Chapter 6

The Effective Delivery System Objective

An effective delivery system, the fifth objective of a modern workmen's compensation program, is required in order to achieve the four basic objectives: complete coverage, adequate income maintenance, necessary medical care and rehabilitation, and safety incentives. Such a system enlists both private and public organizations including insurance carriers, courts, and workmen's compensation agencies. A variety of individuals are also involved, including employers, employees, attorneys, and physicians.

An effective delivery system is a means to an end, not an end in itself. Its performance is evaluated relatively in comparison with other systems and absolutely by the degree of accomplishment of the four basic objectives of workmen's compensation.

As originally conceived, the workmen's compensation delivery system was to be self-administering. It was expected that, with elimination of the fault concept and the prescription of benefits by statute, employees would be able to protect their interests without external assistance. The hope for self-administration was overly optimistic.

It has become clear that workmen's compensation claims and statutes are, in practice, much more complex than anticipated. Determination of compensability and the extent of disability are inherently controversial. Nevertheless, litigation might have been less frequent had State agencies provided enough positive assistance to workers who were unable by themselves to deal with the complexities of the law. For budgetary and other reasons, most States have not provided such aid. Consequently, the void has been filled by an active plaintiff's bar.

Claimant's counsel have in fact contributed to the performance of the system to the degree they have protected employees' rights.

Their arguments in court through the years have liberalized interpretations of conventional tests for compensability and they have supported many legislative improvements.

The participation of attorneys, however, has not been without costs. In almost every State, claimants' attorneys' fees are deducted from awards to the workers. Their fees, while reflecting considerable service to employees, are a significant proportion of the total monetary cost of workmen's compensation. Less obvious costs of litigation which affect the performance of the delivery system may be even more substantial. These costs include delays and uncertainties resulting from legalistic jousting over means of determining benefits, as well as the immeasurable cost of interference with or delay of rehabilitation of the disabled. An equally tragic side-effect of litigation is the tendency to polarize attitudes of labor and management to the extent that both resist reforms that would be to their common advantage.

Workmen's compensation can be undermined by excessive litigation. It would be possible for the administrative agency to eliminate most of the need for counsel by providing assistance to employees. However, when the agency fails them in this regard few employees without counsel are prepared to negotiate with representatives of employers or insurers. The delivery system can perform well without outside counsel for impaired employees only if State agencies both receive authority commensurate with their responsibility and are given the staff and budget sufficient to fulfill their obligations.

In a modern workmen's compensation program, a State agency has six primary obligations.

First, in order to insure that the basic objectives of the program are met, the agency must take the initiative in administering the law.

Second, the agency must continually review the performance of the program and be willing to change its own procedures. It must request the State legislature to amend the law in order to meet the changing needs of the program.

A third obligation of a workmen's compensation agency is to advise workers of their rights and obligations under the law and to assure that they receive the benefits to which they are entitled.

Fourth, the agency should apprise employers and carriers of their obligations and rights under the law. Other parties in the delivery system, including physicians and attorneys, should also be informed of their obligations and privileges.

Fifth, the agency should assist in voluntary and informal resolution of issues. The agency should make sure that such voluntary agreements are consistent with the law. An agreement which the concerned parties are prepared to accept must, if inappropriate, be prohibited.

Sixth, the agency must adjudicate claims which cannot be resolved voluntarily. Adjudication, however, should be a secondary task. If the agency is performing well in fulfilling the first five obligations, there will be little need for adjudication.

A. ADMINISTRATIVE ORGANIZATION

In order for these six administrative obligations to be fulfilled, careful design of the administrative organization and of the procedures of the workmen's compensation program is necessary.

Current Patterns of Structure

The administrative structure of workmen's compensation in the various States can be catalogued in several dimensions. One relates to the responsibilities of the administrator. There are two general approaches to responsibilities of the chief administrator. In about half of the States, the chief administrator has administrative duties only. He is not an adjudicator. The administrator either is responsible to the Governor; to a State cabinet officer, such as the Commissioner of Labor; or to the workmen's compensation commission, which is composed of members of an appeals board.

The second approach makes the chief administrator an adjudicator as well. In some States, the chief administrator is a designated member of the commission that rules on contested claims, and in others, the entire commission is assigned the administrative responsibilities.

A third approach is used only in Louisiana, where there is no administrator: the work-

men's compensation program is court administered.

Another dimension for cataloguing administrative structures concerns the forum to which disputed claims are first referred. In five States, these claims are assigned to the same courts that handle general litigation. In 45 States, contested cases are assigned to adjudicators who handle workmen's compensation claims only.

