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Russell Crabtree
Edward Mithcell
Ira Weiss

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NOTE

Proposed Federal Workmen’s Compensation Legislation: A Comparative View

The problem of dealing with work-related injuries is being given considerable attention in the United States. Each year some 14,000 workers die, another 90,000 are permanently impaired, and more than 2,000,000 miss one or more days of work because of job-related injuries and diseases.1 Although each of the fifty states and the federal government do administer workmen’s compensation programs, the benefits that are disbursed do not fulfill the need nor the promise of adequate worker protection. Legislation was passed by the U.S. Congress that authorized the formation of a commission to examine the problems inherent in the work-injury programs and to recommend solutions to the recurring dilemma. After intensive research, the National Commission on State Workmen’s Compensation Laws issued numerous proposals, most of which were not hypotheticals nor theories that may work, but were based on practices that were functioning quite effectively in nations throughout the world.

The purpose of this note is to examine the faults found in the United States’ systems of work-injury relief and the proposals set forth by the Commission. These will be analyzed and evaluated with other programs to deduce whether the new proposals will bring the United States into the realm of protection advocated by the majority of the world.

Starting at the beginning of civilization and running until relatively recent times the central theme of mankind’s economic endeavors have been agricultural. For human life to survive and to prosper was directly related to the land that was available and how that land was put to use. It is not surprising then that historic common law traditions reflect a society in which ownership, or at least control of land was of major importance. This fact may be easily noted in many areas of our present legal structure. One of the most obvious indications of the agricultural based background of our present system is the division of all property into two groups:

real property and personal property. While many of the distinctions between real and personal property no longer exist many are still in common use. Laws dealing with wills, for example, still require in many situations that greater precautions against fraud be imposed in the transfer of real property than of personal property.

The very fact that some of the legal distinctions between land and other types of property have broken down indicates that the system has undergone substantial change. The changes in the legal system have not, however, been nearly as extensive as those that society has undergone. Beginning in England, around 1750, and spreading to the United States in the early 1800's, a change began to take place in the way goods and services were produced, and with it, the way in which men lived. This change in the pattern of life came to be known as the Industrial Revolution and is a phenomenon which is neither completed nor clearly understood.

One of the results of the industrial revolution was that large numbers of men were forced to work in factories and other large and small industrial undertakings that involved substantial risks to life and limb that were unknown in the pre-industrial age. The legal system in the early years of industrialization failed to respond adequately to the price industrial development was taking in human flesh. There were primarily two reasons for this. One reason was based on the ideology of the time. In a time in which those persons in positions of authority wished to see rapid expansion of industrial enterprise, the courts often stressed the individualistic tendency and reliance upon a person's own achievements in the common law as a way to encourage industrial enterprise by making the responsibilities of employers for injuries to employees relatively light. The widespread acceptance of laissez faire economic thought also encouraged courts to give business a free hand.

The second reason for the weakness by the courts in holding employers responsible for injuries occurring as a result of their business enterprises was that the legal principles by which they decided cases were either originated in a pre-industrial era or were established by judges who insisted on thinking in pre-industrial terms. Employers were generally able to rely on three separate defenses which in effect protected them from liability in most situations. Employers could rely on the "assumption of the risk" doctrine which might be a reasonable defense if each potential employee had a

2 See F. Dodd, Administration of Workmen's Compensation (1936).
3 See E. H. Downey, History of Work Accident Indemnity in Iowa (1912).
number of possible jobs from which to choose. But under the economic realities of the time, employees often had to choose between a hazardous job or unemployment, in an era that provided little in the way of social welfare to protect against starvation. "Contributory negligence" was also commonly used to defeat employee recovery. This may seem a rational protection for a principal against the carelessness of his agent when dealing in a relatively safe non-industrial situation. In a factory, where a person works daily over a period of years with a highly dangerous machine and allows his guard to slip for one instant and is perhaps injured in a manner that makes him unemployable for the rest of his life, the escape from liability by an employer seems terribly harsh. Similarly with the "fellow-servant" rule, an employee may guard against the negligence of a co-worker when only a small number are employed in a relatively simple process. However, in a large industrial concern employing thousands of people, with various processes being used that are obviously not understood by the other employees, a worker cannot realistically be expected to guard against the possible negligence of a co-worker.

The development of the common law defenses in non-industrial situations and their subsequent application in denying liability for industrial injuries has been skillfully summed up with regard to the "fellow-servant rule":

In 1837, Lord Abinger invented the fellow-servant exception to the general rule of masters vicarious liability, in his famous Priestly v. Fowler, (1837) 3 M&W 1, 150 Reprint 1030, opinion. In that case, the master, a butcher, was held not liable for the negligence of his servant in overloading a van which broke down as a result and injured the plaintiff, another employee. The decision was based largely on what Abinger called "the consequences of a decision the one way or the other," consisting largely of "alarming" examples of possible master's liability for domestic mishaps due to the negligence of the chambermaid, the coachman, and the cook. If Abinger realized the unhappy effect of his decision on the injured victims of the industrial age which was violently erupting all around him, the opinion does not show it. But when American courts began to follow his lead, as in Farwell v. Boston & Worcester R.R., 4 Metc. 49 (Mass. 1842), in Massachusetts, holding a railroad immune from liability to one of its locomotive engineers for injury caused by the negligence of one of its switchmen, it became clear that the real implications of the decision involved not butcherboys and chambermaids, but trainmen, miners, and factory workers.4

As a consequence of the gross unfairness of the results that the common law system provided for those injured by industrial activity throughout the late 19th and early 20th centuries, increasing pressure developed to bring the legal system more closely into line with the realities of the industrial world.

Over a period of years charged with bitter confrontations led by employers who contested the concept of employer responsibility for industrial injuries, a system of payments for injured workers was developed that is known generally as workmen's compensation. Workmen's compensation is not the only method used to bring the legal system into line with the realities of industrialization. Various other methods are used to aid workers; the social security systems pay disability benefits⁵ and various laws are in effect to improve safety conditions on the job.⁶ While these and other measures have been taken, workmen's compensation has continued to be the major program benefiting the worker.

Rather than being a single entity in the United States, separate workmen's compensation plans were established in the various states and territories, and for workers connected with interstate commerce and the federal government. Workmen's compensation plans are generally compromises in which a worker receives an increased possibility of some recovery for injuries and the employer is spared the danger of a large judgment. The cost of injuries is ostensibly passed on to the consumer as part of the cost of the product and safety is encouraged by allowing the employer with a good work record to pay less in the way of insurance premiums than the employee with a higher number of accidents. While these plans vary from state to state, the legislation typically contains the following provisions:

(a) the basic operating principle is that an employee is automatically entitled to certain benefits whenever he suffers a "personal injury by accident arising out of and in the course of employment";
(b) negligence and fault are largely immaterial, both in the sense that the employee's contributory negligence does not lessen his rights and in the sense that the employer's complete freedom from fault does not lessen his liability; (c) coverage is limited to persons having the status of employee, as distinguished from independent contractor; (d) benefits to the employee include cash-wage

⁵ Under the program used in the United Kingdom, if a worker does not qualify under the work-injury program, he still will receive benefits under the National Health Program.

⁶ In the Soviet Union, plant managers can lose their positions if they allow unsafe conditions to occur in their industries.
benefits, usually around one-half to two-thirds of his average weekly wage and hospital and medical expenses; in death cases benefits for dependents are provided; arbitrary maximum and minimum limits are ordinarily imposed; (e) the employee and his dependents, in exchange for these modest but assured benefits, give up their common-law right to sue the employer for damages for any injury covered by the act; (f) the right to sue third persons whose negligence caused the injury remains, however, with the proceeds usually being applied first to reimbursement of the employer for the compensation outlay, the balance (or most of it) going to the employee; (g) administration is typically in the hands of administrative commissions; and as far as possible rules of procedure, evidence, and conflict of laws are relaxed to facilitate the achievements of the beneficient purposes of the legislation; and (j) the employer is required to secure his liability through private insurance, state-fund insurance in some states, or "self-insurance"; thus the burden of compensation liability does not remain upon the employer but passes to the consumer, since compensation premiums, as part of the cost of production, will be reflected in the price of the product.7

While there is no doubt that in many instances workers have been aided by workmen's compensation in situations under which they would have been ignored by the common law of the 19th century, and that workmen's compensation and various other programs have prevented injuries, during the last few years increasing doubts about the adequacy of these protections have been raised. As industry has become more advanced and industrial processes more complex, new forms of injury and disease are developing, or at least, are being recognized for the first time. The adequacy of payments being made has also come into increasing question. All too many examples exist of workers who have suffered greatly as a result of their occupations in which little or no attempt was made to protect their health. These cases are made all the worse by situations in which the financial burden of the injuries was either placed on the worker or the amount paid him was woefully inadequate.

Typical of the dangers found presently in many industrial concerns are those described by Dr. William H. Stewart, former U.S. Surgeon General:

In 1966-67, we studied six metropolitan areas, examined 1,700 industrial plants which employed 142,000 workers. Because of the precise nature of the analyses, it can be statistically related to 30,000 plants, covering 650,000 workers. The study found that 65 percent of the people were potentially exposed to toxic materials or harmful physical agents, such as severe noise or vibration.

7 Larson, supra note 4, at 1-2.
Our investigators examined controls that were in effect to protect these workers from toxic agents and found that only 25 percent of the workers were protected adequately. The remaining workers were plainly unprotected or working in conditions which needed immediate attention.

Recently, we studied foundries in one state. We found that 7.3 percent of the 3,200 workers — or one in fifteen — were exposed to environmental conditions which were capable of producing disabling and fatal diseases.8

While the dangers to large groups of workers best illustrate the problems of industrial injury protection, it is the pitiful stories of individual workers and the difficulties they have encountered that most arouse a sense of outrage. A dreadful collection of these accounts is gathered together in Bitter Wages, a book prepared by Ralph Nader’s Study Group on Disease and Injury on the Job. A sampling of these horror stories include the following statements.

