

## **Part One**

# **General Objectives**

**A brief description of the origin and current state  
of workmen's compensation in the United States of America  
and an affirmation of general objectives appropriate for a modern  
workmen's compensation program**

## **Chapter 1**

# **The General Objectives of Workmen's Compensation**

Accidents, many of them avoidable, annually cause 115,000 deaths and more than 11 million injuries which are disabling beyond the first day, according to the National Safety Council. No small part of this annual toll is work-related. 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. Ten million workers a year require medical treatment or at least temporarily suffer restricted activity because of work-related injuries, according to the National Center for Health Statistics. The dollar cost of lost wages, medical treatment, lost production, damaged equipment, and other consequences of work-related accidents for 1971 is estimated at \$9.3 billion.

The importance of work-related injuries and diseases is not so much in the number or

frequency. There is less likelihood that a worker will be injured at work than elsewhere, according to the National Safety Council, although, considering the hours of exposure, a person is more likely to be injured and less likely to be killed on the job than away from the job. (Table 1.1) Numbers aside, the true concern with work-related disabilities is that they strike men and women in their most productive years when they are most likely to have a dependent family.

Increased concern with work-related injuries and diseases and new awareness of remedial possibilities have motivated recent legislation both by State and Federal governments. State legislatures in 1971 adopted amendments to workmen's compensation laws at twice the normal rate for odd-year sessions. Federal actions have included the Coal Mine Health and Safety Act of 1969 (compensating miners totally disabled by pneumoconiosis and, in the

TABLE 1.1. Accidental deaths and injuries of workers,<sup>a</sup> 1971

Place	Deaths	Injuries (thousands)	Death <sup>b</sup> rate	Injury <sup>b</sup> frequency rate
Total	55,700	5,400	.12	11.8
At work	14,200	2,200	.09	14.4
Away from work	41,500	3,200	.14	10.4
Motor vehicle	25,100	950	.90	30.8
Public non-motor vehicle	8,600	1,100	.08	10.0
Home	7,800	1,200	.05	7.1

a Excludes children, housewives, students, the unemployed, the self-employed, employers, members of the armed forces, the retired, and others.

b Per 1,000,000 man-hours of exposure for all workers in all industries, including agriculture.

Source. National Safety Council, Accident Facts, 1972 Edition.

event of death, their widows and children) and the Occupational Safety and Health Act of 1970. By this Act, the Federal government assumed responsibility for establishing and enforcing safety and health standards for the protection of almost all employees.

The Act also established this Commission with the charge to "undertake a comprehensive study and evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation" for workers who suffer disabling injury or death in the course of their employment. The Act obligated the Commission to "transmit to the President and to the Congress not later than July 31, 1972, a final report containing a detailed statement of the findings and conclusions of the Commission, together with such recommendations as it deems advisable."

#### A. THE BASIC NATURE OF WORKMEN'S COMPENSATION

There is a workmen's compensation act for each of the 50 States, and for five of the six other "States" we were asked to study. There are also two Federal workmen's compensation programs, for a total of 58 jurisdictions. (See Glossary) No two acts are exactly alike, but many have similar basic features.

Workmen's compensation provides cash benefits, medical care, and rehabilitation services for workers who suffer work-related injuries and

diseases. To be eligible for benefits, normally an employee must experience a "personal injury by accident arising out of and in the course of employment." All laws provide benefits for workers with occupational diseases, although not all cover every form of occupational disease.

Chapter 2 considers in some detail the phrase "personal injury by accident arising out of and in the course of employment." In general, its effect is to exclude some injuries and diseases from the scope of the program. But the distinguishing feature of workmen's compensation is that it assures benefits for many who could not win suits for damages under the common law, which usually requires that an injured party prove the defendant was at fault. Workmen's compensation benefits are paid even when the employer is free of negligence or other fault. These benefits are the employer's exclusive liability for work-related injuries and diseases. As the next section indicates, this decision to hold the employer liable without fault, while limiting his liability, was a deliberate choice.

When an injury or disease falls within the scope of the workmen's compensation program, the employer must furnish medical care, usually unlimited in time or amount. Most States also provide vocational and medical rehabilitation services, or supervise these services as furnished by the employer.

Cash benefits usually are classified as temporary total, temporary partial, permanent total, permanent partial, and death benefits. Temporary total benefits are paid to employees

unable to work after a specified waiting period. Temporary partial benefits are paid during a period of reduced earnings. These temporary benefits cease when the worker returns to full wages or is found eligible for permanent total or permanent partial benefits. Permanent total benefits are paid to those disabled completely for an indefinite time. Permanent partial benefits are paid if the employee incurs an injury or disease which causes a permanent impairment or experiences a permanent but partial loss of wages or of wage-earning capacity. If the worker is fatally injured, the employer is required to provide burial expenses and to pay benefits to specified dependent survivors. For each category of benefits, all States prescribe a maximum weekly benefit and usually a minimum weekly benefit. Some States prescribe limits on duration or total amount or both for certain classes of benefits.

The primary purpose of these benefits is to replace some proportion of wage loss, actual or potential. Many States also provide benefits because of impairment (See Glossary), whether or not this results in lost wages. Most laws prescribe a schedule of permanent partial impairments which specifies the number of weeks' benefits paid for the loss (including loss of use) of particular parts of the body.

In all but one State, an administrative agency supervises workmen's compensation claims; in 45 States, the agency also adjudicates disputes concerning eligibility for benefits and extent of disability. Decisions of these agencies may be appealed for review by the courts. In five States, the courts decide all disputed claims.

Despite the State role in workmen's compensation, it is largely a privately administered and funded program. The workmen's compensation statutes provide that each employer shall compensate disabled workmen by a certain formula of benefits, and that the employer must pay for these benefits. The employer usually makes private insurance arrangements to meet his statutory obligations. In all but four States, the employer may self-insure the risks of work-related injuries and diseases if he can meet the State financial standards. In 44 States, the employer may purchase workmen's compensation insurance from private insurance carriers. There are 18 States which operate insurance funds, but 12 of these compete with private

carriers. Of the States which bar private carriers, three allow eligible employers to self-insure. Private insurance carriers are responsible for about 63 percent of all benefits paid, self-insurers for 14 percent, and State funds for 23 percent.

Workmen's compensation benefits are financed by charges in the form of insurance premiums at rates related to the benefits paid. The relationship between benefits paid and the employer's costs is most direct for self-insuring employers. Other employers are rated on the experience of their class by State insurance funds or private carriers. Typically, several hundred insurance classifications are used in each State. The individual employer usually pays a rate related to the benefits paid by all employers in his class, but employers with sufficiently large premiums can have their rates modified to reflect their own record of benefit payments relative to other firms in their class. Some employers pay three times as much per \$100 of payroll as others in their classification. These differences provide a powerful incentive to reduce the frequency of compensable injuries and diseases.

## **B. THE ORIGIN OF WORKMEN'S COMPENSATION IN AMERICA**

In the first decade of the twentieth century, U. S. industrial injury rates reached their all-time peak. In 1907, in two industries alone, railroading and bituminous coal mining, the toll was 7,000 dead. Despite these tragedies, the remedies available to recompense disabled workers or their families were inadequate and inequitable, consisting mainly of appeals to charity or law suits based either on the common law or, in many jurisdictions, on employers' liability statutes.