The cataloguing of administrative structure on these two bases does not convey adequately the extent of differences among the States. Some commissions that have administrative or adjudicatory responsibility for workmen's compensation also carry other unrelated responsibilities. The Ohio Industrial Commission, the State's final level of appeal for workmen's compensation, also manages the State insurance fund. In New York, the Workmen's Compensation Board also runs the temporary disability insurance program, which pays short-term cash benefits to workers disabled from non-work-related sources.

States also differ in the degree to which they perform the six cited obligations. Some States do little else than adjudicate contested claims.

Analysis and Recommendations on Structure

The key to an effective delivery system is the agency's active pursuit of the administrative obligations. If these are fulfilled satisfactorily, the number of claims which require adjudications should be low. The thrust of the system should be to create an ambience of protection and mediation rather than adjudication.

R6.1

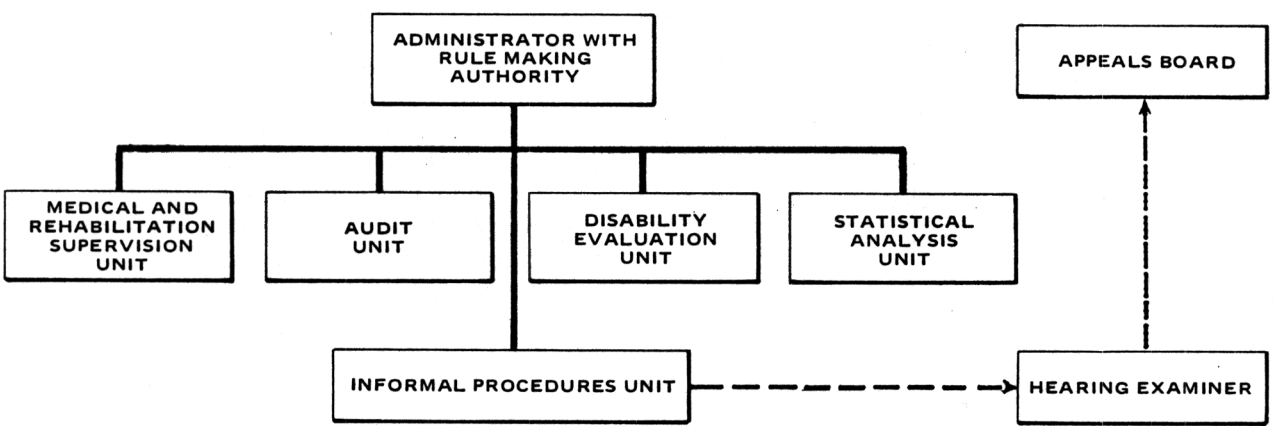
We recommend that each State utilize a workmen's compensation agency to fulfill the administrative obligations of a modern workmen's compensation program.

To give proper attention to its administrative obligations, the agency should carry out all the functions contained in Figure 6.1. This figure is not intended as a model organizational chart for every State to emulate. It is offered as a short summary of the functions that should be performed by a State. We recognize that the precise manner in which a State performs these functions must be adapted to local factors, including the State's size and history. The functions of the units in Figure 6.1 are described below.

Administrator. There should be one person responsible for the administration of the agency. He should have the authority to supervise all employees of the agency except the members of the appeals board. In addition, he should have the power to hire hearing examiners and all other employees, and the power to reward or penalize, subject to civil service regulations, according to the performance of duties. The administrator should prepare the budget for the agency.

The recent tendency, particularly in larger States, has been to make the chief administrator a full-time employee with no adjudicatory responsibilities and independent of the appeals board. In general, we believe this is a desirable policy. The agency under our recommendations will have substantial nonadjudicatory obliga-

FIGURE 6. Hypothetical organization chart of Workmen's Compensation Agency



tions. One person should be responsible for these obligations. Some States, however, have been able to meet most of the obligations of a modern workmen's compensation program even though the chief administrator is an adjudicator or under control of the appeals board. We support these arrangements where they have proved effective.

Informal procedures unit. We believe that one of the most important aspects of administration of workmen's compensation is the agency's responsibility for utilizing a positive program to provide assistance to workers. A unit following informal procedures should supervise all claims in their initial stages, including those disputed. The unit should help all concerned to reach voluntary agreements consistent within the dictates of the act, without necessarily resorting to legal advocacy. Only if the unit fails in this task should claims be assigned to hearing examiners for formal procedures leading to adjudicative awards.

In some States, especially small ones, the same official might attempt informal settlement of a disputed claim with authority to assume the role of a hearing examiner and make a formal determination only if informal procedures fail. However, the distinctive difference between informal procedures and formal hearings will perhaps best be protected if the agency assigns different personnel to these respective functions.

Medical and rehabilitation supervision unit. This unit should actively monitor and supervise all medical care and physical and vocational rehabilitation services. It must have responsibility and authority to order appropriate medical and rehabilitation care, subject to review of the administrator and consultation with appropriate health authorities. (See Chapter 4.)