A worker from a chemical plant in New Jersey speaking about the dangerous effects of acrylamide said:

We’ve had six or seven people that have suffered strokes, paralysis. One of the men became blind about a year ago. Now this acrylamide is also used in all acrylic-based paints. . . . But what I’m interested in now is finding out exactly what the crippling effects of this acrylamide are. Because everybody in this plant is exposed to this, due to the faulty equipment that management has installed there. They’re only concerned with a production yield, not a safety standard.9

A man who works in a plant where mercury and chlorine exposures are common described the experiences of his family by saying:

And, well, my father worked in a chemical plant right next door to the one I work for; about twenty years. He’s dead now. I had an uncle; he also worked in a chemical plant, the same plant right next door to me. He died of cancer, this cancer in the throat. He had a tube in his throat, and it was as a result of working in this chemical plant; he didn’t have it before he went there. But a certain chemical that he inhaled got in his throat, and his throat was a mess and he died. I mean, I don’t use the expression — he died like a dog. . . . We’re a small bunch but we’ve got a problem. Those chemicals are going to kill us all.10

A worker who feared he had chronic phenol poisoning but could find little help for his situation said:

10 Id. at 9.
The union told me there wasn't a doctor anywhere around who would go against [the company]. I ask them if I had to do as some of the others had done. About nine years ago eight men had to die before anyone would move. At that time the company lied and wouldn't supply information to save these men. They died of leukemia induced from benzene. I asked if the only proof in my case would be in the autopsy and they [the union] said they knew of no doctor who would do anything before.\textsuperscript{11}

The role of workmen's compensation is normally seen as providing payments for care and living expenses for a worker and his family and it would therefore seem that the prevention of situations like those described above is not a problem to be dealt with under workmen's compensation. This, however, is an overly simplistic view of workmen's compensation. As has already been stated one of the reasons workmen's compensation programs were developed was to encourage the highest possible levels of industrial safety by making it prohibitively expensive for an employer to operate a plant in an unsafe manner. Based on the evidence listed above and the vast amount of other information that has been made available, over the last few years workmen's compensation fails in this task. Even in its more narrowly defined role workmen's compensation has not achieved its purpose of providing payments to those injured workers who need them. This failure to provide payments may be due to any of a number of reasons. It may be that the injury is of a form not recognized by workmen's compensation acts: "occupational diseases constitute the most serious hazard to the American worker today, yet many of these illnesses are not covered by state workmen's compensation acts. In addition . . . workers may not realize they are suffering from one of these diseases, or that the disease is work-related."\textsuperscript{12} It may also be that the injury occurs among one of the groups not normally covered by workmen's compensation, such as farm workers or domestic help.

Farm workers especially have been the victims of some of the more disastrous forms of occupationally related suffering. These workers are seldom given workmen's compensation or other forms of legal protection provided other workers and often come into contact with some of modern technology's most deadly devices as the following experience dramatizes:

A three-year old Mexican-American girl and her four-year old brother were playing around an unattended spray-rig next to their mother

\textsuperscript{11} \textit{Id.} at 134.

\textsuperscript{12} \textit{Id.} at 156.
who was picking berries on a large ranch. The four-year-old apparently took the cap off a gallon of 40 percent TEPP pesticide left on the rig. One drop of pure TEPP swallowed or on the skin will kill an adult — this child weighed thirty pounds. The little girl put her finger in the bottle, then in her mouth. She became unconscious and was dead on arrival at the hospital where her mother rushed with her. The rig operator was apparently not told to remove the pesticide, much less the rig, immediately after its use; the children's mother was not told of the danger of the pesticide; and there was no supervised safe place to leave the children while the mother worked.\(^\text{13}\)

From these examples, it becomes apparent that the increasing demands for more protection for workers is not without justification. In answer to this demand several steps have already been taken. One of the most significant of these steps was the passage of the Occupational Safety and Health Act of 1970.\(^\text{14}\) Through this Act the Federal Government assumed, for the first time, responsibility for establishing and enforcing safety standards and protecting the health of the vast majority of workers. The Act also called for the formation of a Commission to review the existing state workmen's compensation programs and the problems that have developed. The Commission was also to recommend changes in the existing systems so that workmen's compensation may be used to, "provide an adequate, prompt, and equitable system of compensation."\(^\text{15}\)

The National Commission on State Workmen's Compensation Laws found that a modern workmen's compensation program requires four main objectives and a fifth objective to support these four. The four objectives are to provide: "Broad coverage of employees and of work-related injuries and diseases." This involves extending protection to the largest possible number of workers and to include all work-related injuries and diseases. There should be "substantial protection against interruption of income." The workmen's compensation payments should replace a high proportion of a disabled worker's lost wages. "Provision of sufficient medical care and rehabilitation." Efforts should be promptly made to restore a worker's health and return him to a wage earning status. There must also be significant "Encouragement of Safety." Economic incentives should be used to reduce the incidence of work-related injury and disease. In order to achieve these four goals it is necessary

\(^\text{13}\) \textit{Id.} at 143.
\(^\text{15}\) \textit{Id.} at § 676.
that the fifth objective be fulfilled: "An effective system for delivery of the benefits and services."\(^{16}\)

Although coverage has been increased in recent years, the Commission found that the existing state and federal programs provide coverage for only 85 percent of all employees. There exists substantial inequity in the coverage being provided by the various states. While 13 states cover more than 85 percent of their workers, there are still 15 states which cover less than 70 percent.\(^{17}\) The reasons for these failures of coverage are usually found to stem from statutory exclusions of specific groups of employees. As a result the excluded workers are usually low-wage employees who are in special need of the protection and are employed as farm help, domestics, casual workers or employees of small firms. A second cause for failure of coverage was sighted as the elective coverage of many states.

The Commission recommended that substantial changes be made to increase the number of workers able to qualify for workmen's compensation. The changes involved removing the elective feature of workmen's compensation where it still exists. The program should be compulsory, not elective. There should be no minimum number of workers that an employer must employ before the injured become eligible for benefits. By July 1, 1973, the Commission urged that coverage should be extended to agricultural employees whose employer pays out over $1,000 annually in wages. This should then be changed by July 1, 1975 so that farm workers are covered on the same basis as other employees. Exclusion of domestic employees should be eliminated so that they are covered for work injury, to at least the level that they are protected by Social Security. All government employees should also receive mandatory coverage.\(^{18}\)

Legal technicalities which may keep an injured worker from qualifying for benefits should also be eliminated. The Commission urged the simplification of conflicting rules. Where a conflict between two or more states is likely to develop over which one has the right to deal with an injury, the Commission would give the option to the worker, not the state. An employee should be given a choice to file his claim either in the state where he was

\(^{16}\) Commission Report, supra note 1, at 15.

\(^{17}\) Id. The 13 states that cover more than 85 percent of their workers do contain more than half the nation's labor force.

\(^{18}\) Id. at 15, 17, & 18.
hired or in the state where his employment was principally located, 
or in the state where the injury took place.

The Commission also urged the abolition of the "accident" re-

duirement to eliminate lengthy and expensive litigation. The courts 
have traditionally ruled that an "accident" is an event that happens 
at a given moment, not a gradual, time-developed condition. Is a 
disease an "accident"? Is the breathing of noxious fumes an "acci-
dent"? This technicality has created extreme hardship which is the 
reason the Commission has given its elimination high priority.19

In dealing with the question of the amount and period of com-

pensation, the Commission found the majority of disabled benefi-
ciaries receive less than two-thirds of their lost wages. In 34 states 
the maximum weekly benefits that are allowed come to less than 
the poverty level income for a family of four.20 Payments were 
often found to be more inequitable to high wage earners because 
of a maximum ceiling placed on weekly benefits. Some states pay 
relatively high amounts for minor injuries when compared to pay-
ments for more major injuries. The Commission would change 
the way payments are calculated by making payments equal to 80 
percent of a worker's previous spendable income:

Benefits usually are computed as a percentage of gross pay, rather 
than spendable earnings. Tax factors and the number of depend-
ants contribute to inequities in this approach, and the inequities 
would be compounded if higher benefits were paid. The tradi-
tional payments are two-thirds of pre-tax wages. Benefits calcu-
lated as 80 percent of spendable earnings would better reflect the 
worker's preinjury economic circumstances and cost the system little 
more.21

The Commission formulated a step by step program that would 

partially eliminate these inadequate benefits. Maximum weekly 
wage benefits should be increased according to a time schedule so 
that by 1981 each state would provide a maximum of at least 200 
percent of the state's average weekly wage. During the transi-
tional period until a state provides 80 percent of the worker's spend-
able income for temporary total disability, it should provide at least 
two-thirds of his gross wages. Contrary to its other findings, the 
Commission discovered that a few states allow permanent total dis-

19 Id. at 18.
20 THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, 
SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S 
21 COMMISSION REPORT, supra note 1, at 18.
ability payments where a worker is only unable to return to his previous job rather than requiring a complete loss of wages. The Commission recommended the stricter "total loss of income" test as being more equitable. However, if a worker does qualify for payments he should be able to get them as long as he needs them and there should be no limitation as to time or amount.

The Commission concluded that most systems provided reasonably good medical care, but found the rehabilitation programs extremely lacking in scope. The performance of physical restoration through vocational guidance and instruction services was of unacceptable quality and was coupled with terribly inadequate placement services. To improve the present situation guarantees should be established to permit each worker in the initial selection of his doctor, either from all physicians in the state or from a group of physicians approved by the appropriate workmen's compensation agency. There should be no statutory limit on the length of time or dollar amount for medical care or physical rehabilitation services. Each workmen's compensation agency should establish a medical rehabilitation division with authority to supervise medical and rehabilitation services. This division should be given the responsibility of assuring that every worker, who could benefit from training would be offered these services. A second-injury fund, paid for by all workmen's compensation carriers would be established, which would encourage the hiring of the handicapped and would, in case of further injury, not burden the employer with paying for the original damage. Efforts should also be made to publicize the program to employers and employees.

The goal of just improving industrial safety was found to be inadequate. The system of experience rating was not being applied to 80 percent of all employers since they were too small to fall within present programs. Experience ratings of insurance premiums offers employers an incentive to take positive steps to encourage safety within their business. This type of program has worked quite effectively when followed. Comprehensive safety programs should be used more frequently and be a required service of all insurance carriers and employers.

If the above mentioned proposals are established, an effective

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22 Id. at 19.
23 Id. at 19-21.
24 The Federal Republic of Germany has based its work injury program on safety and rehabilitation for the worker.
delivery system must be adopted to administer the program properly. The Commission recommended that the controlling administrative agency should fill six obligations:

(1) to take initiatives in administering the act, (2) to provide for continuing review and seek periodic revision of both the workmen's compensation statute and supporting regulations and procedures, based on research findings, changing needs, and the evidence of experience, (3) to advise employees of their rights and obligations and to assure workers of their benefits under the law, (4) to appraise employers, carriers, and others involved of their rights, obligations, and privileges, (5) to assist voluntary resolutions of disputes, consistent with the law, and (6) to adjudicate disputes which do not yield to voluntary negotiation.25

To effectuate these duties, the agency must be staffed by full time personnel whose main concern would be to keep disputes out of the courts. Courts are too slow since the worker needs the benefits now, not two years hence. All attorneys' fees should be regulated so that the worker will not be dissuaded from filing a dispute for fear of gaining little if he does win or of owing a considerable sum if he loses.26 An efficient and effective program must decide the majority of its disputes within itself and do so as quickly as possible.

These proposals were not based on hypothetical probabilities, but were based on the results of the experiments already conducted in the laboratoriedes of the world. Workmen's compensation is the oldest and the most used form of a social security program. Only 77 countries had some form of work injury legislation in 1958, but by 1967 a total of 117 nations provided some type of program.27 Although the United States has led the world in industrialization and productivity, it has lagged behind the rest of the industrialized world with regards to worker protection. Germany first passed a work injury program in 1884, followed by Great Britain, in 1897, France, Italy, and Denmark in 1898, the Netherlands in 1901, Luxembourg in 1902, and Belgium in 1903. It was not until 1908 that a program was passed in the United States which was a limited project including only a small number of federal employees. Not until 1911 did any of the separate states pass any legislation dealing with the growing rolls of injured workers. The United States has

25 COMMISSION REPORT, supra note 1, at 23.
26 Id. at 23-4.
developed the habit of following the leads set by our industrialized competitors, rather than taking the initiative itself.