The common law for work injuries originally developed when most employers had few employees. Often a firm was like a large family that settled disputes without appeal to the courts. With this tradition, courts tended generally to lack sympathy for complaints by employees. In an economic and political climate favoring industrial growth, the courts were reluctant to burden entrepreneurs with the care of those disabled in their employment.

Most observers were critical of the common law handling of work-related injuries. As plaintiff, the workman had to prove the employer's negligence. Given the complexity of the work situation and the reluctance of fellow workers to testify against the employer, the worker often could not prove his claim. Even more obstructive to the employee's chance for recovery were three defenses available to the employer: (1) contributory negligence: the worker whose own negligence had contributed in any degree to his injury could not recover; (2) the fellow-servant doctrine: the employee could not recover if the injury resulted from the negligence of a fellow worker; and (3) assumption of risk: the injured man could not recover if the injury was due to an inherent hazard of which he had, or should have had, advance knowledge.

By the middle of the 19th century, protests against the grossest deficiencies and inequities of the common law led to employers' liability laws, which restricted the employer's legal defenses. However, these laws still obliged the employee to prove the employer's negligence, and their contribution to the ability of an injured workman to win a claim against his employer was minimal.

At the opening of the 20th century, the shortcomings of the legal remedies for work-related injuries were common knowledge. The compensation system which based liability on negligence was an anachronism in a time when work was recognized to involve certain inherent and often unpredictable hazards. Awards for injuries generally were inadequate, inconsistent, and uncertain. The system was wasteful, partially because of high legal costs. Settlements were delayed by court procedures. Society was disturbed by the burden of charity for uncompensated injured workmen. As Arthur Larson has observed, "the coincidence of increasing industrial accidents and decreasing remedies had produced in the United States a situation ripe for radical change. . . ."

Workmen's compensation statutes, as an alternative to the common law and employers' liability acts, had many objectives, most of them designed to remedy past deficiencies. The statutes aimed to provide adequate benefits, while limiting the employer's liability strictly to workmen's compensation payments. These payments

were to be prompt and predetermined, to relieve both employees and employers of uncertainty, and to eliminate wasteful litigation. Appropriate medical care was to be provided. Most radical of all these objectives was the establishment of a legal principle alien to the common law: liability without fault. The costs of work-related injuries were to be allocated to the employer, not because of any presumption that he was to blame for every individual tragedy, but because of the inherent hazards of industrial employment. Compensation for work-related accidents was therefore accepted as a cost of production.

These objectives were widely applauded. The workmen's compensation program eventually was supported by both the National Association of Manufacturers and the American Federation of Labor.

The no-fault approach spread rapidly: between 1911 and 1920, all but six States passed workmen's compensation statutes. These laws were influenced by the contemporary interpretations of constitutional law. The Supreme Court's reading of the interstate commerce clause precluded the possibility of a Federal law on workmen's compensation for most private industry, although the Federal Employers' Liability Act, applicable to railroad employees engaged in interstate commerce, and a compensation act covering certain Federal employees were both enacted in 1908. A New York State study commission, whose 1910 report was the basis for the New York Compensation Act, would have adopted the German compensation plan's feature of employee contributions had this been deemed constitutional. Of even greater impact was the 1911 decision by the Court of Appeals of New York that compulsory coverage was unconstitutional because the imposition of liability without fault was taking of property without due process of law. Consequently, these early laws made coverage elective and applied mainly to specified hazardous industries.

Although most of these constitutional views no longer hold, their imprint on today's workmen's compensation statutes is unmistakable. The present system is basically State operated and almost exclusively employer financed. Moreover, in some States, the tradition of elective coverage and the application to only certain occupations continues: only about 85 percent of all employed wage and salary workers

are covered by workmen's compensation.

A description of the origins of workmen's compensation, including the vestigial constitutional inhibitions, serves a larger purpose than homage to history. The basic principles of the present program are largely those established 50 or 60 years ago; they can be completely understood only in the context of forces present at their creation.

Since then, the task of workmen's compensation has grown more difficult. Technological advances have produced unfamiliar and often indeterminable physical and toxic hazards. Occupational diseases associated with prolonged exposures to unsuspected agents or to fortuitous combinations of stresses have undermined the usefulness of the "accident" concept. While advances in medical knowledge have facilitated the treatment of many injuries and diseases, they have also enlarged the list of diseases that may be work-related. Simple cause/effect concepts of the past have yielded to an appreciation of the many interacting forces that may result in impairment or death. In addition to genetic, environmental, cultural, and psychological influences, physicians must consider predisposing, precipitating, aggravating, and perpetuating factors in disease. Etiologic analysis, estimates of the relationship to work, and evaluation of the extent of impairment have become accordingly complex for many illnesses.

Workmen's compensation has failed, meanwhile, to achieve certain of its original objectives. The program has not been self-administering but has seemingly spurred litigation. Benefits have increased but in most States have not kept pace with rising wage levels. The failure to adapt to changing conditions has led to many criticisms, but constructive criticism requires a restatement of the objectives for the modern era.

### C. FIVE OBJECTIVES FOR A MODERN WORKMEN'S COMPENSATION PROGRAM

Many of the traditional attributes of the workmen's compensation program, such as liability without fault, have continuing validity. Other attributes which persist, such as elective coverage, are no longer warranted in the light of the objectives of a modern workmen's compensation program. These are stated in general terms

below. Specific applications appear in Part Two.

The four basic objectives are

*broad coverage of employees and work-related injuries and diseases;*

*substantial protection against interruption of income;*

*provision of sufficient medical care and rehabilitation services; and*

*encouragement of safety.*

The achievement of these basic objectives is dependent on an equally important fifth objective:

*an effective system for delivery of the benefits and services.*

After discussing these five objectives in turn, we shall examine a distinctive attribute of workmen's compensation: the program is designed to assure that the objectives reinforce each other.

#### (1) Workmen's Compensation Should Provide Broad Coverage of Employees and Work-Related Injuries and Diseases

Workmen's compensation protection should be extended to as many workers as feasible, and all work-related injuries and diseases should be covered.

**Coverage of employees.** Among the many reasons given for the lack of universal coverage of employees is that many of the currently excluded firms are small or have poor safety records and are reluctant to bear the cost of workmen's compensation. This argument is not convincing. Many States have been able to extend their laws to virtually all employers without undue financial distress. An economic advantage of coverage is that employers are relieved of possible liability in damage suits. Moreover, if the costs of newly covered employers are high, this means that employees and society were previously absorbing the costs of work-related impairments and deaths through enforced poverty or welfare payments. We be-

lieve these costs should be assessed against employers, not against the disabled or the ordinary taxpayer.

Another factor in the exclusion of certain occupations from workmen's compensation is that these groups, such as household workers, lack political influence. We believe that this explanation, while historically accurate, is unacceptable as a basis for a modern workmen's compensation program. Another historic reason for excluding certain workers was the constitutional requirement of due process. At one time, the due process standard forced States to make their laws elective, so that the laws embraced primarily work that was especially dangerous. Today, the constitutional limitations of due process have little or no relevance to workmen's compensation.