Disability evaluation unit. This unit should assist the agency to determine (a) the extent of a worker's impairment due to a work-related injury or disease, and (b) the degree of disability that results from the impairment. The impartial unit's professional services can be available to the informal procedures unit, to the hearing examiner, and to the appeals board.

In smaller States, the disability evaluation unit and the medical and rehabilitation supervision unit might be combined, although the two functions differ considerably.

Audit unit. The audit unit should monitor the agency's performance in complying with the law and in treating approved claims consistently. The unit can sample reports of settlements reached by informal procedures and decisions of the adjudicatory process, including awards by hearing examiners and the appeals board. It should also review settlements reached voluntarily without direct participation of agency officials. In one State, such reviews of voluntary payments had the effect in a few years of raising the volume of awards acceptable to the agency from 35 percent to 80 percent of the total number of voluntary agreements. The audit unit also can monitor the performance of carriers and self-insurers in following the progress of beneficiaries and the delivery of payments.

Statistical analysis unit. This unit has the general responsibility for collecting and interpreting data on administrative operations. These interpretations guide the administrator's decisions on regulations and agency procedures and serve also to demonstrate to the legislature a basis for opposing or supporting statutory changes.

Staff

The quality of experience and the job security of agency employees can have an important bearing on the effectiveness of the agency's operations. There is considerable variation among the States in the length of terms of the members of the appeals board and in the job security or career protection provided to the administrator and other employees. In some States, employees have civil service status or other forms of protection. In others, employees have little job security.

Arguments supporting long terms for members of the appeals board and protected job status for other employees include: continuity of the staff, insulation from politics, and the opportunity for long-term or protected employees to become proficient in the technicalities of workmen's compensation. The primary argument against indefinite tenure is that it might be desirable to hold the Governor accountable for agency operations, in which circumstance he would require authority to select agency policymakers. The conflict in the arguments over

tenure is most difficult to resolve concerning the status of the administrator. We believe a blending of the security and accountability factor is necessary.

R6.2

We recommend that in those States where the chief administrator is a member of the appeals board, the Governor have the authority to select which member of the appeals board or commission will be the chief administrator. In those States where the administrator is not a member of the appeals board or commission, his term of office should either be indefinite (where he serve at the pleasure of the Governor) or be for a limited term, short enough to insure that a Governor will, sometime during his term of office, have the opportunity to select the chief administrator.

Arguments in favor of longer terms and substantial job protection for members of the appeals board are stronger than for the chief administrator.

R6.3

We recommend that the members of the appeals board or commission be appointed for substantial terms.

R6.4

We also recommend that agency employees be given civil service status or similar protection.

Once they have satisfactorily completed their probationary period, agency employees should be removed only for just cause.

R6.5

We recommend that the members of the appeals board or commission and the chief administrator be selected by the Governor subject to confirmation by the legislature or other confirming body. The other employees of the agency should be appointed by the chief administrator or selected in accordance with the State's civil service procedure. Insofar as practical, all employees of the agency should be full-time, with no outside employment. Salaries should be commensurate with this full-time status.

Advisory Committees

Many workmen's compensation agencies use some form of advisory committee or advisory council. The basic purposes of an advisory committee are to expose the administrator to a broad range of experience on which he can formulate his program and to give him a broad base of support in obtaining necessary legislative changes.

The testimony presented at our hearings suggests that the laws in some States have developed in a patch work fashion, as judicial interpretations and statutory amendments have been grafted onto the original statutes. A thorough and detailed examination of the workmen's compensation law appears necessary in most States.

R6.6

We recommend that an advisory committee in each State conduct a thorough examination of the State's workmen's compensation law in the light of our Report.

This advisory committee could be composed of representatives of the workmen's compensation board, insurance carriers, business, labor, the medical profession, the legal profession, and educators, all having special expertise in workmen's compensation, and representatives of the general public. *Ex officio* members drawn from the legislature or from the Governor's office could also be included.

Methods of Financing

No administrative agency will perform its responsibilities effectively and efficiently unless it is adequately staffed and financed. There must be sufficient resources for the agency to carry out its task. Financing of workmen's compensation must not be subject to wide swings from year to year.

Several methods of financing the cost of administration currently are used. These include appropriations from general revenue, income from the operation of the State workmen's compensation insurance fund, assessment on insurance premiums, licensing fees for employers or carriers, and an ear-marked payroll tax. The most common method is to assess the premiums

collected by the insurance carrier, private or State, and to make an equivalent assessment against self-insurers.

R6.7

We recommend that the workmen's compensation agency be adequately financed by an assessment on insurance premiums or benefits paid plus an equivalent assessment against self-insurers.

Normally, the funds collected are placed in a special fund from which the legislature appropriates money for the budget of the workmen's compensation agency. This method of financing has a record of success.