Most workmen's compensation legislation is based on the programs initiated in Germany or Great Britain. The German law passed in 1884 maintained Bismarck's commitment to developing a system of social insurance evidenced by the passage of the 1883 health insurance program and of the 1885 workers' accident insurance. The work injury program was the employee's exclusive remedy, replacing the employer's civil liability. Only upon proof of the employer's intent or grave neglect could a worker or his survivors obtain further compensation. This scheme was immediately adopted by France, Austria, and most of the continental countries.

Unlike the German system under the original British legislation, the civil liability of the employer continued. The employee did, however, have to choose which route to take, for he would forfeit the other remedy. The British legislation cast into statutory form the principle of strict employer liability regardless of fault. Upon the introduction of this bill to Parliament in 1897, a Government spokesman contended that "when a person, on his own responsibility and for his own profit, sets in motion agencies which create risks for others, he ought to be civilly responsible for the consequences of what he does." This is the model that the United States followed in setting up the state and federal programs. Today none of the other industrial nations of the world completely follow this rationale, not even the United Kingdom.

The historical differences between the original British and German models are still recognizable today, but with the primary difference being liability. Under the original British system, the liability was placed squarely on the shoulders of the individual employer. Under the German archetype, the legal responsibility had become collectivized, transferred to the government directly or indirectly through some administrative program. Under the original British system, the employer would not be bound to protect himself against possible claims. The legislation would take the form of either requiring some sort of self insurance or the posting of collateral when a business was begun, or more likely, of creating an elective insurance program with a private or public insurer which

\[28\] Q.J. Econ. 121 ff. (1888).
\[29\] 12 Q.J. Econ. 110 ff. (1898).
the employer could join if he desired to do so. Under the German
model, it was compulsory for the employer to take out workmen's
compensation insurance. In this way the risk could be better col-
lectivized without the single employer or the single employee being
severely burdened as a result of an injury.

Today most of the nations of the world are following the model
initiated by the German plan. About 70 nations, or 3/5 of those
with workmen's compensation programs, maintain a central public
fund. All employers subject to the program are obliged to pay
premiums to this fund, which in turn delivers the benefits due to
the injured worker. This program has produced over a dozen con-
verts in the last decade: Columbia, South Korea, and Zambia in
1963; Cyprus, Ecuador, Iraq, Mauritania, and Togo in 1964; the
Central African Republic and Jamaica in 1965; and Algeria, Ire-
land, and the Netherlands in 1966. Still in the majority of coun-
tries, work injury benefits are financed solely by the contributions of
employers. In the major industrial nations, only France, Belgium,
Italy, and the United States do not supply some form of govern-
ment assistance in funding. Compulsory insurance may be consid-
ered paramount to the collectivization of the work injury risk. In
at least 85 nations, or 71 percent of whose with work injury pro-
grams, it is compulsory for employers to insure themselves against
the injury risk. All the highly industrialized nations make insur-
ance compulsory except the United States, where several states have
turned to a compulsory program only within the last two years, still
leaving 14 states, or 28 percent, with elective insurance systems.
The United States still is following far behind the route set by the
rest of the world.

Since the end of World War II, changing social conditions
throughout the post-war world have produced changes in social
thought which are reflected in the expanding status of work injury
insurance. Personal injury and death due to work related causes
are no longer as significant as they once were. This is true be-
cause the total number of injuries through work related incidences,
thought down from their former highs, seem insignificant when
compared to the hundreds of thousands killed and maimed in war

31 S.S. IN THE WORLD, supra note 27, at xxiii.
32 Id.
33 THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS,
COMpendium TO THE REPORT OF THE NATIONAL COMMISSION ON STATE WORK-
MEN'S COMPENSATION LAWS 63 (1973) [hereinafter cited as COMPendium].
and on the highways. Comprehensive social security legislation has spread to provide some measure of protection in most disabilities. These new measures question the two major premises that formed the foundation of the original legislation. The first was the conviction that persons employed and their dependents deserved more preferential treatment for work related injuries than did the person not under orders or not in a work caused injury. The second was the theory that "work connection" could be established beyond a reasonable doubt. A narrow and rigorous definition, such as the phrase "personal injury by accident arising out of and in the course of employment," was thought to single out work related injuries from all others.

Today, the international feeling is that it is neither compelling nor self evident that work injuries can or should be deserving of special treatment. The public is increasingly focusing on the effects, rather than the causes of accidents and illness. Viewed in this perspective, the need for protection or compensation for all injuries, regardless of origin has come to command a high priority, at least insofar as one can judge from recent social legislation in advanced countries, as the extension of the separate and preferential coverage of the work connected risks.

The task of distinguishing between work connected and non-work connected cases has proven difficult, especially with regard to occupational diseases. A dilemma occurs in that a restrictive definition of work injury coverage and work connection can facilitate the distinction but it fails to answer present social needs. However inclusive coverage would make differentiation difficult and inequitable.

Several countries have met this dilemma by a variety of methods. Germany, Israel and the Soviet Union have extended work injury coverage to categories of persons other than employees, and along with the Netherlands they have given a broad definition to "work connection" by including road accidents on the way to and from work. The Soviet Union, the United Kingdom, and other coun-

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34 COMMISSION REPORT, supra note 1, at 32. Statistics listed on this page show that in 1971 for every 1,000,000 man-hours of exposure, accidents at work have a death rate of .09 and an injury frequency rate of 14.4 while accidents involving motor vehicles have a death rate of .90 and an injury frequency rate of 30.8.

35 SIR W. BEVERIDGE, SOCIAL INSURANCE AND ALLIED SERVICES § 81 ff. (1942).

36 HANES, supra note 30, at 61.

tries have aimed not at the work injury compensation program but at the mode of its benefit delivery, by extending the general health, disability, and survivors benefits programs to include all employees or members of the labor force. These programs have extended generally and vertically unconditional entitlement to free or prepaid medical care, either through comprehensive health insurance or through a national health service. Several countries such as the Netherlands and the Soviet Union have done away with a separate employment injury branch and utilized other programs in a comprehensive social security system, such as long term disability and survivorship benefit components, to deliver employment injury benefits.

While the more or less self-contained workmen's compensation programs based on the concept of employer liability have been losing ground to the collectivized schemes integrated into national security systems, direct liability has been revived in several countries. However, the purpose of this move is not to place full blame on the individual employer, but to provide for flagrant violations of safety. The Soviet Union places sanctions against management for neglecting to provide adequate safety measures. The rationale is that this neglect has hindered the state's productivity. The German Federal Republic penalizes the negligent employer by forcing contributions to a statutory benefit supplementary fund. The rationale is to encourage safety measures in all the factories which would prevent all but ordinary accidents that are associated with the job. The fine will be used to provide rehabilitation for the injured worker. Both plans do work to collectivize the risk, but provide punishment for grossly negligent conditions.

There has also been a movement to collectivize the risk bearing through the use of social risk insurance. The Netherlands recently adopted this plan by dismissing the requirement that the injury be work related, concluding that the injured party must be aided for the good of society. These plans emphasize the importance of the restoration of the injured and his reintegration into the labor market.

38 COMPENDIUM, supra note 33, at 63-4.
39 Id. at 64.
40 Id. at 76.
42 SEYFARTH, SHAW, FAIRWEATHER, & GERALDSON, LABOR RELATIONS IN WEST GERMANY AND THE UNITED STATES 546 (1969) [hereinafter cited as SEYFARTH].
New Zealand, in creating a universal health service, did so to emphasize rehabilitation, for it was discovered that the amount received under workmen's compensation, a certain percentage of wages, might not be sufficiently adequate to help the worker become useful again. These trends point to the discovery that for workmen's compensation to function properly, coverage must be extended to as many people as possible. The Commission pointed this out. It also pointed out that once again the United States is lagging far behind the rest of the world.

The International Labor Office has set guidelines on the structure of workmen's compensation. The purpose was to enable developing nations and nations just developing an adequate social security system to ascertain the objective of a competent work-injury program and to provide a model for such an effective system. The recommendations that were placed in Convention 121, passed in 1964, are very similar to the recommendations of the Commission. The I.L.O. holds that all employees should be covered, with only a few exceptions which would not represent more than 10 percent of the work force. The Commission found that in the United States 15 states cover less than 70 percent of the work force. Both the I.L.O. and the Commission have concluded that a work related accident should include anything dealing with employment, although the Commission did not include commuting, it did feel that the statutes must be construed liberally. Most states construe "in the course of" and "arising out of" employment very strictly and definitely do not include commuting. Both agree that all medical care and rehabilitation should be paid for the injured party. Most states have adequate medical assistance, though not paying all costs, but have extremely inadequate rehabilitation programs. Both emphasize that income loss should be kept at a minimum so as to protect the injured party from poverty. Only four states provide for income loss from temporary illness, therefore workers lose over $12 billion each year because of illness and are only compensated for about 30 percent of their losses.

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44 See ROYAL COMM. TO INQUIRE AND REPORT UPON WORKMEN'S COMPENSATION, COMPENSATION FOR INJURY IN NEW ZEALAND (1967) [hereinafter cited as ROYAL COMMISSION].
45 Accident Compensation Act 1972, c. 9.7 (New Zealand).
mission recognize that the states have failed to live up to the proposed standards while other nations of the world are quickly striving toward these goals.

India is a developing nation that is striving to fulfill the standards set by the I.L.O. The Workmen's Compensation Act of 1923 (WCA) was based solely on the original British theory of strict employer liability. It was superseded by a collectivist program passed in 1948, the Employee's State Insurance Scheme (ESIS).48 However, the WCA is still in effect in those areas where the ESIS has not yet extended, which includes any industry that does not use power. The ESIS only covers those industries that have 20 or more employees, and thus far has not reached further than 200 industrial centers.49 The definitions for "work connection" in the ESIS are taken directly from the old WCA. "Work injuries" are those accidents "arising out of and in the course of employment" and are strictly construed. There is very little in the way of rehabilitation after the injury, except for the supplying of artificial limbs, hearing aids, and eye glasses. When the worker is totally disabled, the ESIS provides only for a pension that amounts to 58 percent of the worker's average wage.

The Indian program at first glance does not seem to live up to the principles enunciated by the I.L.O. India, unfortunately, has a problem common to all underdeveloped nations of the world, too many people and too little money. India has a huge unemployed population to care for, so it must divert much of its effort to this problem. The ESIS was a collectivized effort to create a program of social insurance for all, which in certain respects hurts the worker. Employees earning over 400 rupees a month are not entitled to either ESIS or WCA. However, all workers are allowed full medical expenses. The worker is provided free care for artificial limbs, hearing aids, and eye glasses, while the population at large must pay a fee. Although injury is strictly construed, a disease has been defined as an accident, thus allowing coverage.

