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Administrative Law--Judicial Review--Certification of Questions of Law

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CASE COMMENTS

ADMINISTRATIVE LAW—JUDICIAL REVIEW—CERTIFICATION OF QUESTIONS OF LAW.—The state compensation commissioner, after finding for claimants of silicosis benefits under the workmen's compensation law, held the award chargeable to the employer's account. The Workmen's Compensation Appeal Board, while affirming the award, reversed the determination that it was chargeable to the employer, and acting under W. VA. CODE c. 23, art. 5, § 4 (Michie, 1949), certified to the Supreme Court of Appeals the question of chargeability. *Held*, reversing the appeal board and answering the question, that the employer was chargeable. *Rogers v. State Compensation Comm'r*, 84 S.E.2d 218 (W. Va. 1954).

Judge Lovins, dissenting in part, regarded the statute allowing certification as a violation of the separation-of-powers article of W. VA. CONST. Art. V, § 1, and was apprehensive lest such procedure "pave the way for advisory opinions by this court." *Id.* at 223.

Certification had not previously been resorted to by the appeal board. Similar statutes elsewhere are rare; their employment still rarer. A sampling of approximately three-fourths of the states revealed five: N.Y. COMP. LAWS § 23 (1946), IND. STATS. ANN. § 49-1512 (Burns, 1952), and VA. CODE tit. 65, § 94 (Michie, 1950) (workmen's compensation laws); N.H. REV. LAWS c. 78, § 35 (1942) (tax commission), and N.H. REV. LAWS c. 287, § 20 (1942) (public service commission).

But the statutes, though few, are enough to give rise to conflicting judicial views. The New York court refused to answer a certified question of the validity of a proposed resolution by the industrial commission, as being a mere request for advice, saying, "The questions certified under § 23 must be incidental to a pending controversy with adverse parties litigant." *In re Workmen's Compensation Fund*, 224 N.Y. 13, 17, 119 N.E. 1027, 1028 (1918).

Indiana takes a diametrically opposite view. While no supreme court decision has been found, the appellate courts accept the statute as one whose purpose is merely to permit the courts to assist the board by giving information, answers being for the board's guidance and advisory only, much like an attorney general's opinion. *Evans v. Watt*, 90 Ind. App. 37, 168 N.E. 39 (1929); *State ex rel. Lynch Coal Operator's Reciprocal Ass'n v. McMahan*, 194 Ind. App. 151, 142 N.E. 213 (1924); *Bimel Spoke & Auto Wheel Co. v. Leper*, 65 Ind. App. 479, 117 N.E. 527 (1917). This position

has been announced even though in each instance adverse parties were litigating justiciable claims.

New Hampshire seems to agree with New York, the court saying of a question certified by the tax commission that, where justiciable rights are involved and the question arises in adversary proceedings, there is a proper question for certification. *Petition of Turner*, 97 N.H. 449, 91 A.2d 458 (1952). *Petition of White Mountain Power Co.*, 96 N.H. 144, 71 A.2d 496 (1950), answered a question certified by the public service commission which was moot as to the commission proceedings, reasoning that, in the words of the statute, the answer would "aid in the proceedings". Both the *Turner* and *White Mountain* cases treated the answer as an adjudication, not just advice. New Hampshire, unlike the other states whose decisions are referred to in this comment, by constitutional provision authorizes advisory opinions, see N.H. CONST. Art. 74; but its court considers answers to questions certified by the tax commission adjudication, not advice, and so not affected by this constitutional provision. *Petition of Turner, supra*. Neither New Hampshire case was an actual controversy with adverse parties.

Under the Virginia statute, similar to West Virginia's the certification procedure has often been used without question of its validity. See *Nicely v. Va. Electric & Power Co.*, 195 Va. 819, 80 S.E.2d 529 (1954); *Allen v. Mettley Construction Co.*, 160 Va. 875, 170 S.E. 412 (1933); *King v. Empire Collieries Co.*, 148 Va. 585, 139 S.E. 478 (1927); *Crawford v. Virginia Iron, Coal & Coke Co.*, 136 Va. 266, 118 S.E. 229 (1923); *Mann v. City of Lynchburg*, 129 Va. 453, 106 S.E. 371 (1921). In all of these cases there were adverse parties and a commission decision before certification for review.

That there is so little authority on the problem posed by Judge Lovins may be attributed to the fact that so few states have enacted such legislation and to the wider use of other standard methods of review. What authority there is, with the exception of Indiana, suggests that if adverse parties are litigating an actual controversy the courts may, by way of adjudication, answer a question certified from a board decision, thus making available another method of judicial review of administrative determinations. In Indiana, both the adjudication theory and the corollary limitations are rejected, although the procedure is permitted.

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