More cogent arguments against extending workmen's compensation to certain classes of employees are based on administrative feasibility. If certain employers, such as homeowners or owners of small farms, were required to cover all of their employees, many of whom are casual, the administrative burden on employers, insurance carriers, and State workmen's compensation agencies would be substantial. A related argument is that it is difficult to inform homeowners and other employers of casual labor of the coverage requirement. Because these arguments have some merit, our recommendations will reflect our concern for these conditions, while manifesting our primary interest in protecting workers, regardless of who are their employers.

A final argument against universal mandated coverage is that it limits the ability of employees and employers to decide freely how much protection against work-related injuries and diseases is desirable. In the absence of workmen's compensation, the parties would be free to negotiate contracts concerning the risks of industrial disabilities, or each party could individually purchase insurance.

For several reasons we do not find the freedom-to-contract plea convincing. A classic point against that plea is that employees do not have equal bargaining power with their employers, particularly when employees are not unionized. An even more compelling reason for mandatory insurance is that the task of selecting a job is complex. Most workers are unlikely to

assess properly the probabilities of being exposed to work-related impairments. Often employees and employers are contemptuous of the risks they assume. We believe that society can appropriately mandate workmen's compensation coverage as a way of insuring that those injured at work do not become destitute.

**Coverage of injuries and diseases.** All work-related injuries and diseases should be covered by workmen's compensation. Of necessity, the meaning of "work-related" must be defined by statute and interpreted judicially, but injuries and diseases which are in fact work-related should not be excluded from coverage because of legal technicalities. On this basis, statutes which restrict coverage to a list of specified occupational diseases are incompatible with the objective of complete protection.

Arguments against broad coverage of injuries and diseases are sometimes similar to those against broad coverage of employees, e.g. the expense of full coverage. Experience refutes these theories: many States have succeeded with broad coverage of work-related injuries and diseases.

## **(2) Workmen's Compensation Should Provide Substantial Protection Against Interruption of Income**

Workmen's compensation must be an insurance program, not a welfare program. The availability and extent of cash benefits should not depend primarily on a beneficiary's economic needs, as in public assistance programs. Rather, the cash benefits for the disabled worker should be closely tied to his loss of income. The benefit formulas should also be carefully predetermined in order to reduce uncertainties of employees and employers about the possible consequences of injuries and diseases.

**Disability benefits.** The basic measure of the worker's economic loss is the life-time diminution in remuneration attributable to the work-related injury or disease. This can roughly be described as wage loss, although remuneration is composed of earnings plus supplements (Figure 1.1). Supplements include fringe benefits, such as health insurance, and legally mandated expenditures, such as employers' contributions for Social Security.

The appropriate measure of lost remuneration

**FIGURE 1.1. Elements of remuneration before and after impairment from injury or disease**

BEFORE IMPAIRMENT		AFTER IMPAIRMENT	
+	Basic wages and salaries	+	Basic wages and salaries
	Irregular wage payments		Irregular wage payments
	Pay for leave time		Pay for leave time
	Employer contributions for supplements		Employer contributions for supplements.
=		=	
Total remuneration		Total remuneration	
-	Taxes	-	Taxes
	Work-related expenses		Work-related expenses
			Expenses caused by injury or disease
=		=	
Net remuneration		Net remuneration	

See Table 3.1 for U.S. Department of Commerce definition of "compensation," which is equivalent to "total remuneration" in Figure 1.1

ation is not the difference between total remuneration before and after the disability. Rather, the difference in net remuneration before and after the disability should be considered. This comparison reflects factors that are affected by disability such as taxes, work-related expenses, some fringe benefits which lapse, and the worker's uncompensated expenses resulting from the work-related impairment.

Workmen's compensation should replace a substantial proportion of the worker's lost remuneration. From the standpoint of the worker, insurance against the full possible loss of remuneration is desirable. Replacement of a substantial proportion is justified by a feature of workmen's compensation which distinguishes the program from other forms of social insurance. In exchange for the benefits of workmen's compensation, workers renounced their right to seek redress for economic damages and pain and suffering under the common law. In no other social insurance program, such as Social Security or unemployment compensation, did workers surrender any right of value in exchange for benefits.

As discussed below, other objectives of workmen's compensation have implications for the proportion of lost remuneration that should be replaced, but the general conclusion stands: a substantial proportion of the disabled worker's lost remuneration should be replaced by workmen's compensation.

While workmen's compensation benefits

should be a substantial proportion of the worker's lost remuneration, there are reasons to set minimum and maximum weekly cash benefits. A low-wage worker, if totally disabled, may be unable to live on the same proportion of lost remuneration that is appropriate for most workers. To avoid committing such a worker to dependence on welfare, a minimum weekly payment may be needed. Of course, if another program, such as a family income maintenance program, were to guarantee a basic level of income for all workers, there might be no need for minimum benefits under workmen's compensation.

The arguments for maximum benefit are more troublesome. As long as benefits are linked to the losses in net remuneration caused by the work-related impairment, the task of providing incentives for return to work should be no more difficult for a worker with high earnings than for others. To argue that maximum benefits will reduce the costs of the program for employers is to ask disabled high-wage workers to bear a high proportion of their own lost remuneration. A somewhat more appealing argument for maximums is that highly paid workers presumably are able to provide their own insurance and to make decisions about risks. A maximum limit on benefits would provide high-income workers an opportunity to design their own insurance programs: if, for example, the maximum benefits would replace only half of a high-wage worker's lost remuneration, he may choose to increase his



private insurance. Another possible argument for maximums is that if one conceives of workmen's compensation benefits being paid out of a fixed fund, then other uses for the fund, such as an extended duration for permanent total benefits, may have a greater priority than the replacement of a high proportion of lost remuneration for well paid workers. A final argument is that if workmen's compensation engages in some income distribution to the low-wage workers through the device of minimum benefits, then the same philosophy justifies income redistribution at the expense of high-wage workers. We are not totally unsympathetic to this philosophy, but we emphasize again that the primary purpose of workmen's compensation is to provide insurance against interruption of income, not welfare or income redistribution. We conclude that there is an uneasy case for maximum and minimum benefits as long as they do not distort the primary insurance function of workmen's compensation.

**Impairment benefits.** In the preceding paragraphs, we argue that the primary basis for determining workmen's compensation income benefits should be the remuneration lost by the worker because of disability. As noted in Section A, many States also provide cash benefits because of work-related impairment (See Glossary), even if this does not result in lost remuneration. We believe that, within carefully designed limits, impairment benefits are appropriate, but they should be of secondary importance in a modern workmen's compensation program and the amount of such benefits should be limited.

The argument for impairment benefits is that many workers with work-related injuries or diseases experience losses which are not reflected in lost remuneration. Permanent impairment involves lifetime effects on the personality and on normal activity. This factor suggests that workmen's compensation benefits should not be tied solely to lost remuneration.

There are several reasons, however, why impairment benefits should be of limited number and amount. One is the historical exchange, or *quid pro quo*, which we believe is of continuing validity insofar as impairment benefits are concerned. The *quid* is the principle of liability without fault, which means that many workers qualify for workmen's compensation benefits

who could not qualify for damages under negligence suits. The *quo* is that an employer's liability is limited. The employer's liability is less in some workmen's compensation cases than it would be under negligence suits, where awards can include payments for full economic loss, pain and suffering concurrent with an accident, and the non-financial burdens of permanent impairment.