India is moving as quickly as she possibly can to improve the worker's plight by trying to improve the plight of all her people.50 Plans for gradual expansion of the ESIS's protection comprise proj-

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48 See V. N. Rajan, Social Insurance Scheme for Employees in India, 18 BULL. INT'L SOC. SECURITY ASS'N 1 (1965).
49 See INT'L LABOR OFFICE, SOCIAL SECURITY IN ASIA: TRENDS AND PROBLEMS (1968).
PECTS TO BE IMPLEMENTED IN TANDEM WITH THE GOVERNMENT’S SUCCESSIVE 5-YEAR PLANS. THERE IS THE EXTENSION OF COVERAGE TO SMALLER AREAS AND TO NEW TYPES OF FactORIES TAKING PLACE DAILY. MORE AND BETTER FACILITIES ARE BEING ESTABLISHED TO IMPROVE SICKNESS PROTECTION. A PROVIDENT FUND SCHEME HAS BEEN CREATED, WHICH IS A JOINT EMPLOYER-EMPLOYEE COMPULSORY SAVINGS PLAN TO PROVIDE PENSIONS AND SURVIVOR BENEFITS. HOWEVER, THE LACK OF MONEY IS PREVENTING THE EXPANSION AND PROTECTION OF WORKERS TO THE LEVEL ENVISIONED BY THE INDIAN GOVERNMENT AND THE I.L.O. FOR A LONG TIME TO COME.

LIKE INDIA, JAPAN HAS AN EXTREMELY LARGE POPULATION, HOWEVER, JAPAN HAS DEVELOPED INTO AN INDUSTRIAL GIANT AND HAS THE FUNDS NEEDED TO IMPLEMENT AN ADEQUATE WORKMEN’S COMPENSATION PLAN. THE JAPANESE CONSTITUTION REQUIRES THAT THERE BE A SOCIAL SECURITY SYSTEM TO PROTECT THE PEOPLE. ARTICLE 25 READS THAT “ALL PEOPLE SHALL HAVE THE RIGHT TO MAINTAIN THE MINIMUM STANDARDS OF WHOLDSOME AND CULTURED LIVING.” WORKER INJURY PROTECTION IS BASED ON TWO ACTS, THE LABOR STANDARDS LAW AND THE WORKER’S ACCIDENT COMPENSATION INSURANCE ACT. SIX TYPES OF BENEFITS ARE GIVEN: MEDICAL CARE BENEFITS, ABSENCE FROM WORK BENEFITS (60 PERCENT OF THE AVERAGE WAGE), DISABILITY BENEFITS, SURVIVORS BENEFITS, FUNERAL EXPENSE BENEFITS, AND LONG TERM DISABILITY BENEFITS. THE EMPLOYER MAY PAY A DISABLED WORKER, WHO REMAINS THIS WAY FOR THREE YEARS, AN “EXPIRATORY COMPENSATION” EQUIVALENT TO 1200 DAYS AVERAGE WAGES. THE PROGRAM IS FINANCED SOLELY FROM THE EMPLOYER’S CONTRIBUTIONS EXCEPT FOR CERTAIN LONG TERM EXPENDITURES AND PAYMENTS ARE BASED ON THE AVERAGE WAGE PAID. AS OF MARCH 1964, THERE WERE 19,500,000 INSURED EMPLOYEES RECEIVING BENEFITS OF 43,509,680,000 YEN.

COVERAGE SINCE 1969 HAS REACHED THE POINT OF COMPELLING COVERAGE IN ALL ENTERPRISES EMPLOYING ONE OR MORE WORKERS, WITH THE DISTINCTION BETWEEN COMPELLARY AND VOLUNTARY COVERAGE ABOLISHED. THE LUMP SUM PAYMENTS ARE BEING ABANDONED IN FAVOR OF LIFE LONG PENSIONS. MEDICAL CARE IS ALSO INCLUDED UNTIL THE WORKER IS CURED OR DIES AND IS ESSENTIALLY FREE. BENEFITS ARE EXAMINED AND AUTOMATIC ADJUSTMENTS ARE MADE AS WAGE AND PRICE CHANGE, ALTHOUGH THE

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51 Id. at 181.
52 The Labor Provident Fund Laws (amend.), Ordinance No. 3 (1971) (India).
54 R. COLE, JAPANESE BLUE COLLAR 31-2 (1971).
55 COMPENDIUM, supra note 33, at 80.
government usually falls behind in updating. The government is trying to expand coverage to include commuting and more areas of risk and to make administration more efficient. Japan seems to be moving quickly toward social insurance rationales that are in use in Europe, but as of yet not being developed in this country.

Germany took the lead in the payment and creation of social insurance and workmen's compensation. Since 1958 Germany has had the highest standard of social service care in Europe, although the other European nations are rapidly catching up. By 1965, Germany's expenditures represented 18.1 percent of its GNP while Italy's expenditures were 18.0 percent, France's were 17.3 percent, Luxembourg's were 17.1 percent, the Netherlands' were 16.9 percent, and Belgium's were 16.3 percent. This is an interesting phenomena since the thrust of the German program is not on providing compensation for the injured party, but is on the rehabilitation of the worker and the total safety of working conditions.

The year 1963 brought a Reform of Industrial Injuries insurance, which above all, prescribed that, in establishments employing more than twenty workers, a safety steward was to be appointed, that the federal government should annually submit an Accident Prevention Report, and the Funds, the administrative agencies, should be empowered to acknowledge that industrial diseases do arise out of employment. To promote safety consciousness among management, an Arbeitssicherheit (safety at work) committee was formed. Without exempting the worker from responsibility for following common sense safety measures, it tells the employers, "Safety on the job is the job of the employer." A 1967 report showed that as a result of this program, there were 14 percent less accidents than in the previous year.

The program is paid for by contributions from the employer and is compulsory, covering 80 percent of the population. There is an income limit — 6000 marks annually — for white collar workers who need not be covered. However, the German system is flexible, and anyone who desires to can be covered. The Government even provides a subsidy to aid an agricultural accident insurance system.

56 Rohrlich, supra note 47, at 56.
58 Id.
60 Seyf Barth, supra note 42, at 560.
The amount paid by employers comes from an assessment of the risk basis of the occupation and is paid into separate Funds (Krankenkassen). Each Fund represents a particular occupation, and a worker would join the appropriate one. The government is trying to cut down the number of Funds, for at one point there were over 2000. The contribution by the employer varies depending on the risk, but most were between 1.5 to 2 percent of the annual wage paid.

Coverage has been extended so that most everyone is covered except a few agricultural workers, housewives, public officials, and the self-employed, although they can voluntarily join the program. Those unemployed but willing to work are covered; so are prisoners. Those doing anything that someone gets paid to do are covered. The injury must arise out of the employment, but this has been expanded to receiving work required physicals, and going to and coming from work. This extended definition of risk is now the rule rather than the exception in Europe.

Although restoration of working and earning capacity takes precedence over monetary benefits, the German worker is adequately covered. Medical and all forms of ancillary care are provided for with no limit and remain available even if there is no reduction in his working capacity. This includes nursing allowances and maintenance benefits to avoid hardship. The monetary pension amounts to two-thirds of earnings of the previous year, but his pension will change as wages change, and the worker will be allowed increments for children and other needs. This is Germany's program of pension dynamics, the quasi-automatic revaluation of pensions currently payable, which is now fairly common in Europe, but highly lacking in the United States. This flexibility is the key to Germany's success in dealing with workmen's compensation.

Unlike its systems for sickness and old age, France's completely new system covering industrial accidents and occupational illnesses, as set up in 1945, immediately found its equilibrium. The administration has functioned so satisfactorily that only minor modifications have been required in the program. These modifications centered mainly in extending coverage through its system of social in-

63 See Rohrlich, supra note 47, at 29-67.
In 1962, France was only spending 15.6 percent of its GNP on its social service program, while in 1965 it was extended to 17.3 percent of its GNP.\(^6\)

France from the beginning had rejected the concept of the employer's liability and founded a collectivized system that functions through the general social security system.\(^5\) The work injury program has organized its coverage on a large basis. All non-agricultural employees, or 70 percent of the work force, are covered by the program. A special fund was created to care for agricultural employees, railroad workers, and public utilities employees.\(^6\) Medical care is completely guaranteed without the patient having to advance the costs, and leaves him complete freedom to choose his doctor and his hospital.\(^6\) There is no minimum period he must wait to qualify. Payments for temporary disability represent 50 percent of his earnings during the first 28 days and 66 2/3 percent thereafter. Payments for permanent disability are much higher, and where there is 100 percent total disability, the amount paid will equal the entire sum of the wages lost.

The French system applies to all wage earners, but it is financed solely by employers. The employer's contribution will vary with the risk involved in the particular industry, but the average rate amounts to 3 percent of the employer's payroll but not more than 1080 francs per month.\(^8\) The program designed for agricultural workers requires that the worker receive his benefits directly from his employer, rather than through the general fund. The newest law has devised a system that provides obligatory insurance for the benefits of the farmer with hired hands.\(^6\) However, nothing has yet been done to protect the self-employed worker. France is still expanding its coverage and may soon include these small businessmen in its progressive protection.\(^7\)

Like all the Commonwealth nations, New Zealand adopted the original British proposal for administering workmen's compensation. In 1972, New Zealand passed an act that abolished the old scheme of employer liability for a more liberal community welfare

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\(^6\) D. Schewe & K. Schewe, supra note 57, at 32.

\(^5\) Compendium, supra note 33, at 61.

\(^6\) S.S. in the World, supra note 27, at 74.


\(^8\) S.S. in the World, supra note 27, at 74.

\(^6\) P. Laroque, supra note 67, at 180.

\(^7\) Id.
The Accident Compensation Act was based on the findings of a Royal Commission established in 1966 "to Inquire into and Report upon Workers' Compensation." Although the benefits paid under New Zealand's present system were more liberal than the recommendations presented by the Commission in the United States, the Royal Commission found that a fully satisfactory injury insurance system would have to be based on "community responsibility" and "comprehensive entitlement." The Royal Commission believed that the present levels of cash benefits under the previous Workmen's Compensation Act would be sufficient. For temporary disabilities, 80 percent of the injured party's wages would be paid, while for the more serious and permanent disabilities, 80 percent of the wages plus special allowances for dependents and for all medical care would continue to be paid. (It should be noted that the Commission set up by the United States Congress recommended that the individual states raise their benefits up to 66 2/3 percent of the worker's earnings.) The Royal Commission vigorously demanded the abolition of the common law actions that base benefits on the question of "fault." It deemed court action "a form of lottery" where a few win and "All others are left to fend for themselves."

