under the Act, and by again petitioning the Board to reopen his case after it was closed by his returning to his work and asking for further compensation.

It is, therefore, my opinion that the Industrial Accident Board has the power to deny the motion to dismiss the application made by the employee and claimant.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.