The objective of an effective delivery system also requires limits on impairment benefits. The determination of the degree of impairment is inherently complicated and expensive. If benefits linked to the degree of impairment play a secondary role in workmen's compensation, there will be far less time consumed in evaluating such claims.

For these reasons, we believe that the primary basis for determining workmen's compensation benefits should be lost remuneration, and that cash benefits for impairment should be limited.

### **(3) Workmen's Compensation Should Provide Sufficient Medical Care and Rehabilitation Services**

Too often workmen's compensation is viewed simply as a cash indemnity to pay the disabled worker for loss of earnings or impairment or both. The cash benefits are important, but equally so are medical care and rehabilitation services. The objectives of workmen's compensation include repair of the damage both to earning capacity and the physical condition of the worker.

A proper medical care and rehabilitation program is a triad of functions. First, high quality medical care must be provided to restore promptly the patient's abilities or functions. Medical care includes not only hospitalization and medical and surgical services but also a wide variety of treatment and supplies furnished by health professionals such as physical therapists. Second, vocational counselling, guidance, or retraining may become necessary if the worker suffers a job-related loss of endurance or skills needed to perform accustomed duties. The third step of rehabilitation is restoration to continuing productive employment.

These three functions can be achieved only if disabled employees receive prompt and sufficient medical care with continuous physical

and vocational rehabilitation as long as restorative efforts are justifiable. Positive incentives that encourage disabled workers, employers, insurance carriers, and administrative agencies to provide and utilize appropriate rehabilitation services should be built into a modern workmen's compensation program.

Rehabilitation is not a mere gesture of social responsibility: it is economic wisdom. With a relatively small investment of resources, many disabled workers can be returned to productive jobs where they are again self-sufficient and where their efforts increase the total yield of goods and services. At the same time, restoration relieves others of the burden of supporting the disabled.

There is economic wisdom in efforts to improve the worker's physical condition even when the expenditures cannot be justified by the gain in earning capacity. The worker's feeling of worth and well-being is a legitimate concern. Nevertheless, it is reasonable to place some limits on the employer's liability for rehabilitation benefits which do not increase the worker's earning capacity. Expenditures for rehabilitation that will not enhance a worker's earning capacity do not deserve priority over other uses for those rehabilitation resources outside of the workmen's compensation system.

A further function of rehabilitation is to offer incentives to employers to put the beneficiaries of rehabilitation services on the payroll. Some employers feel that should such workers again suffer from a work-related injury or disease after being hired, the rise in their insurance costs will be substantial. In order to remove that barrier to employment of the rehabilitated, statutes should provide for procedures to limit the employer's liability for pre-existing impairments.

#### **(4) Workmen's Compensation Should Encourage Safety**

Workmen's compensation should encourage safety directly by providing economic incentives for each firm and employee, and indirectly by providing incentives for increased output in firms and industries having fewer work-related injuries and diseases.

First, workmen's compensation should encourage each employer to utilize safety devices and methods and to stimulate employees

to observe safe practices. Proper allocation of the costs of work-related injuries or disease, including lost wages and production and accidental damages to property, can provide a powerful economic incentive for safety programs. Because the employer's control over working conditions far exceeds that of the employee, we believe that assigning to the employer the largest portion of the costs of work-related injuries and diseases will best serve the objective of safety.

It might be argued that the appropriate way to assess the cost of work-related impairments is on a case-by-case basis, with the burden assigned in proportion to each party's negligence. This scheme, however, would be inherently litigious and would clearly violate the objective of an effective delivery system, discussed below.

In order to provide the most powerful direct incentives to safety, we believe in strengthening the concept of relating each employer's workmen's compensation costs to the benefits paid to his employees.

Second, workmen's compensation can indirectly encourage safety by strengthening the competitive position of firms and industries which have superior safety records. It does this by allocating the costs of work-related injuries and diseases to the appropriate firms and industries. An industry with high workmen's compensation costs owing to a poor safety record may have to increase its prices. Consumers will then tend to patronize industries with low rates of injury and disease. Within an industry, the firm with an inferior safety record will tend to have higher costs and lower profits than its direct competitors, who consequently are more likely to prosper and grow.

#### **(5) There Should Be an Effective Delivery System for Workmen's Compensation**

An effective system for the delivery of benefits and services, as relevant for workmen's compensation as for any other program, is needed to insure that other program objectives are met efficiently and comprehensively.

Comprehensive performance means that the participating personnel and services are of sufficient number and quality to serve the program's objectives. The personnel and institutions contributing to a comprehensive perform-

ance include employers, insurance carriers, attorneys, physicians, and State courts and workmen's compensation agencies.

Efficient performance means that a given quality of service, such as the treatment necessary to restore the functions of an injured hand, is provided promptly, simply, and economically. The efficiency of a program may be judged by comparing its performance with similar activities inside and outside the system. To justify itself, workmen's compensation should meet its objectives more economically than any other system of delivering such benefits. Within the system, functions should be designed and performed with the least expense for a given quality of service.

### The Interrelationship of the Objectives of Workmen's Compensation

Although in the preceding parts of this section we discuss the objectives of workmen's compensation separately, the program is designed to serve its several objectives simultaneously and automatically. The degree to which workmen's compensation serves multiple objectives simultaneously is a feature which distinguishes it from other social insurance programs.

To the extent that the objectives of workmen's compensation are complementary, the interrelationship or linkages built into the program are desirable. For example, the replacement of a high proportion of lost remuneration by income benefits provides a spur to safety

efforts by employers, since the benefits are charged against the employer via experience rating. Conversely, if an inadequate proportion of lost remuneration is replaced by income benefits, then the stimulus to safety will be inadequate. In this way the objectives of safety and replacement of lost remuneration reinforce each other.

On the other hand, to the extent that the objectives of workmen's compensation are in conflict, the linkages compel compromises or trade-offs. For example, the rehabilitation objective suggests that the portion of the disabled worker's lost remuneration replaced by cash benefits should be low enough to provide the worker with an incentive to return to work. This reduction, however, conflicts with income protection and safety objectives. In the abstract, there is no "correct" balance between conflicting objectives. We give serious consideration to such conflicts when, in Part Two, we frame our specific recommendations.

\* \* \*

We have suggested five objectives for a modern workmen's compensation program. We believe that workmen's compensation can and should be designed to make positive use of the interrelationships among these objectives. Because the accommodation of these five interrelated objectives is itself so complex a task, we emphatically discourage the use of workmen's compensation to meet the objectives of other programs.

## REFERENCES FOR CHAPTER 1

Introduction, See *Compendium*, Chapter 1  
 Section A, See *Compendium*, Chapter 4  
 Section B, See *Compendium*, Chapters 2 and 3  
 Section C, See *Compendium*, Chapter 3

The *Compendium on Workmen's Compensation* was prepared for the National Commission on State Workmen's Compensation Laws. References for data cited in this *Report* are included in the *Compendium*, but the Commission does not endorse all ideas expressed in the *Compendium*.