The Royal Commission found that the only way in which a comprehensive system of compensation could operate equitably is by linking benefits to earning capacity and by taking into account permanent physical disability. Even though the Royal Commission favored a unified system, it could not accept unification across the board on a principle that equated unequal losses and that produced unacceptably low levels of benefits to those with the greatest losses. It totally rejected the idea of private insurance company participation for it could not incorporate the prospect of profit with the concept of societal protection. It proposed a scheme which would consolidate the accident risk only, irrespective of causation. The Royal Commission concluded that the self-employed, the domestic worker, and the housewife should be as entitled to protection as the industrial employee. The proposal would mandate the eclipse of the

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71 ROYAL COMMISSION, supra note 44, at 40.
72 S.S. IN THE WORLD, supra note 27, at 154.
73 ROYAL COMMISSION, supra note 44, at 19.
74 Id. at 101.
75 Id. at 26.
occupational risk notion by what has been called the "social risk" principle, or, called by the report, "community responsibility."

With the Accident Compensation Act of 1972, New Zealand provided for universal coverage of personal injuries sustained in motor accidents and for a continuous 24 hour per day coverage for wage earners, both employed and self-employed, who sustain personal injuries by accident. Certain other persons might also be approved by the board administering the program for work accident coverage. No action is allowed at common law, except for claims based on contract (insurance contract). Three bases for compensation were provided: 1) economic loss, compensated for at the rate of 80 percent of average weekly earnings at the time of the injury; 2) loss of bodily function, compensated for at a lump sum of up to $5000; 3) loss of enjoyment of life, pain and mental suffering for which a lump sum of up to $7500 may be awarded. Financing for the schemes comes from levies payable by motor vehicle owners and employers and the self-employed. This money would sufficiently cover wage loss and medical expenses, but also provide funds for better rehabilitation programs and for the promotion of safety programs.

The original British program dealt solely with employer liability, but today the United Kingdom has moved more toward a collectivist system of worker protection yet cannot seem to break completely with the past. The English Workmen's Compensation system has provision for industrial accident and disease in a united plan for social security combined with discriminatory programs in favor of those workers who die or incur a prolonged illness or disability as a result of an industrial accident. Industrial injuries insurance is a branch of the general system to be applied as a social service instead of being regarded as merely an obligation of the employer. The system is also intended to be complementary to the remedies available at common law, so it is specified that the amount of benefits payable under the act are to be taken into account in all court actions when assessing employer liability.

Under the industrial injuries program, all employment in Great Britain under a contract of service is insurable. Certain de facto employees not technically under a contract of service, such as the bailment of automobiles by taxi drivers, are also covered. This, un-

76 See Accident Compensation Act 1972, supra note 45.
77 SIR W. BEVERIDGE, supra note 35, § 85.
78 1 H. VESTER & H. CARTWRIGHT, INDUSTRIAL INJURIES 6 (1961).
fortunately, is the farthest the coverage has been extended in the direction of the self-employed. Casual work, not in line with the employer's business and family employment are categories that are also excluded.

The victim must have suffered "personal injury by accident, arising out of and in the course of employment." However, an accident that occurred "in the course of" is deemed also to have been "arising out of" the employment in the absence of contrary proof. Most commuting accidents, to and from work, are still not covered.

A claim for benefits for an occupational disease must meet several criteria. First, the disabling syndrome must derive from a prescribed disease, (one contained in a schedule appended to the law that is quite similar to that issued by the International Labor Office). Yet any condition not listed, if work disabling, gives rise to a sickness benefit under the general national insurance scheme. Second, the diseased person must have been in insurable employment and must have engaged in the type of occupation in which such a disease is known to arise. Work connection of occupational diseases is thus established on a presumptive basis by scheduling the disease and listing certain types of work that are known to give rise to it. The list is an open one and extensions are possible by administrative action.

The most distinctive feature of the British plan is the way in which the damage due to a work accident is conceptualized. A key to the whole program is the concept of "disablement" as a loss of physical and mental faculty which means the power to enjoy the life of a normal, healthy person of the accident victim's age. The important concept which differs drastically with the findings of the New Zealand Commission, is that the determination is not tied to the injured person's earning power before or after the accident (pre-accident wages may remain unchanged). The disablement benefit resulting from a determination by a single physician or medical board remains payable without regard to employment and earnings. Reassessment of the degree of disablement is possible in the case of unforeseen aggravation of the victim's physical or mental condition. The disability rating procedure for accidental injuries is simplified by a schedule that lists certain disability assessments in the event of

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79 COMPENDIUM, supra note 33, at 64.
80 The National Industrial Injuries Act of 1946, 9 & 10 Geo. 6, c. 4 (U.K.).
81 COMPENDIUM, supra note 33, at 66.
specified physical losses. There may be equal findings on the basis of nonscheduled conditions.\textsuperscript{82}

Considered apart from the disability determination is the injured worker’s capacity for gainful employment and other factors important to determine his total entitlement to monetary benefits. Workers disabled by job related events are paid a fixed weekly sum, designated “injury benefit” for up to 26 weeks. This is the principal cash payment pending adjudication of disability. It may be supplemented by a flat rate weekly allowance for each dependent or an earnings related supplement payable under the general program.

When there is still disability at the termination of the injury benefit, the disablement benefit becomes effective, if as a result of the employment inquiry, the worker is unable to follow his regular occupation (or work of an equivalent standard), he then may receive a special hardship allowance. When the disabled person’s condition is likely to be permanent and rules out work of any kind the worker is eligible for an unemployment supplement. This allowance is noncompatible with the foregoing allowance and with certain general social security benefits.\textsuperscript{83} Other supplementary benefits include a constant attendance and an exceptionally severe disablement allowance, and payments for age increase, hospital treatment, and dependent’s allowances. Since it is not related to earning capacity, the disablement benefit continues whether or not the injured person is capable of work, and is actually working. Sickness benefits under the general program may also be paid if there is continuing incapacity for work.\textsuperscript{84}

As to the medical care, integration of the work-connected cases with all the others under its provisions makes the National Health Service the principal resort for physical rehabilitation. It pays for such benefits as eye glasses and hearing aids. General programs run by the Health Services include vocational rehabilitation, preparation for reemployment, and placement operations.

England uses the quota and reserved-employment techniques when it deals with reemployment of disabled work injury victims. Private employers of 20 people are required to draw 3 percent of their workers from a disabled persons register. Registration on the part of the disabled is voluntary. Certain types of jobs have been

\textsuperscript{82} Id. at 67.
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 68.
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earmarked for the disabled. England, in this way, hopes to provide the best protection possible for those injured and unable to work.

Although the various nations of the world differ in the administering of their work injury programs, the National Commission on State Workmen's Compensation Laws has discovered that they care for their workers much better than do the states. The Commission recommended that the states make many changes, which have been in effect for several years in other nations.

The states have acted speedily in enacting certain portions of the Commission Report, but none have enacted the majority of the recommendations. Since the issuance of the Report, 43 states have added 200 amendments to their programs. The Commission recommended that benefits paid be subject to an allotment of at least 66 2/3 percent of the state's average weekly wage by July, 1973. A trend has now developed toward the use of flexible maximum weekly benefit provisions and of annual adjustments to benefits based on changes in the state's weekly wage. Maryland, which had a maximum provision for temporary total disability after the first 42 days, eliminated this statutory limitation on the amount payable during the initial period, thereafter basing all maximum weekly benefits on 66 2/3 percent of the state's average weekly wage. (Twenty eight states have increased maximum weekly benefits for temporary total disability.) Many states have also raised weekly benefits for permanent total disability, for partial disability and death, and some raised total maximum benefits. Alaska increased the total maximum payable for specified temporary injuries to $175 a week, the highest in the country. Pennsylvania and South Carolina increased periods of payment for specific scheduled injuries and liberalized the payment rates. Vermont increased the weekly allowance for dependent children. New Mexico increased its maximum weekly compensation for specific injuries. Still at least half of the states pay maximum weekly benefits for temporary total disability of less than the Federal poverty level. Several changes have occurred in the expansion of coverage. For example, insurance was made compulsory in four additional states, this now being required in

87 Id.
88 Id. at 46.
36 states. Coverage was extended to agricultural or other non-industrial workers in five states. Numerical qualifications for making an employer subject to the workmen’s compensation laws were eliminated in five additional states, this now being eliminated in 34 states. However, these three measures have not been followed by any one state. Georgia and Kentucky changed from an elective system to a compulsory program. Kentucky does not include agricultural workers as covered employees and Georgia specifically exempted employers of less than ten employees, of farm laborers, and of domestic servants. Massachusetts extended compulsory coverage to all employees except seasonal or casual employees and part time domestic servants. Colorado provides compulsory coverage for agricultural and ranch employees, but the employer must have at some period four people working for him. South Carolina considers those in vocational training to be covered employees, but only reduced the number of employees required to make the employer comply, rather than extinguishing any numerical requirement. Pennsylvania did not diminish the number of employees required by an employer, but expanded the coverage of those already protected by redefining a coverable offense from "accident" to "injury."

Another area deemed important by the Commission was the provision for greater medical benefits. With the addition of five more states, 45 states now provide the full payment of medical care, instead of setting an arbitrary ceiling on the costs covered. Pennsylvania requires the employer to provide full medical care and permits the employee to select a physician of his choice, unless the employer designates a panel of five examining physicians. Virginia now provides for medical, surgical and hospital services for as long as necessary, provided that the injured employee files an application with the Industrial Commission, within a three-year period after the accident, to have his benefits extended. South Carolina, which already had full medical care provisions, strengthened them

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90 LABOR MONTHLY, supra note 86, at 47.
91 Id. at 48.
92 Id.
by mandating that permanent totally disabled employees will receive full medical benefits for life. Other states' provisions dealt with payments for replacement of devices such as hearing aids and contact lenses or payments to reimburse employees for visits to a physician.\textsuperscript{95} Still, little has been done in the area of rehabilitation, with a few states increasing the amount received while training, or defining rehabilitation as a reasonable medical service.

The Commission recommended that states establish a subsequent injury fund with broad coverage of preexisting impairments. A subsequent injury fund would insure that a handicapped worker who suffers a subsequent injury on the job will receive full compensation to cover the resultant disability. The idea was to encourage the employment of the physically handicapped. South Carolina enacted a broad subsequent injury fund to replace its limited fund which applied only to loss of specific members. The new law provided for reimbursement to employer or carrier for compensation and medical benefits in excess of 104 weeks and specifies methods of funding. Connecticut increased its percentage assessment and Pennsylvania, whose fund was previously supported entirely by State appropriations, provided for maintenance of the fund by specified assessments from each insurer.\textsuperscript{96}

Full coverage for work-related diseases was another recommendation the Commission considered essential. Three states have recently enacted full coverage for occupational diseases making a total of 43 states now having such coverage. Three coal mining states further amended their occupational diseases provisions to comply with criteria established by the Secretary of Labor, based on the Federal Coal Mine and Safety Act (Public Law 91-173).\textsuperscript{97} This law provides for monthly benefits to miners disabled by pneumoconiosis and to widows of miners who die of the disease. Claims are processed through state workmen's compensation agencies having legislation complying with the criterion established by the Secretary of Labor for the adequate provision of miners so afflicted.