We also suggest consideration of the Model Act's proposal for handling balances in the fund at the end of the appropriation period. The balances are carried forward into the next appropriation period for the use of the workmen's compensation agency. If the fund reaches a surplus level, there is a choice of reducing the assessment on the employers or transferring the excess to another of the special funds within the workmen's compensation program, such as the second-injury fund. The fund should not be used for purposes outside the workmen's compensation program.

B. THE PROCESSING OF WORKMEN'S COMPENSATION CLAIMS

This section indicates, in general terms, the procedures we believe are appropriate for the processing of workmen's compensation claims. We recognize that these procedures must be modified to fit the particular needs of each State.

Information About the Workmen's Compensation Program

Despite the fact that workmen's compensation covers a substantial majority of all employers and employees and that the system processes more than 5 million claims each year, it is apparent from our hearings that many employees and employers are not aware of important aspects of the program. Some employees apparently filed workmen's compensation claims more by chance than by intent. Some employer's representatives seemed unaware of the nature of such important features as the second-injury fund.

R6.8

We recommend that the workmen's compensation agency develop a continuing program to inform employees and employers about the salient features of the State's workmen's compensation program.

A worker does not need to know the details of the program prior to the time he suffers an impairment, but he should know the general nature of the program. He needs to know where to turn for assistance in the event he is disabled. Employers should be kept informed of their rights and obligations in order to improve the effectiveness of the delivery system.

Employee's Notice of Physical Impairment or Death

State laws now require an employee to provide notice to his employer of any impairment resulting from a work-related injury or disease. In the event of a work-related death, this notice must be provided by the employee's dependents. Usually, written notice to the employer is unnecessary because the employer quickly hears about an accident on the job. Nevertheless, the employee, to protect his rights, should file a written report.

It is in the employer's interest to know of an injury so that the employee can be directed promptly to appropriate medical and rehabilitation services and so that the employer can collect necessary information for his report to the insurer or the State. However, some employees fail to notify their employers because they do not know the law's requirement.

R6.9

We recommend that the employee or his surviving dependents be required to give notice as soon as practical to the employer concerning the work-related impairment or death. This notice requirement would be met if the employer or his agent, such as an insurance carrier, has actual knowledge of the impairment or death, or if oral or written notice is given to the employer.

Under the Model Act, the claimant's failure to give notice can be excused if it can be demonstrated that "for some satisfactory reason such notice could not be given or that the employer or carrier has not been prejudiced by failure to receive such a notice." We believe that the Model Act's suggestion for waivers for failure to give such notice are appropriate.

Employer's Report of a Work-Related Impairment or Death

Employers in all States but Louisiana are obligated under certain circumstances to report to the workmen's compensation agency when they have knowledge of an employee's work-related impairment or death. In 25 States, all work-related injuries and deaths must be reported. In 14 States, the employer is required to report work injuries that result in time lost beyond the shift or working day in which the injury occurred or that resulted in some permanent impairment. In 10 States, employers must report only potentially compensable cases (those involving permanent disabilities or lost time beyond a specified waiting period).

The employer's report of work-related impairments or deaths is a valuable source of information. These reports can be screened immediately to estimate prospective claims and to identify workers who may benefit from medical and rehabilitation services. Employers' reports can be used also for operations research; e.g. statistical analyses can identify unsafe establishments. The employer's report on the work-related impairment or death may become the first document in the employee's case file, although an employer would be reluctant to provide full information in the initial report if he felt it could be used against him in a contested claim.

R6.10

We recommend that employers be required to report to the agency all work-related injuries or diseases which result in death, in time lost beyond the shift or working day in which the impairment affects the worker, or in permanent impairment to the worker.

States may wish also to require that employers file with a State agency a copy of their reports on all injuries and diseases filed in compliance with the Occupational Safety and Health Act of 1970.

R6.11

We recommend that, for those injuries and diseases which must be reported to the workmen's compensation agency, the period allowed for employees to file claims not begin to run until the employer's notice of the work-related impairment or death is filed with the workmen's compensation agency.

This recommendation assumes that the employee will have met his obligation to notify the employer. (R6.9) The time limits for filing a claim are discussed below.

Uncontested Claims

In most workmen's compensation cases, there is no dispute between the employee and the employer about the employer's initial liability for benefits. When a worker is injured on the job and in immediate need of medical care benefits, or is incapacitated enough days to satisfy the waiting period requirement for temporary total disability benefits, the employer usually is willing to assume his responsibility for these benefits. Sometimes, although there was no dispute about initial liability, subsequent events may lead to a contest; for example, a dispute about the extent of the worker's permanent impairment.