## **Part Two**

# **Evaluations & Recommendations**

Evaluations of present workmen's compensation programs,  
with Commission recommendations for coverage,  
income benefits, medical care and rehabilitation;  
safety, and delivery system

## **Chapter 2**

# **The Appropriate Scope of Workmen's Compensation**

A basic objective of workmen's compensation is to provide broad coverage of employees and of work-related injuries and diseases. Section A in this chapter considers which employees should be covered; Section B discusses which injuries and diseases should be compensable; and Section C takes up the relationship between workmen's compensation and other possible remedies for work-related impairments and deaths.

### **A WHICH EMPLOYEES SHOULD BE COVERED**

Most employees in the United States are covered by workmen's compensation, but coverage is not universal. In 1970, the latest year for which coverage data are available, 83 percent of employed wage and salary workers in the 50 States and the District of Columbia were cov-

ered by workmen's compensation. (Table 2.1) At the same time, variations among the States were pronounced in the proportion of workers covered. (Table 2.2) Of the 50 States, 13 covered more than 85 percent of their workers, but 15 covered less than 70 percent. Typically, the States with more extensive coverage also on the average had larger work forces, so that 51 percent of all employees in the United States (excluding Federal and railroad workers) lived in the District of Columbia or the 13 States which covered more than 85 percent of their workers. Statutory extensions of coverage as a result of 1971-72 amendments have probably increased total coverage to about 85 percent of all employees.

Three general factors account for the deficiencies in coverage. First, some laws exclude certain classes of employment, such as farming, small business, or non-hazardous occupations. Second, a number of State laws are not

**TABLE 2.1. Estimated number and percentage of workers covered by workmen's compensation in the 50 States and the District of Columbia, 1940-70**

Year	Employed wage and salary workers (millions) <sup>a</sup>	Covered by workmen's compensation (millions) <sup>b</sup>	Percentage employees covered
1940	34.8	24.2-25.0	70.8
1946	42.6	32.3-33.2	76.8
1956	53.6	42.8-43.1	80.2
1966	64.6	53.5-53.8	83.1
1970	70.6	58.8-59.0	83.4

a Includes workers in private industry and civilians in Federal, State, and local government.

b Includes coverage required by law and by voluntary election by employer.

Sources. Covered Workers: *Social Security Bulletin*, October 1970 and January 1972, Social Security Administration, U.S. Department of Health, Education, and Welfare. Employed wage and salary workers: *Employment and Earnings*, various issues, Bureau of Labor Statistics, U.S. Department of Labor.

**TABLE 2.2. Actual workmen's compensation coverage as a percentage of potential coverage in various jurisdictions, 1970**

Jurisdictions	Less than 70%	70 to 84.9	85% or more
States (50)	15	22	13
Other "States" (6)	NA	NA	1 <sup>b</sup>
Federal	0	1 <sup>a</sup>	0

a Number of workers under Federal workmen's compensation programs (FECA and LHWCA) as a percent of workers under these laws plus those under Federal employer liability acts which apply to railroad employees and merchant seamen (FELA and Jones Act). This way of accounting for workers under Federal law demonstrates that some workers over whom the Federal government has taken jurisdiction are not protected by workmen's compensation.

b District of Columbia.

See Table 2.3 for other explanatory notes.

compulsory, and some employers or employees do not elect to be covered. Finally, but probably of limited significance, some employers fail to meet their legal obligation to provide coverage.

## Mandatory Universal Coverage

Our conclusion in Chapter 1, based on a consideration of all the arguments for and against universal mandatory coverage, was that such coverage is warranted, subject to possible minor limits for administrative reasons. There has been a definite trend towards increased coverage in the period since World War II, as coverage of workers has risen from about 77 percent to about 85 percent. But coverage still is not adequate, and if the trend of the past 25 years is projected into the future, universal coverage will not be achieved for almost 50 years.

The inequities of wide variations among the States in the proportion of labor force covered are compounded by the nature of the exclusions. The occupations typically excluded from coverage, such as household workers and farm help, are disproportionately low-income, less educated, non-white, and female—those least able financially of carrying the burden of disability by themselves.

Our goal of universal and mandatory coverage can be achieved if our specific recommendations are adopted.

**Compulsory laws.** That workmen's compensation laws should be compulsory, not elective, has been recommended by a number of sources. (Here and elsewhere in this report, we refer to two sources of recommendations: the recommended standards of several organizations, as compiled and published by the U. S. Department of Labor, and the "Workmen's Compensation and Rehabilitation Law" of the Council of State Governments [the Model Act]. Several of our recommendations differ from theirs, but these sources provide a convenient reference to standards which reflect earlier deliberations and which are widely accepted as desirable.)

The Model Act and the standards published by the Department of Labor recommend compulsory coverage. The considerable progress since 1946 still leaves more than one-third of the States in 1972 with elective laws. (Table 2.3) As noted in the opening chapter, the elective approach originally was based on contemporary interpretations of the Constitution. These constitutional mandates now are largely irrelevant. Even though most eligible employers in States

**TABLE 2.3. Jurisdictions with compulsory coverage, 1946-72**

Year <sup>d</sup>	States <sup>a</sup> (50)	Other "States" (6) <sup>b</sup>	Federal (2) <sup>c</sup>
1946	21	2	2
1956	25	4	2
1966	27	4	2
1972	31	5	2

a Alaska and Hawaii are counted among the States in 1946. Mississippi had no workmen's compensation law in effect until 1949.

b District of Columbia, Puerto Rico, Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands: designated as "States" by the Occupational Health and Safety Act of 1970. The Trust Territory of the Pacific Islands has no workmen's compensation law applicable in general to private employment. The law in Guam was enacted in 1952; that in the Virgin Islands in 1954; that in American Samoa in 1968.

c Federal Employees' Compensation Act (FECA) and Longshoremen's and Harbor Worker's Compensation Act (LHWCA).

d Evaluations of 1946-66 are as of December 31; for 1972, as of January 1.

with elective laws choose to be covered, others, who do not, deny their employees protection and shift to others their share of the burden of impairments. Employees excluded from coverage are forced to fall back on liability suits, a drawn-out, costly, and uncertain process that was dismissed long-ago as a means of dealing with occupational injuries and diseases.

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#### R2.1

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**We recommend that coverage by workmen's compensation laws be compulsory and that no waivers be permitted.**

Pursuant to this recommendation, coverage could not be avoided by action of an employee or his employer, or by agreement between them, or by other types of waiver.

**Numerical exemptions.** Coverage of all employers without regard to the number of employees has been recommended by the several prestigious bodies. The Model Act provides coverage of all employers with one or more employees, except for a few types of employers such as farmers and charitable organizations.

The standard published by the Department of Labor recommends no exemptions based on the number of employees. Even disregarding special exceptions for certain classes of employers, barely half of the States cover all employers without numerical exemptions. (Table 2.4)

**TABLE 2.4. Jurisdictions providing workmen's compensation coverage without exemptions based on the number of employees, 1946-72**

Year	States (50)	Other "States" (6)	Federal (2)
1946	19	1	2
1956	21	2	2
1966	23	3	2
1972	27	4	2

See Table 2.3 for explanatory notes.