The Commission proposed that every state utilize a workmen's compensation agency, financed through assessments against insurance carriers and self insurers in order to fulfill its administrative obligations. More states have progressed with the administrative changes than with the substantive recommendations. Pennsylvania

\textsuperscript{95} LABOR MONTHLY, supra note 86, at 46-7.
\textsuperscript{96} 72 DICK. L. REV., supra note 94, at 468.
\textsuperscript{97} LABOR MONTHLY, supra note 86, at 47.
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gave its Department of Labor and Industry strong supervisory powers over workmen's compensation insurers and new procedures to be followed in workmen's compensation cases were specified.\(^8\)

Other provisions were designated to fulfill all of the Commission's recommendations in this area. Kentucky created an Uninsured Employer's fund to provide payments to employees whose employer has failed to secure such payment. Delaware and Hawaii increased penalties for failure to make payments of compensation within a certain time.\(^9\)

Other states' provisions included hearings before benefit termination, requirements of notice for cessation of benefit payments, the maintenance of accurate records, and penalty provisions against employers who discriminate against an injured employee for action taken or benefits received. A few states have authorized new studies of various aspects of their workmen's compensation laws as a result of the Commission Report.

To focus on the true impact on the states of the Commission Report, it may be best to focus on one of the great industrial states and to examine its response. Pennsylvania for years was a leader in progressive work injury legislation, but by the time of the Report, the broad humanitarian purpose of the Pennsylvania laws were being frustrated, so a reassessment was vitally needed.

In February, 1972, the Pennsylvania Legislature passed a procedural package designed to reinvigorate the intent of the original legislation and to close some severe administrative gaps. The Secretary of Labor and Industry was given the power to enforce time standards and to enter into the agreement system sua sponte.\(^10\)

Workmen's Compensation referees were to become members of a crucial service system to alleviate the backlog of cases awaiting referees' hearings.

In March, 1972, substantive amendments were added to bring Pennsylvania's program more in line with other progressive programs. Some changes made were the inclusion, in the injury coverage formula, of workers with pre-existing disabilities,\(^11\) the extension of payments in cases of permanent partial disability,\(^12\) the creation of a subsequent injury fund,\(^13\) the elimination of the acci-

\(^8\) \text{PA. STAT. ANN. tit. 77, § 411 (Supp. 1974).}

\(^9\) \text{LABOR MONTHLY, } \text{supra note 86, at 49.}

\(^10\) \text{2 PA. BULL. 249 (Feb. 19, 1972).}

\(^11\) S.B. 1048 § 301 (c), 156th Sess. (1972), amending \text{PA. STAT. ANN. tit. 77, § 411 (Supp. 1971).}

\(^12\) S.B. 1048 § 306 (c), 156th Sess. (1972).

dent dental requirement, and the correlation of the compensation ceiling with the statewide average weekly wage.105

The procedural legislation set the stage for the substantive amendments that followed. From a procedural viewpoint the entire workmen's compensation concept was renovated. The Secretary of Labor and Industry was given the power to do something about the "bureaucratic administrative mess," as he described the system.106 A new provision, section 401.1, gives the Secretary the power to enforce performance standards. Further and more extensive authorization for the department to enter the system on its own motion is found in the new section 435 which gave the department the power to establish rules calculated to expedite the reporting and processing of injury cases, assure full payment of compensation when due, and expedite the hearing and determination of claims. The Secretary is authorized to conduct a hearing in the event of an employer's non-compliance to determine the facts behind the failure to comply. Although the new amendments avoid the use of the phrase "in the discretion of the secretary" in reference to his power, the authorization he has under the amendments amounts to a grant of the right to investigate in his good discretion. This power receives approval in the Model Workmen's Compensation Act.107

The major emphasis of the new law is on the Secretary's power to intervene in the interest of timely payment of claims. The new section 401.1 while being a check on fair bargaining does suggest a slight realignment toward the direct payment system. Agreement between the employer and employee remains the basis of the Pennsylvania system, the enactment may be a pacemaker:

The employer and the insurer shall investigate each injury reported or known to the employer and shall proceed promptly to commence the payment of compensation due either pursuant to an agreement upon the compensation payable or a notice of compensation payable. . . . The first installment of compensation shall be not later than the 21st day after the employer has notice of the employees' disability.108

The notice of compensation payable is used primarily in situations where it is agreed that some compensation is payable but where there has been no final agreement as to how much, and it further serves to identify the employer's payments as compensation installments.

Pennsylvania's legislature compromised on the problem of terminating compensation without notice to the claimants. The employer's filing of a petition to terminate or modify a compensation agreement will act as a supersededas (stop order) only if the petition alleges that the injured employee has returned to work or that his doctor has certified a return to full health. In other cases the petition will be treated as a request for supersededas which the referee will investigate and rule on based on the facts of the case.

Under the new amendments, the general rule is that an appeal by either party will not act as a supersededas. If the employer petitions the board to which the appeal is directed, the board is supposed to consider whether on failure to pay or continue to pay compensation immediately may jeopardize the health or well being the employee and rule on the petition as soon as possible.108

The Model Code for Workmen's Compensation, approved by the Council of State Governments, has taken a different position on the application of supersededas to appeals on the idea that the assumed operation of supersededas will discourage spurious employee appeals.110 Pennsylvania's approach may be closer to humanitarian purposes of the act and it still allows for supersededas to apply when the employer can demonstrate that the employee no longer requires the compensation. A logical next step in Pennsylvania's compensation would be to adopt the model compensation code's position on the flexible statute of limitations with regard to all injuries, which would insure that the disabled employee would be compensated, not defeated on technicalities. (It should be noted that the above mentioned proposals of the model code were also included in the I.L.O.'s recommendations.111)

As to the substantive provisions, the legislature took out the limitation of 12 months on surgical and medical expenses necessitated by the work-caused injury. Under the permanent partial injury provisions, schedule periods are almost doubled in amendments to

110 See COUNCIL OF STATE GOVERNMENTS, COMMENTARY: WORKMEN'S COMPENSATION AND REHABILITATION LAW 147 (1965).
Section 306. Under Section 306.2 the Subsequent Injury Fund is increased under the hope that an employer who knows that he will not have to bear the cumulative weight of a successive injury to an already handicapped employee will not be as reluctant to hire the handicapped. The "quota" system used in the United Kingdom was not considered by the legislature. Amendments also eliminated the ceiling of $60.00 as the maximum compensation payable per week and replaced it with the standard set by the Commission, 66 2/3 percent of the state's average wage.

The elimination of the "accident" criterion is the most controversial of the Commission's recommendations, but Pennsylvania eliminated it to provide greater protection. The initial sentence in Section 431 had been the basis of the accident requirement, thus the substitution of the word "injury" for "accident" in that sentence is crucial to the changing of the judicial construction of the injury coverage formula. Courts in determining workmen's compensation problems must note the change in Section 431 and also that the term "injury" was redefined to mean:

An injury to an employee, regardless of his previous physical condition arising in the course of employment and related thereto and such disease. . . .

The employee's injury is compensable under the act regardless of his previous physical condition if there is a sufficient work relation. "Regardless" implies that the employee's medical contribution to the injury is not to be considered along with casual contribution of the employment. This is different from the way the act had been read in the past. "Though problems will probably arise with such a broad mandate, the courts are now deciding compensability on a workable issue-causation."

Unlike the direct payment systems (such as the Longshoremens and Harbor Workers Act) the Pennsylvania reforms do not take the practical agreement factor out of the private sector. However, they do indicate that the Department of Labor and Industry can investigate the dilatory payment of compensation and reprimand employers who violate the law. A characteristic of direct payment plans in the Pennsylvania act is that employers must begin payment within three weeks of the disability or inform the Department why they have not. This is designed to get the agreement process moving and to get aid to the injured worker as quickly as possible.

The effects of most of the procedural and substantive amendments was to give Pennsylvania a new profile against the standards set up by the Commission Report. However a flaw in the American old British system of workmen's compensation continues within the legislation. Judicial decision will determine how closely the acts will be carried out towards their real purpose, by interpreting the "true" meaning of the statute without the "accident" requirement. In *Hamilton v. Procon, Inc.*, the court said:

> . . . the Commonwealth's primary concern is that an employee should be paid benefits for any injuries which are unforeseen or unexpected and are suffered in the course of employment. This should mean an injury is compensable whether or not the employee had a pre-existing disease as long as the result was precipitated or aggravated by any work related task. . . .

The problem becomes one of causation. The employee has the burden of showing that the injury was caused by the employment for the employer is liable only for work related injuries. The issue becomes whether or not there is enough medical causation to create coverage. The courts will most likely look for the answer in Pennsylvania's "unusual pathological result" precedents and also in neighboring state's decisions. New Jersey and Michigan, two progressive states in workmen's compensation matters, may provide insight into the standard Pennsylvania courts might use to determine causation.

New Jersey's statute governing the compensability of work accidents in New Jersey is similar to the old Pennsylvania act. It requires compensation for "personal injuries to, or for the death of, such employee by accident arising out of and in the course of employment." The New Jersey Supreme Court attacked the "by accident" requirement in *Ciuba v. Irrington Varnish & Insulator Company*. There they held that the widow of a millwright did not have to prove that her husband's heart attack occurred as a result of unusual exertion, as a condition of compensability. Thus, in Pennsylvania, by legislation, and in New Jersey, by judicial decision, the issue of compensability centers on causation.

The legal test for causation in New Jersey was asserted and amplified in *Dwyer v. Ford Motor Company* where the court said:

> . . . the Commonwealth's primary concern is that an employee should be paid benefits for any injuries which are unforeseen or unexpected and are suffered in the course of employment. This should mean an injury is compensable whether or not the employee had a pre-existing disease as long as the result was precipitated or aggravated by any work related task. . . .

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Compensability arises whenever the required exertion is too great for the man undertaking the work, whatever the degree of exertion or condition of the heart.

The court defined the claimant’s legal burden as that of showing by a preponderance of the evidence that ordinary work effort or strain, in reasonable probability, contributed in some material degree to the precipitation, aggravation or acceleration of the existing heart disease and death therefrom. The claimant’s mere assertion of a reasonably probable contributory work connection is not enough unless supported by expert medical testimony.

The court stated in Dwyer that the ultimate judicial decision in a specific case is reached by evaluating the conflicting opinions in the light of the facts surrounding the work efforts. This difficult task is the reason that the law demands that the medical experts describe the operative factors which led to their conclusions. In Schiffres v. Kittatinny Lodge, Inc., the New Jersey Supreme Court found that where petitioner’s evidence was not explicit and detailed as to the causal connection between his heart attack and the employment, he failed to carry his burden of proof. The legal test as established by the New Jersey cases is resolved by the preponderance of the probabilities based on sufficient, detailed, analytical, credible evidence.