When liability is not contested, payment to the worker may begin by one of several routes: direct payment, agreement, or others. In direct payment States, such as Wisconsin, the employer is obligated to begin payment at once, unless there is a legitimate dispute about liability. In the agreement States, such as Massachusetts, the employer is under no obligation to pay until an agreement has been reached between the employer and the employee concerning the benefits to be paid. Possible errors in amount or date are corrected by the agency before the agreement is approved. Agreements have the advantage of being contracts enforceable by law. On the other hand, agreements in some situations may impose a heavy clerical burden on the system and delay payment to the worker. Direct payments, however, require more

post-payment auditing than agreements. Other approaches also are used. For example, in Maryland the employer is under no obligation to pay until a claim is filed by the employee with the State agency. We do not believe that the differences among the methods of initiating payments in uncontested cases are critical. Most members of the Commission, however, prefer the direct payment approach because this approach seems likely to increase the promptness of the first payment since the employer is obligated to proceed without waiting for approval of the State agency or the employee's agreement. When payments begin promptly, the extent of litigation probably will be reduced because employees will see they can receive benefits without legal assistance. While these advantages support the direct payment approach, the agreement method also has worked successfully in some States. We would not wish to foreclose any effective ways to begin prompt payment of uncontested claims.

The crucial aspect in the processing of uncontested cases is not which payment system is used, but whether the State agency is active or passive. The administrative obligations of workmen's compensation can be met only by an active agency. If the agency takes the initiative to protect the rights of workers, then the system of beginning payments in uncontested cases is of secondary moment. If, on the other hand, the agency is passive and does little more than adjudicate disputes, any approach to payment inevitably becomes litigious and ultimately cumbersome because workers in increasing numbers will employ counsel in order to protect their interests.

An active administration will exercise substantial influence in all workmen's compensation claims, including those which are not contested. This active role begins with the screening of the employer's report of a work-related impairment or death, continues with a review of the report that, in almost every State, the employer must file as soon as he is aware that an impairment is compensable, and culminates with a thorough examination of the report that the employer submits when payments are terminated.

R6.12

We recommend that the administrator of the workmen's compensation agency have discretion under his rulemaking authority to decide which reports are needed in uncontested cases.

Generally, the administrator is likely to require a notice of first payment. One use of this notice is an analysis by the audit unit of the promptness of payment by employers and carriers. The administrator is also likely to require a notice concerning employees who need medical and rehabilitation services. Although the employer or carrier is expected to take the initiative in providing emergency and restorative services, the State agency also should be in contact with the employee to insure proper care.

If the period of disability is extended, the agency needs periodic progress reports on the worker. These reports provide information on the amount of cash benefits and whether the employee has gone back to work. In response to these reports from the employer or carrier, the agency should advise the employee of his rights and provide him a record of the benefits he has received. A notice will be needed also when payments are terminated.

Contested Claims

Disputed claims for workmen's compensation tend to fall into two broad categories: issues of liability or coverage and issues of the extent of payment. In the first bracket come such questions as: is the employer insured? does the law apply to the particular event, worker, or impairment? did the impairment arise out of and in the course of employment? is the disability related causally to the injury or exposure? In the second category, the questions are: how real or serious is the impairment or disability? how long will the disability endure? how much earning power has been lost and how much should be replaced? who, in the event of death, are legitimate dependents?

The mere cataloguing of these issues probably conveys the image of workmen's compensation as a litigious labyrinth. And the popular support of the notion of "the rule of law, not of man," may lead some to conclude that the more litigation, the better. We do not sympathize with this reasoning. In a properly functioning workmen's compensation program, the agency should be the basic source of protection for the worker and should resolve

most of these issues without the assistance of legal counsel representing employee or employer. There will, of course, be occasional claims which involve facts or legal issues so inscrutable that a contest between the worker and his employer is inevitable. The next few pages are devoted to such cases. But a workmen's compensation program in which more than an insignificant minority of claims involve formal contests is aberrant and suggests that the State is not providing adequate protection to workers through the workmen's compensation agency.

Number of contested claims. The extent to which claims are contested is shown in Table 6.1. The term "contested claim" is used to refer to any dispute between the employee and the employer concerning the general liability of the employer or the extent or duration of the benefits that the employer must pay. A claim is not considered contested if the employer voluntarily pays the benefits and the employee had no disagreement with the benefits paid. Nor would the case be considered contested if the State agency merely reviews the benefits voluntarily paid by the employer and accepted by the employee, or merely reviews the agreement reached by the parties on a voluntary basis.

Although information on contested cases is far from complete, the data in Table 6.1 indicate that a substantial proportion of claims in some States are contested. If employers and carriers have an obligation to initiate direct payments in uncontested claims and if the agency provides positive assistance to employees in all claims, the number of contested cases should be reduced substantially.