There is no current justification for the exclusion of small firms from the coverage of workmen's compensation. That one-half of the States have been able successfully to cover firms with one or more employees suggests that there are no administrative factors which make such coverage infeasible.

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#### R2.2

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**We recommend that employers not be exempted from workmen's compensation coverage because of the number of their employees.**

As indicated below, there are a few occupations such as household workers which require special coverage rules, but there should be no numerical exemptions to coverage that are generally applicable to all employers.

**Exclusion of hazardous or nonhazardous occupations.** The argument for excluding hazardous occupations because of the high costs to employers is unacceptable: this exclusion transfers the costs of work-related injuries and diseases to employees and society in general. Neither are limitations of coverage to hazardous occupations justifiable, as the original constitutional requirements no longer pertain.

We recommend that workmen's compensation coverage be extended to all occupations and industries, without regard to the degree of hazard of the occupation or industry.

**Farmworkers.** Proposed standards of coverage for farm employment differ. The Model Act exempts agricultural employers who have fewer than three employees. The recommended standards published by the Department of Labor would cover farmworkers on essentially the same basis as other employees. Only about one-third of the 50 States now meet that standard (Table 2.5), although the number has increased steadily since the mid-1960's.

TABLE 2.5. Jurisdictions covering agricultural workers on the same basis as other workers, 1946-72

Year	States (50)	Other "States" (6)	Federal (2)
1946	6	1	2
1956	6	2	2
1966	10	2	2
1972	17	3	2

See Table 2.3 for explanatory notes.

The plight of the injured farmworker is no less serious than that of a worker in a manufacturing plant or a retail store. Indeed, the farmworker is the least likely to have personal insurance or savings. Administrative problems, however, make universal coverage for farmworkers more difficult to achieve than coverage for most other employees. The predominance of part-time help on farms, their geographical dispersion, and the fact that migrant farmworkers may work for many different employers during the course of a year present difficulties in reporting, rating, medical care, rehabilitation, and auditing.

New York has dealt with some of these administrative problems by requiring coverage of all farm laborers for the 12-month period beginning April 1, if the farmer's total cash payments to all employees during the preceding calendar year amount to \$1,200 or more. Several States, including California, Massa-

chusetts, New Jersey, Ohio, and Oregon, have found it administratively feasible to cover farmworkers on the same basis as all other employees. The use of group insurance covering several farms has eased the administrative burdens in some States.

Recognizing the desirability of as broad a coverage as possible and bearing in mind the transitional problems which may occur as a State moves towards full coverage,

We recommend a two-stage approach to the coverage of farmworkers.

First, we recommend that as of July 1, 1973, each agriculture employer who has an annual payroll that in total exceeds \$1,000 be required to provide workmen's compensation coverage to all of his employees.

The coverage requirement could be based on the payroll in the preceding year.

As a second stage, we recommend that, as of July 1, 1975, farmworkers be covered on the same basis as all other employees.

**Casual and domestic workers.** It is sometimes argued that since a household produces no goods or services which are sold to the public, then one of the original rationales for workmen's compensation—that the price of the product should bear the injury costs associated with the production of that product—is not applicable to household employees. This argument is unacceptable. In the first place, it is obvious that the household is both employer and consumer of the household worker's services and in the latter capacity should bear the cost of the worker's injuries. Second, the objectives of workmen's compensation, such as income replacement and rehabilitation, are as valid for a domestic worker as for any other kind of employee. Arguments concerning the proper allocation of the costs should not be permitted to thwart the achievement of these primary objectives.

Administrative burdens offer a more valid argument to be considered in determining coverage of household employees. By their numbers alone, employers of household workers create a formidable task of record-keeping and corre-



spondence. A single household may employ a bevy of transient, part-time workers, such as gardeners or babysitters, during a year. The number of new households and the constantly shifting location of households add to the difficulties of notification and auditing.

The Model Act gave careful attention to these considerations in determining coverage of domestic workers and casual employees of the household. Essentially, domestic workers are covered by the Model Act only if they work in a private home where there are two or more domestic workers regularly employed 40 or more hours a week. Casual workers are covered only if they work at least 10 consecutive work days at a private home or at the premises of an employer who has no other employees covered by workmen's compensation. In effect, these provisions materially reduce the numbers of employees and households to be covered.

Several States have mandated coverage which is more inclusive than the Model Act provisions. No State, however, covers domestic workers on the same basis as all other workers. New Jersey goes furthest by making households liable for compensation for domestic workers, but does not require households to carry insurance.

While administrative difficulties appear to make it impractical to extend complete coverage to domestic workers and casual workers around the home, nonetheless it is possible to go far beyond the coverage provided in most States at present.

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#### R2.5

We recommend that as of July 1, 1975, household workers and all casual workers be covered under workmen's compensation at least to the extent they are covered by Social Security.

Basically, Social Security coverage is extended to any worker who earns \$50 or more in cash in any calendar quarter from a single household. The coincidence between workmen's compensation and Social Security coverage for household workers will reduce the administrative burden on such coverage.

Many households could conveniently meet our recommendation if workmen's compensation protection were made a provision in every homeowner's insurance policy. Premiums

could be based on an estimate of the payroll for household workers in the policy year, subject to a premium revision on the basis of actual payroll.

**Government employees.** The Model Act suggests coverage of "every person in the service of the state or of any political subdivision or agency thereof." The laws in 44 States are compulsory for covered State employees, and are compulsory for local government employees in 36 States. All of the remaining States but one have elective coverage for public employees.

Because State and local government employment is increasing rapidly, the lack of full coverage is particularly disturbing. There is no reason to exclude government employees from coverage. Indeed, a State has a special obligation to set a good example for private employers.

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#### R2.6

We recommend that workmen's compensation coverage be mandatory for all government employees.

**Other classes of workers.** Other classes of workers, including professional athletes and employees of charitable organizations, have a history of special treatment under some workmen's compensation laws. The Model Act excludes employees of religious or charitable organizations having fewer than four employees.

Various reasons can be offered for such exclusions. Indeed, a cynic might say that a goal of some professional athletes is to injure one another and it seems illogical to compensate their injuries. We find such an argument unconvincing.

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#### R2.7

We recommend that there be no exemptions for any class of employees, such as professional athletes or employees of charitable organizations.

**Employers, partners, and self-employed workers.** Workmen's compensation coverage traditionally has been extended only to employees, not to employers, partners, or the self-employed. There is some justification for this limitation, since workmen's compensation was developed as a substitute for suits by employees

against their employers. Since an employer or self-employed person never had the right to sue himself for a work-related injury, the "substitution" of workmen's compensation for a non-existent right seems anomalous.

However, most of the objectives we have suggested for a modern workmen's compensation program are as relevant for an employer or the self-employed as for an employee. Therefore we are not convinced that the tradition of confining workmen's compensation to employees remains valid. A broad definition, such as the Model Act provides, would resolve the issue of who is an employee, so that no one need be denied benefits because he has some of the attributes of the self-employed.

Our recommendations are two:

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R2.8

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We recommend that the term "employee" be defined as broadly as possible.