In Michigan, the legislature removed the term “accident” from their compensation act. This was affirmed in Sheppard v. Michigan National Bank (overruling a previous judicial decision which had asserted that the accident criterion had to be met). As interpreted by the courts, an injury is accidental when the cause or the result is unexpected or accidental, even though the work done is ordinary or usual. Pre-existing health is immaterial where prior determination discloses that an injury in fact exists and the injury is causally connected with the employment. This test resembles the traditional tort test of causation which weighs the contributing roles of each participating factor. To recover in Michigan, the claimant must demonstrate a higher level of employment contribution to a particular injury than he would have to show in New Jersey.

Federal court decisions under federal compensation programs,

118 Id. at 459, 178 A.2d at 164.
such as the Longshoremen's and Harbor Worker's Act\textsuperscript{121} may also provide some background for the Pennsylvania courts trying to deal with the causation tests and to develop an adequate standard. Under the act mentioned above, the claimant has a presumption that the compensation provisions apply, which his employer may rebut. Causation was repudiated as the foundation of compensability by the Supreme Court in \textit{O'Leary v. Brown-Pacific-Maxon},\textsuperscript{122} with a broad standard of positional risk being substituted in its place. The court stated that:

\begin{quote}
The test of recovery is not a causal relation between the nature of the employment and the accident . . . all that is required is that the "obligations or conditions" of employment create a "zone of special danger" out of which the injury arose.\textsuperscript{123}
\end{quote}

The positional risk doctrine has an inherent difficulty in that it is a vague test. \textit{Wolf v. Britton}\textsuperscript{124} drew the line at idiopathic falls and held that there must be more work relation than mere presence at the work site.

Although Pennsylvania has made great strides in improving workmen's compensation and in fulfilling the Commission's recommendations, it still does not provide the coverage that the other industrial nations provide for their workers. The major difference between the other systems in force and Pennsylvania's is the historical traditions that surround the concept of employer liability. To collect in Pennsylvania, there must be "work causation." "Work causation" has been interpreted differently by courts in New Jersey and Michigan, and by the United States Supreme Court. Most of the industrial nations have given up on the tedious task of trying to define what is or is not work caused, and have expanded the concept into a social insurance system whereby the "lottery" image has been eliminated. The Pennsylvania system, as well as the other state programs, is oriented toward court action, with demands for specific evidence and exact procedure. However, the system should be oriented toward helping and aiding the injured worker as quickly and efficiently as possible.

The federal government has also made several changes in the benefits rendered through its work-injury programs. Several recent enactments, such as the Occupational Safety and Hazard Act

\textsuperscript{122} 340 U.S. 504 (1951).
\textsuperscript{123} \textit{Id.} at 507.
\textsuperscript{124} 328 F.2d 181 (D.C. Cir. 1964).
(OSHA), the Federal Coal Mine Health and Safety Act, and the Longshoremen's and Harbor Worker's Compensation Act (Amendments of 1972) directly affect workmen's compensation programs. OSHA was concerned with improving worker rehabilitation and safety. It also established the Commission. The Federal Coal Mine Act, along with the 1972 amendment, the Black Lung Benefits Act of 1972, provided benefits for miners who have been disabled by pneumoconiosis, a chronic dust disease of the lung arising out of employment in underground mines. However, the most reflective of current Congressional attitudes must be the most recent legislation passed, amendments to the Longshoremen's Act.

The 1972 amendments to the Longshoremen's Act may be seen as an extension of the policy set forth in OSHA, since the basic premise held by the authors of both was that adequate workmen's compensation benefits are important not only to meet the needs of injured employees, but also to strengthen the employer's incentive to provide adequate job safety by assuring that the employer bears the cost of unsafe conditions. In considering the amendments Congress followed the highly unusual practice of examining the treatment that European nations gave to their work injury problems. They also gave careful attention to the just-published recommendations of the Commission. Therefore, the new act effects current Congressional thought as to the proper means of administering any workmen's compensation program, state or federal.

The amendments signify that the old act, which provided higher levels of benefits than most state programs, failed to provide adequate income replacement for disabled workers and also failed to aid in the rehabilitation process.

130 See U.S. CONG. JT. ECON. COMM., supra note 62.
131 See H.R. REP., supra note 129. Employer groups had indicated a willingness to increase workers' benefits, but an 11-year impasse had developed over the principle of "seaworthiness." Prior to the amendments, a line of Supreme Court rulings — The Osceola, 189 U.S. 158, 23 S. Ct. 483 (1902), Mahnich v. Southern Steamship Co., 321 U.S. 96, 99, 64 S.C. 455, 457 (1944) — provided that a shipowner was liable for damages caused by any injury regardless of fault. However, shipping companies were generally able to transfer their liability to the actual employer of the longshoreman by recovering the damages for which they were held liable to the injured long-
A major improvement to the Act concerned the benefit structure. Under the provisions of the old act, an injured worker would receive 66 2/3 percent of his average weekly wage. However, to prevent high compensation payments for injuries to highly paid workers, this requirement had been subject to an arbitrary limitation. Since the benefits had not been improved in 12 years, this maximum resulted in many workers receiving as low as 30 percent of their average weekly wage.\textsuperscript{132} The maximum disability allowance was increased in section 5 of the amendments through a four-step program, beginning with $167, or 125 percent of the national average weekly wage, whichever is higher, as determined annually by the Secretary of Labor and ending at 200 percent of the average by October 1, 1975. At this latter percentage, it was expected that 90 percent of the work force covered by the act will receive at least 2/3 of their average weekly wage. Section 6 provided for a minimum benefit level of 50 percent of the national average weekly wage, or the employee's full weekly salary, whichever is less. The previous minimum payment of $18 a week was considered unconscionable.\textsuperscript{133} The $24,000 ceiling on temporary disability payments was also eliminated\textsuperscript{134} to avoid any possible injustice.

Provision was also made for annual adjustments of benefits through a process of redetermination to be administered by the Secretary to allow increases in the national average weekly wage to be reflected in the compensation paid. Where there are cases of death or permanent total disability similar provisions for upgrading

\textsuperscript{132} Id. at 4700.
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 4706.

\textit{shoremen from the stevedore's employer on theories of expressed or implied warranty. See Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp., 350 U.S. 124, 76 S.Ct. 232 (1956).}

The key issue on the question of seaworthiness was the liability of vessels as third parties to longshoremen injured in stevedoring operations. Under the amendments, where the injury occurs through the fault of the vessel, it would be placed in the same position as a normal third party in a land-based action. It was decided by Congress that given the improvement of compensation benefits that the amendments would provide, it would be consistent with the objective of protecting the health and safety of employees who work on vessels, to predicate liability of vessels as third parties on negligence rather than the no-fault concept of seaworthiness. Thus, persons who had a right to compensation under the old act retain the right to recover against the vessel for negligence, but cannot now bring actions for damages under the doctrine of seaworthiness. This means that a vessel's liability is no longer absolute. However, where the injured worker's own negligence may have helped to cause the injury, the admiralty concept of comparative negligence rather than the common law rule of contributory negligence would apply.
Proposed Workmen's Compensation benefits were also added. The same section of the amendments also increased future benefits to be paid to those receiving payments for death or total disability at levels ranging from less than $25 a week to the $70 a week maximum.\textsuperscript{135}

It had been the custom that when an employee had not been working a full week, any disability payments would be calculated as a percentage of average weekly wages. These calculations were based upon the assumption that the average weekly wage was to be divided into sevenths. So that workers in a five-day work week would not have their benefits reduced by seven-day work week calculations the 1972 amendments gave the employee's actual work week as the standard for determining benefits.\textsuperscript{136}

An employee’s liability in cases where an injury followed a previous impairment (second-injury cases) was clarified and limited in Section 9 of the amendments (section 8(f) of the Act). To correct the erroneous impression that the employer bears a heavy cost when a handicapped worker is injured at a new place of employment the employer’s liability is now limited to the scheduled award for the subsequent injury, or 104 weeks, whichever is greater.\textsuperscript{137} Where the employee is totally or partially disabled, a special fund will pay the remaining obligation. This provision spreads the risk among all employers and is designed to encourage the employment of handicapped workers.

A key factor of the amendments was the extension of coverage to shoreside areas for it reflected Congress’ awareness of the inadequacy of many state workmen’s compensation programs. Prior to 1972, the Act did not cover injuries that occurred on the land; these were covered by the various state systems. Great discrepancies occur in the amount of benefits paid to an injured seaman based solely on the fact that the injury occurred on land and not on the ship. As the House Report stated:

To make matters worse, most State Workmen’s Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen’s Compensation Laws recommended standard of a maximum limit on benefits of not less than 200 percent of statewide average weekly wages.\textsuperscript{138}


\textsuperscript{136} H.R. REPORT, supra note 129, at 4701.

\textsuperscript{137} Id.

\textsuperscript{138} Id. at 4707.
The House committee realized that if state laws were permitted to continue to apply to injuries occurring on land and the federal benefit structure contained in the amendments were enacted then there would be a great disparity in the benefits available to permanently disabled longshoremen, depending upon where the injury occurred.\(^\text{139}\)

A concern was also expressed that under laws of some states, due to exemptions based upon the number of employees hired, some workers might be uncovered in the event that they were injured.

As a result of these concerns about the State’s programs, the Act was amended to provide coverage of longshoremen, harbor workers, and other employees engaged in maritime employment, if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, or other area adjoining such navigable waters, customarily used by an employer in loading, unloading, repairing, or building a vessel.\(^\text{140}\) In this way a compensation system could be uniformly applied to employees who otherwise would not be covered by this Act, for at least part of their activities.

As previously mentioned, the Federal government has an advantage with the Longshoremen’s Act which the states do not. The Federal courts have held that compensability rests upon “positional risk” while state courts still adhere that “causation” is the foundation.\(^\text{141}\) Thus, in *Wheatly v. Adler*,\(^\text{142}\) the widow of a garage mechanic recovered compensation when the husband sustained a heart attack caused by advanced arteriosclerosis and myocardial insufficiency while on his employer’s lawn having relieved himself prior to the beginning of his first job. The court held that the absence of unusual strain and the presence of arteriosclerosis had no effect on the claimant’s petition. The deceased was found to be in the course of his employment because he had changed into work clothes and had been given his first assignment by the foreman. This theory expands coverage and also speeds recovery since the more liberalized test leads to fewer disputes that require long court action.

As to the administrative changes in the amendments, it was thought that the administration of the Act had suffered by virtue of the failure to keep separate the functions of administering the

\(^{139}\) *Id.*

\(^{140}\) *Id.* at 4708.


\(^{142}\) 407 F.2d 307 (D.C. Cir. 1968).
program and sitting in judgment on the hearings. Consequently, the Act was amended to make clear that all the hearings under the Act were to be conducted in conformity with the Administrative Procedure Act\textsuperscript{143} by hearing examiners qualified under the Act. The determination would have less of a taint than before and would, hopefully, create less bitter feelings that would lead to lengthy court battles.