TABLE 6.1. Contested cases as a percentage of all reported cases in State and Federal jurisdictions, 1971

Percent	States (50)	Other "States" (6)	Federal (2)
Less than 5%	11	2	0
5-9.9%	6	0	1
10-24.9%	3	0	0
25-49.9%	4	0	0
50% or more	1	0	0
Cannot estimate	25	3	1

See Table 2.3 for explanatory notes.

Time limit for filing initial claim. If the employer accepts liability for the impairment and the employee does not disagree with the amount and duration of the benefits offered by the employer, the employee should not be obliged to file a workmen's compensation claim. If there is a dispute, however, then the employee must file a claim with the workmen's compensation agency.

When the employer accepts some liability in the case but disputes the total amount of the liability, the employer should be obliged to pay that portion of the benefit accepted as a liability while the employee files a claim for the contested portion.

Various considerations apply to the time limit for filing this initial claim. From the employee's side, initially the impairment may not be serious enough to interfere with his capacity to work, but the impairment may worsen over a prolonged period. Moreover, the employee may not be aware immediately that the impairment is work-related. From the employer's side, the earliest possible date for the filing of the claim is desirable because the employer can prepare his defense and anticipate the eventual extent of his liability.

The problem for the employee in meeting the time limit for filing a claim is particularly acute when impairment results from a latent work-related disease. A substantial time lag may occur between exposure to the occupational agent or stress, on the one hand, and, on the other, the manifestation of symptoms and diagnosis of the etiology, medically speaking, and determination of causality in the legal sense. The standard published by the Department of Labor recommends that the time limit on filing occupational disease claims be flexible. Filing should be permitted for at least one year after the employee has knowledge of his impairment and its relationship to his job and after he experiences some wage loss because of the impairment. Table 6.2 indicates that about one-half of the States meet this recommended standard.

R6.13

We recommend that the time limit for initiating a claim be three years after the date the claimant knows or, by exercise of reasonable diligence should have known, of the existence of the impairment and its possible relationship to his

employment, or within three years after the employee first experiences a loss of wages which the employee knows or, by exercise of reasonable diligence should have known, was because of the work-related impairment. If benefits have previously been provided, the claim period should begin on the date benefits were last furnished.

TABLE 6.2. Jurisdictions with adequate time limit for filing occupational disease claims, 1966-72

Year	States (50)	Other "States" (6)	Federal (2)
1966	21	1	1
1972	24	3	1

See Table 2.3 for explanatory notes

The role of the agency in contested cases. The primary responsibility of the agency in contested cases is to settle claims at the informal, nonadjudicatory level. Several procedures are available to accomplish this goal. First, in order to reduce common misunderstandings that lead to controversy, the chief administrator can promulgate guidelines for evaluating impairments. For example, the medical criteria used to evaluate the extent of permanent impairment can be elaborated. Second, the agency can provide, through the disability evaluation unit, an impartial estimate of the extent of impairment of individual employees. Also, the agency can help to resolve disputes through informal procedures. The informal procedures unit would not make formal findings of facts or issue binding legal opinions. Its role would be to advise the parties of solutions consistent with the law and to persuade them to accept recommended solutions.

Those contested claims which cannot be settled by the informal procedures unit must be referred to the formal adjudicatory section of the agency. Even here, the hearing examiner can attempt to resolve the dispute as informally as possible, through such devices as pretrial conferences. The hearing examiner should make the employer's payment prior to the trial a matter of record. If the disability evaluation unit has provided an advisory rating on the extent of the worker's disability, the hearing examiner may make use of this information or he may request additional assistance from the disability evaluation unit. The hearing examiner also may accept evidence from the contestants before making his decision. States may wish to establish a rule which would admit written statements from the treating or examining doctor as part of the record, rather than requiring a personal appearance of the doctor.

The decision of the hearing examiner could be appealed to the appeals board, which could overrule the hearing examiner on questions of fact and of law. The decision of the hearing examiner, however, should be presumed correct and the appeal should not stay the examiner's award.

Court review of agency decisions. In a number of States, the final decision of the workmen's compensation agency can be appealed to the courts and a de novo trial can be obtained or the courts will review both questions of fact and of law. In other States, the decision of the agency is final as to questions of fact; appeals are limited to questions of law. The retrial of the facts of a contested claim is expensive for the parties and the State. Moreover, a prolonged period of litigation can interfere with the worker's rehabilitation. There is, however, some merit to a review of the facts in workmen's compensation cases to insure that basically similar situations are evaluated consistently. This review should, however, be performed by the appeals board within the workmen's compensation system. In fact, the complexities of workmen's compensation and the expertise developed by the members of the agency appellate board make it unlikely that additional review of the facts by a court will improve the quality of the decision.

R6.14

We recommend that where there is an appellate level within the workmen's compensation agency, the decisions of the workmen's compensation agency be reviewed by the courts only on questions of law.