Doubts as to whether a worker is an employee or a non-employee, such as an independent contractor, should be resolved so as to favor workmen's compensation coverage.

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R2.9

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We recommend that workmen's compensation be made available on an optional basis for employers, partners, and self-employed persons.

**Eligibility.** Workmen's compensation statutes traditionally have made a worker eligible for benefits from the first moment he is at work. This "instant" eligibility contrasts with the Social Security and unemployment insurance programs, which require workers to be employed for prescribed periods before they become eligible for benefits. We believe that a continued distinction in eligibility requirements between workmen's compensation and other programs is warranted. One reason is that under the common law a worker was eligible to seek redress for work-related injury from the first moment of employment. Also, new employees typically have a poor safety record and need the immediate protection of workmen's compensation.

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R2.10

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We recommend that workers be eligible for workmen's compensation benefits from the first moment of their employment.

**Employees with multi-state contacts.** Witnesses at our hearings provided several examples of the legal complications which result from injury to an employee who travels among the States. An airline pilot, for example, hired in State A by an airline with its corporate headquarters in State B, may have his regular base of operation in State C, and be scheduled on a flight that terminated in State D, but be injured on an intermediate stop in State E. While a case this extreme may appear to be an exercise in the hypothetical for the benefit of a law school class, we were impressed by the number of compensation cases with such complicated multi-state contacts. These present serious practical obstacles to American workers in their efforts to obtain workmen's compensation benefits.

One suggested remedy is that workers, such as airline stewardesses, with substantial multi-state travel should be placed under a separate Federal statute which would cover them wherever they were located. We do not believe this approach is desirable or equitable. Many employees, such as salesmen, truck drivers, corporate executives, union organizers, lawyers, and academic consultants, travel regularly among the States. We do not believe it is practical to decide which of these occupations are mobile enough to warrant the creation of a special act for their benefit, nor is it necessary as a feasible procedure is available which would substantially reduce the complications of claims with multi-state aspects.

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R2.11

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We recommend that an employee or his survivor be given the choice of filing a workmen's compensation claim in the State where the injury or death occurred, or where the employment was principally localized, or where the employee was hired.

States may wish to add additional bases for coverage, but if every State act were to include these three points of contact, there

would be an expeditious solution to problems arising from the multi-state aspects of workmen's compensation.

## B. WHICH INJURIES AND DISEASES SHOULD BE COMPENSABLE

Designers of a program which covers work-related injuries and diseases must decide where and how to draw the line between those which are and those which are not work-related. Common issues are: At what point does the employee, on his way to work, come so close to the employer's premises that an injury falls within the scope of the act? At what hours are such trips work-related? Especially perplexing are the issues deciding which diseases are work-related: for example, when should a heart attack or cancer be compensable?

In a discussion of these issues, it is important to distinguish carefully the several tests for compensability and to recognize the differences between the medical and legal aspects of the tests. Workmen's compensation benefits will be provided only when (1) there is an impairment (either temporary or permanent and either partial or total), or death, (2) caused by an injury or disease, (3) that is work-related. If these three tests are met, the system will provide medical and rehabilitation benefits (Chapter 4). In addition, cash benefits (Chapter 3) may be paid if additional tests for compensability are met. For example, eligibility for wage-loss benefits is conditional on a sufficient degree of "disability," i.e., actual wage loss or reduction in the ability to engage in gainful activity.

### Impairment and Disability

The distinction between the legal term "disability" and the medical term "impairment" is important. While interpretations of both concepts ultimately are decided in each case by the administrative agency or, upon appeal, by the courts, it is helpful to recognize the distinction between medical and legal issues and to structure the decision-making process to utilize, insofar as possible, medical expertise in resolving the medical issues.

The American Medical Association's recent publication, *Guides to the Evaluation of*

*Permanent Impairment*, properly recognizes the difference between impairment and disability. Impairment is a purely medical condition; it is any anatomic or functional abnormality or loss. Disability is not a purely medical condition. A worker is disabled when his actual or presumed ability to engage in gainful activity is reduced because of an impairment. The extent of disability may depend on an interaction between the impairment and non-medical factors such as the worker's age and education.

### Covered Injuries and Diseases

The legal and medical professions may assign different meanings to the terms "injury" and "disease." We use these terms in their medical sense, which means they are separate categories. (See Glossary) In many, if not all, States, "injury" has been interpreted in a legal sense to include some or all diseases. We have no quarrel with this use of legal terminology: our recommendations concerning injuries and diseases can easily be translated into a program which uses a broad definition of "injury."

**Injuries.** The first question which must be resolved is which injuries should be compensable. The traditional test for compensation has been "a personal injury" caused by an "accident." An "accident" has frequently been defined as a sudden unexpected event, determinate as to time and place. The "accident" requirement has been a bar to compensability, especially in the past, because of failure in a particular case to meet one or more requirements in this definition. Compensation, for example, has been denied when nothing unexpected or unusual occurred. If a man strained his back while doing regular work in the usual fashion, it was to be expected.

This narrow interpretation of "accident" has to a large extent been discarded. Where it persists, it is undesirable as it serves to bar compensation for injuries that are clearly work-related.

There should be no legal impediments to full coverage of all injuries which are work-related.

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R2.12

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We recommend that the "accident" requirement be dropped as a test for compensability.

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**Diseases.** The accident requirement has also served to bar compensation for work-connected diseases. Although many diseases contracted as a result of sudden unexpected exposure have been held compensable, e.g., pneumonia contracted while working in a sudden storm, compensation sometimes has been denied for diseases associated with chronic exposure to adverse agents in the work-setting.

States have remedied this situation in part by providing coverage for specific occupational diseases. Initially, this coverage was usually provided by listing compensable diseases in a schedule.

With advances in medical epidemiology and increased exposures to a growing number and variety of combinations of stresses, it became impractical to define work-related diseases by specific enumeration. Most States have therefore amended their statutes to provide full coverage of occupational diseases, in conformance with the recommended standard published by the Department of Labor. Table 2.6 indicates the considerable progress of the States in meeting this standard.

**TABLE 2.6.** Jurisdictions with full coverage of occupational diseases, 1946-72

Year	States (50)	Other "States" (6)	Federal (2)
1946	18	1	2
1956	30	3	2
1966	30	4	2
1972	41	5	2

See Table 2.3 for explanatory notes.

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**R2.13**

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We recommend that all States provide full coverage for work-related diseases.

### Work-Relationship of Injuries and Diseases

**Basic work-relationship test.** All States use the phrase "arising out of and in the course of employment" or a variant, as the test to determine when an injury or disease is work-related. This test covers questions of the scope

of employment, such as injuries at the physical edge of the employer's premises, or accidents during lunch breaks or other periods when the employee is not under the supervision of the employer, or injuries to salesmen while traveling. The test is used also to decide whether the injury was the result of the work: for example, injuries suffered as a result of horseplay, street risks, or criminal assault by third parties.

There is a substantial body of precedents interpreting the phrase "arising out of and in the course of." These interpretations are not uniform among or even within States, but we believe it is impossible to devise a tidy rule which will end the controversies. The drafters of the Model Act, after considering the "arising out of and in the course of employment" test concluded that, "Arguments could be made for various alterations, but the value of retaining the guidance afforded by hundreds of precedents was not found to be outweighed by any value that would be gained by adopting an unfamiliar and new formula."