Finally, the 1972 amendments require the Department of Labor to take a more active role in providing assistance to claimants. The Secretary, upon request, must provide assistance to persons covered under the Act to enable them to understand the benefits and other matters relating to the operation of the Act, and also to provide assistance in processing a claim. The intention is that the assistance will enable the employee to receive the maximum benefits due to him without having to rely on outside assistance other than that provided by the Secretary.\textsuperscript{144} The bill does make legal assistance in processing the claim for benefits under the Act available in needy cases upon request subject to the Secretary's discretion, but it was hoped that impartiality by the Secretary would cause the cessation of further legal action. It is also provided that the Department of Labor take a more active role in assuring that injured employees receive proper medical treatment and rehabilitation services. The Department should actively supervise the medical care given to injured employees.

Although the task of implementing a workmen's compensation system has been historically left to the states, the failure of the state systems has created a growing movement to federalize these programs. The Department of Labor has published standards that are required in an adequate work-injury program. There were 16 essential practices that produced a possible compliance score of "800." In 1972, the actual score for the states was "402." Nine states followed at least 13 of these practices, while ten followed four or less.\textsuperscript{145} These were the kinds of statistics that caused grumblings in the halls of Congress.

In February, 1969, Congressman Perkins introduced a bill in the House of Representatives which would require all employers engaged in interstate commerce to pay workmen's compensation bene-

\textsuperscript{143} 5 U.S.C. 554 (1966).
\textsuperscript{144} H.R. REPOR\textsuperscript{T}, supra note 129, at 4708-9.
\textsuperscript{145} COMMISSION REPORT, supra note 1, at 119.
fits equal to that provided in the Longshoremen's Act. The bill died in committee. However, some of his proposals were adopted the next year in the Occupation Health and Safety Act. Congressman Perkins proposed that the Secretary be authorized to conduct research and other studies on workmen's compensation, their administration, the income of the disabled, and other related purposes. OSHA authorized the formation of the Commission to review these same matters.

The Commission did not, however, say that presently existing state workmen's compensation insurance arrangements, or if the state allows it, private insurance, need be ended. The Commission did not want to destroy the existing workmen's compensation system and replace it with something totally new or to federalize the existing programs. Rather it wished to continue in the present pattern. The recommendations will have served their purpose if they become a floor below which the state programs will not fall. Only if the states refuse to cooperate and ignore the recommendations would the Commission wish to see action to force compliance. The recommendations therefore are to act as a threat to the states to improve their programs or face possible federalization. If the states will not go along then the Commission would ask the Congress to intervene. The Commission summed up the action they wish to see Congress take in the absence of state compliance by saying:

We believe that compliance of the States with these essential recommendations should be evaluated on July 1, 1975, and, if necessary, Congress with no further delay in the effective date should guarantee compliance.

We believe the most desirable method to insure that each State program contains our essential recommendations would be to include these recommendations as mandates in Federal legislation, applicable to all employers specified by our essential recommendations.

Compliance with the mandates could be insured by two complementary methods. Any employer within the scope of the Federal legislation not already covered by a State workmen's compensation act would be required to elect coverage under the act in an appropriate State. Also all employers affected by the Federal law would be required to insure or otherwise secure the mandated recommendations. Employer compliance with the election and security requirements of the Federal legislation would be assured by a penalty

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147 Id.
148 COMMISSION REPORT, supra note 1, at 24.
149 Id. at 25.
enforceable through law suits filed by the U.S. Attorney's Office in the appropriate Federal District Court.\textsuperscript{150} (Emphasis added)

Although the states have been making changes since the Commission issued its Report, most observers feel that these changes have been made solely to avoid federalization. There have been over 1300 bills introduced and 200 bills passed since the Report was published, but few of these enactments have dealt with the major recommendations.\textsuperscript{151} Although there is now more window dressing, the real flaws in the systems still remain. All this avoidance was occurring while Congress was structuring the Longshoremen's Act around the major proposals. This did not create much support for continued non-intervention.

On June 18, 1973, Senator Jacob Javits and Senator Harrison A. Williams, Jr., introduced Senate Bill 2008, The National Workers' Compensation Standards Act of 1973.\textsuperscript{152} The purpose of the legislation was to recognize the need for some uniformity of treatment given to workers who are injured or who contract diseases on the job. Senator Williams found that, based on the Commission Report, the states have failed to meet their responsibility to provide fair and adequate compensation and that they are still failing to meet this burden. He maintained that it has been the historical function of the Federal government to prescribe minimum labor standards where state efforts have been inadequate. The states have been exhorted, but this has not proved successful and now it is the duty and responsibility of the Federal government to correct the injustices of the past and establish a minimal framework for those who are injured.\textsuperscript{153} Consequently, Senator Williams has embodied most of the recommendations of the Commission into a uniform system of minimal federal standards for the states to follow in the enforcement and administration of their own programs.

Senator Javits, the co-sponsor of the bill, has made it clear that the intent of the legislation is not to federalize workmen's compensation. He feels that federalization would waste the talent and experience of the many state officials involved in the administration of the state compensation programs, by replacing them with

\textsuperscript{150} Id. at 127.
\textsuperscript{151} SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, NATIONAL WORKERS' COMPENSATION STANDARDS ACT OF 1973, 93d Cong., 1st Sess. 49-50 (1973) [hereinafter cited as SUBCOMM. ON LABOR].
\textsuperscript{153} SUBCOMM. ON LABOR, supra note 151, at 43-4.
Federal administrators. As a result of his beliefs, the bill provides that each state would have until January 1, 1975 to comply with the minimum standards in the bill. The Secretary should bend over backwards to continue state involvement. If a state fails to meet the standards, the Longshoremen's Act would apply within that state, but the administration of the law within the state would not necessarily be federalized. The bill specifically directs the Secretary of Labor to attempt to enter into an agreement with the state workmen's compensation agency under which the state agency would agree to administer the Federal law under the general supervision and direction of the Secretary. It is only if a state refuses to enter into such an agreement that the federal government would administer the program.

The Commission did not feel that federalization was essential to having an adequate work-injury program, and there is proof that this can be done. In Canada, each province has set up its own program without any interference from the national government. Unlike the United States, the various provinces adopted a system of compulsory social insurance, rejecting the concept of solving injury questions through the courts, feeling that this is more detrimental than useful.

Most of the provinces base their programs on the Ontario legislation of 1914. This Act concluded that there were two major principles in meeting the workers' needs. The first benefit is the right of the injured person to full medical care and in recent years to substantial rehabilitation services, and the second and corollary benefit is compensation for loss of wages at rates which recognize dependents and are based on previous earning records, with the objective of providing at least 75 percent of the average earnings. Provision is also made for income maintenance to widows and dependents.

Employers are classified according to their potential liability and are assessed as members of a class of industrial employment. Each individual victim's needs and rights are protected by the pool of the Workmen's Compensation Fund and are not subject to any of the

154 Id. at 46.
156 S. S. IN THE WORLD, supra note 27, at 32.
157 Id. at 32-3.
harrassments that are so common when "experience rating" procedures are applied to individual firms and individual victims.\textsuperscript{158}

This Ontario legislation has maintained high standards of impartiality and excellence in medical care that has resulted in acceptance by both employers and employees. Although there is no reason why the risks of industrial accident or illness should be excluded from any national program, it is unlikely that there will be any enthusiasm for a proposal to change workmen's compensation from a purely provincial to a federal or even provincial-federal program. The problems of mobility of labor have been adequately accommodated by inter-provincial agreements and there is a close similarity between the operations and benefits of all the provincial programs. The Workmen's Compensation Boards have plainly defined functions. They have maintained high standards by keeping the links between the risk, the contributor (the employer) and the purpose of the act very close together.\textsuperscript{159} The provinces have done their duty by protecting their workers.

The states have failed in their duty to their workers, so Senator Javits believes that Congress must act now to correct the inequities. He believes that failure to act will destroy the work of the Commission because the momentum for reform may cease if it is not followed up now. He clearly feels that the great amount of legislation passed by the states is meaningless, but may make Congress complacent.\textsuperscript{160} The significance of the legislation, whether it is passed or not, may be its threatened passage to prod the states into action. The historical functions, that Senator Williams noted, are now breaking down and unless the states act, legislation will inevitably be passed to force them into action. Senator Javits now feels that the time and the conditions are right for the passage of this legislation.\textsuperscript{161}

The Commission has discovered that much could be learned from the evolutionary process that has been taking place throughout the world. The various approaches that the nations of the world have taken in implementing their programs for work injury coverage have been modified and improved through years of experience. To these nations, the United States' workmen's compensation program is still in its infancy. Several important trends have

\textsuperscript{158} J. S. Morgan, supra note 155, at 119.
\textsuperscript{159} Id. at 120.
\textsuperscript{160} SUBCOMM. ON LABOR, supra note 151, at 49-50.
\textsuperscript{161} Conversation with Senator Jacob Javits, supra note 89.
become prevalent in every part of the world. The collectivism of the risk bearing with the rejection of the role of employer's liability in work protection is the greatest noticeable trend. One effect of this trend is the growing reliance on social insurance. All the Continental European industrial nations and Japan subscribe to some form of this system. Others have resorted partially to this with the use of generalized social security provisions to create supplemental sources for protection, such as the United Kingdom's National Health Service.

There is also a strong tendency to expand coverage by broadening key definitions. Coverage has been extended to other than employed persons by stretching the definition of "employment," to explicitly covering self-employed persons, and by conceding that an employment relationship need not be the sole basis for coverage. This is done by declaring certain activities per se employment, as giving rise to work connection without regard to the status of the claimant. Thus Germany can cover prisoners with work injury protection. The definition of "work connection," which is normally "arising out of and in the course of employment," has been broadened by removing the "in the course of" requirement, or by redefining "in the course of" to mean "arising out of." Diseases are now assumed to result from employment, unless otherwise proven. Many nations have gone as far as considering commuting accidents to be "work connected."

Two other trends stress the historical intent of workmen's compensation which have long been neglected in the United States. There is a general resurgence of concern for the welfare of the worker who has lost much of his earning capacity as a result of the accident. There is strong emphasis on the restoration of the worker and on his reintegration into the labor force. Germany's entire program is centered around the rehabilitation of the worker, while the United Kingdom requires employers to hire a certain number of the handicapped. Also there is an attempt to expedite adjudication and to review appeals so that the worker can be provided with aid as quickly as possible, for this is his greatest time of need and anguish.

The National Commission on State Workmen's Compensation Laws recommended that the states follow all these basic trends, except one — the move to social insurance. This is the most noticeable world trend, but it is rather obvious why it was never recommended. Most of the actions performed by the states have been
deduced as ploys to avoid federalism. Federalism and social insurance smack of socialism, which is considered a dread disease by most Americans. Yet it must be realized that the diverse nations of the world, which differ in so many ways — in size, climate, resources, history, populations, political system, social structure, economic development, customs, and cultural traditions — do have these many similarities in their work injury programs. They have supplied a working model for the United States to use toward implementing a viable work injury program. It is now the task of the states, and ultimately of the federal government, to evaluate these experiments and to devise an adequate system of workmen's compensation. If the states shun this task, particularly if they fail because of some ideological fear, it will be an insult to all workers and citizens of the United States.

RUSSELL CRABTREE
EDWARD MITCHELL
IRA WEISS