The appeal from the workmen's compensation agency should go to the appellate court of the State, or in those States with no intermediate appellate courts, directly to the State supreme court.

TABLE 6.3. Plantiff's attorney's fees as a percentage of benefit payments in State and Federal jurisdictions, 1972

Percent	States (50)	Other "States" (6)	Federal (2)
Less than 5%	1	0	0
5/9.9%	2	0	0
10% or more	0	0	0
Cannot estimate	47	5	2

See Table 2.3 for explanatory notes.

Legal expenses. The legal fees charged by plaintiff and defendant lawyers probably are a significant part of the costs of workmen's compensation, but few data are available on the matter. Table 6.3 provides data on plaintiffs' attorneys' fees in certain States; comparable data for defendants' attorneys' legal fees are unavailable.

We have considered separately the issues of the size of the fees, the basis of the fees, and the sources of payment.

As to the size of fees, it is evident that a meager return for counsel will have the effect of denying the claimant competent representation. However, fees should not be so high as to encourage gratuitous litigation.

As to the basis of the fees, many States require by statute or regulation that the fee be computed as a percentage of the total award. This arrangement is an incentive to litigation and can leave the plaintiff who pays the fee with a smaller net return than he might have received from voluntary payments before the claim was litigated. A rule which based fees on the difference between the final award and the amount which the employer had paid voluntarily would restrict litigation to those claims most likely to yield a substantial net gain for the plaintiff. At the same time, the incentive for the plaintiff to accept a reasonable settlement without litigation would be increased.

R6.15

We recommend that attorneys' fees for all parties be reported for each case, and that the fees be regulated under the rule making authority of the workmen's compensation administrator.

The agency should consider the work performed by the attorneys in the case as well as the difference between the amount the employer was paying prior to the beginning of the formal hearing and the amount paid by the employer in the ultimate award. Attorneys might be employed by the agency to appraise the value of legal service by counsel.

An additional question is whether the employee or the employer should pay the employee's attorney's fee. With the adoption of our recommendations for improvements in the delivery system and the adequacy of benefits, it is not unreasonable to hold the employee primarily responsible for any attorney's fees that he incurs. However, States should consider the shifting of these fees to the employer as a form of penalty in those cases in which the employer or his insurer has acted in an unjustified manner.

Closing of Workmen's Compensation Cases

After liability of the employer is established, either by voluntary payments or by a formal hearing, a decision must be made about the duration of the employer's liability.

One of the most controversial aspects of the workmen's compensation program in many States involves the use of compromise and release agreements to close cases. Such an agreement usually involves three elements: a compromise between the plaintiff's claim and the employer's previous offer concerning the amount of benefits to be paid; the payment of the compromised amount in a lump sum; and the release of the employer from further liability. As indicated in Table 6.4, compromise and release agreements are widely used. In some States, these settlements are rarely rejected by the State agency. Few workers when faced with a legal document such as a compromise and release agreement feel capable of evaluating their own rights without the aid of an attorney.

The extensive use of compromise and release agreements is not consistent with our recommendations for an active workmen's compensation agency. These agreements have as their main virtues the termination of potential financial liability and administrative responsibilities for the employer or the carrier and the reduction of the administrative load of the State agency.

TABLE 6.4. Compromise and release settlements as a percentage of all cash benefit cases in State and Federal jurisdictions, 1971

Percent	States (50)	Other "States" (6)	Federal (2)
Less than 5%	6*	2	1*
5/9.9%	5	0	0
10.0/24.9%	8	0	0
25.0/49.9%	4	0	0
50.0% or more	1	0	0
Cannot estimate	26	3	1

* In 6 States and under the FECA, compromise and release settlements are not permitted.

See Table 2.3 for explanatory notes.

These factors do not provide adequate justification for a procedure which can seriously deprive the employee of his rights. If, for example, the need for medical benefits is miscalculated at the time the compromise and release settlement is signed, the worker eventually may find himself deprived of such benefits when the need recurs. Moreover, an impairment which at the moment of the settlement does not appear to be a hindrance to employability may within a few years become a serious economic handicap for the worker. Should his employer, for example, go out of business, the worker may find that his physical impairment becomes a serious obstacle to other employment.

R6.16

We recommend that the workmen's compensation agency permit compromise and release agreements only rarely and only after a conference or hearing before the workmen's compensation agency and approval by the agency.

Under some circumstances, compromise and release agreements perform a useful function, as when there are legitimate doubts concerning the employer's liability and the worker might receive nothing if he pursues his claim. These possibilities explain why we are disinclined to recommend that all compromise and release agreements be prohibited.

R6.17

We recommend that the agency be particularly reluctant to permit compromise and release agreements which terminate medical and rehabilitation benefits.