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**R2.14**

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We recommend that the "arising out of and in the course of the employment" test be used to determine coverage of injuries and diseases.

A State may, of course, wish to use a more "generous" test for compensability. An example is Utah, where the test is "arising out of or in the course of employment."

**Application of the work-relationship test.** It is evident that an impairment or death which has as its sole cause a congenital or degenerative source is not compensable. Thus, an impairment due wholly to a birth defect is not compensable.

A serious problem for workmen's compensation occurs when the impairment or death is associated with several contributing factors, and the factors are both work-related and non-work-related, or when there is doubt about the etiology. A classic example is heart damage, which may result from an interaction of congenital, degenerative, and work-related factors. Diabetes is another example, because the etiology of diabetes includes hereditary and degenerative processes, but the symptoms may be aggravated by an incident or condition at work. Respiratory diseases may or may not be work-related. The determination of the etiology or

"cause" of a disease in a medical sense is often difficult or even impossible.

The question of when work-related factors, such as physical exertion or emotional strain, can trigger a heart attack is a subject of some controversy among scientists. It is beyond the competence of this Commission to decide when certain impairments, such as heart disease, are work-related in a medical sense. Workmen's compensation nevertheless must make some legal rules which can be superimposed upon the medical issues of causation for those impairments or deaths which arguably are work-related. The question is how to construct a practical application of the phrase "arising out of and in the course of employment" in a test for compensability of injuries or disease.

Several considerations govern our recommendations for evaluating the relationship of employment to impairment. As the basic purpose of workmen's compensation is to protect the employee, we believe in the traditional practice of resolving doubts in favor of the employee. At the same time, we do not believe that workmen's compensation should be converted into a general insurance scheme: its function is not to protect against all sources of impairment or death for workers. One of its objectives is to provide incentives for employers to improve their safety record. Impairments to his workers from non-work-related sources are largely beyond an employer's control. Moreover, there are many private and public benefits which are available to workers and their families regardless of the source of disability or death. Therefore, despite our sympathy for resolving doubts in favor of employees, we would not extend workmen's compensation to cover impairments and deaths that are not work-related.

Another consideration is that one objective of a modern workmen's compensation program is an effective delivery system, which requires accurate and prompt resolution of issues. Procedures or rules that help to promptly resolve issues of causation of disease or injury facilitate effective delivery and reduce administrative costs.

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R2.15

We recommend that the etiology of a disease, being a medical question, be determined by a disability evaluation unit under the control and

supervision of the workmen's compensation agency.

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R2.16

We further recommend that for deaths and impairments apparently caused by a combination of work-related and non-work-related sources, issues of causation be determined by the disability evaluation unit.

The decisions of the disability evaluation unit should be accepted as conclusions of fact and should be reviewed by the workmen's compensation agency or State court only under the normal rules governing appellate courts in their review of fact determinations. (A general discussion of the composition and role of the disability evaluation unit is contained in Chapter 6.)

The crucial question in the application of the work-relationship tests is: What is the extent of the employer's liability when the impairment or death is determined to be a result of both non-work and work-related sources? In general, an employee has been eligible for full workmen's compensation benefits if any non-trivial portion of his disability was due to a work-related source.

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R2.17

We recommend that full workmen's compensation benefits be paid for an impairment or death resulting from both work-related and non-work-related causes if the work-related factor was a significant cause of the impairment or death.

This recommendation concerns only the amount of the workmen's compensation benefit, not the source of financing the benefits within the program. As discussed in Chapter 4, benefits for impairments resulting from work-related and non-work-related factors may be partially financed by the employer and partially by a second-injury fund.

#### **C. THE RELATIONSHIP BETWEEN WORKMEN'S COMPENSATION AND OTHER POSSIBLE REMEDIES FOR WORK-RELATED IMPAIRMENTS AND DEATHS**

If the previous recommendations in this chapter are adopted by the States, almost all

workers will be protected from the consequences of work-related injuries and diseases. For some workers, remedies other than workmen's compensation are available if they are disabled because of a work-related injury or disease. The proper relationship between workmen's compensation and programs such as Social Security and retirement programs, which are available to eligible workers without regard to whether or not their impairment was work-related is discussed in Chapter 3. Here we consider the relationship between workmen's compensation and other potential remedies confined to work-related injuries and diseases.

### Workmen's Compensation and Damage Suits

Damage suits against employers by workers injured on the job are a possible substitute or supplement for workmen's compensation benefits. For reasons detailed in Chapter 7, we believe these suits are inappropriate.

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R2.18

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We recommend that workmen's compensation benefits be the exclusive liability of an employer when an employee is impaired or dies because of a work-related injury or disease.

Employees may be injured on the job because of the negligence of a third party, such as a supplier of defective machinery. In most States, an employee has the right to sue a negligent third party and, if successful, generally is obligated to repay his employer for some or all of his workmen's compensation benefits. The most troublesome aspect of these suits occurs when the third party is performing a role normally performed by the employer, such as safety inspection. It seems anomalous in such cases to permit an employee to sue a third party, such as a carrier, for the negligence in safety inspections when the employee could not sue his employer for similar negligence.

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R2.19

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We recommend that suits by employees against negligent third parties generally be permitted. Immunity from negligence actions should be extended to any third party performing the normal functions of the employer.

### Programs for Previously Uncovered Workers

Our recommendations would extend workmen's compensation coverage to virtually all employees and provide protection against the consequences of all work-related injuries and diseases. What should be done about workers now disabled because of past work-related injuries or diseases, but who are not receiving workmen's compensation benefits because at the time of initial impairment they were working in uncovered employment or their injuries or diseases were not then deemed compensable? This question has become particularly important because of the 1969 enactment of the Federal Coal Mine Health and Safety Act which provides cash benefits to workers suffering from pneumoconiosis or to the dependents of workers who died from the disease. This "Black Lung" legislation partially reflects the historically inadequate coverage of occupational diseases in some State laws. Presently, payments under the 1969 Act are running about \$35 million per month and are paid from general revenues of the Federal government. Some estimate that, as a result of the 1972 amendments to the Act, payments will increase to as much as \$1 billion per year. Since the benefits paid by the 50 State workmen's compensation programs total about \$3 billion per year, it is apparent that the Federal government is making a substantial effort to rectify the inadequate occupational disease coverage in prior workmen's compensation statutes.

The Black Lung legislation returns full responsibility to the States and private employers for all cases originating after January 1, 1974. We believe it is essential in a modern workmen's compensation program for employers to bear the cost of work-related injuries and diseases. We endorse the timetable adopted by Congress in 1972 for shifting financial responsibility to employers.

### REFERENCES FOR CHAPTER 2

Section A, See *Compendium*, Chapters 4, 7, and 10  
 Section B, See *Compendium*, Chapters 4, 12, and 20  
 Section C, See *Compendium*, Chapters 5, 12, 19, and 20

The *Compendium on Workmen's Compensation* was prepared for the National Commission on State Workmen's Compensation Laws. References for data cited in this *Report* are included in the *Compendium*, but the Commission does not endorse all ideas expressed in the *Compendium*.