Some States permit compromise and release agreements for income benefits but not for medical and rehabilitation benefits. To the extent a State wishes to permit these agreements, it would be appropriate for the State to manifest its permissiveness exclusively for income actions.

R6.18

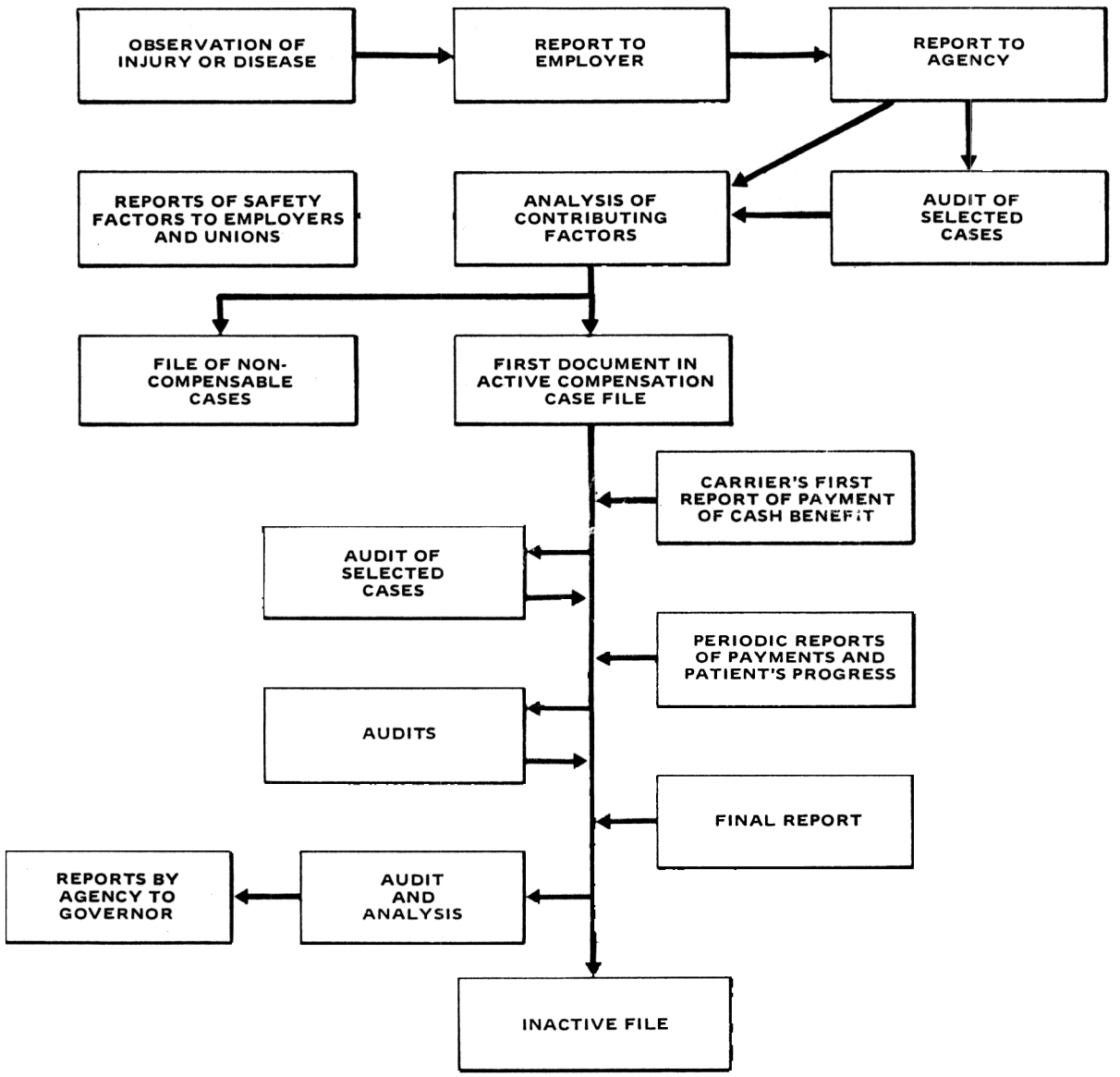
We also recommend that lump-sum payments, even in the absence of a compromise and release agreement, be permitted only with agency approval.

On some occasions, a lump-sum payment in advance of income benefits is desirable; for example, when a beneficiary is in need of capital to establish a small self-sustaining business.

Supervision of Medical Care and Rehabilitation Services

Many workmen's compensation agencies fail to supervise claims in which the impaired worker could potentially benefit from medical care and rehabilitation services. For many workers, the employers and insurance carriers voluntarily provide suitable medical care and rehabilitation services, but no State agency can assume that these services will be delivered automatically. The medical care and rehabilitation unit must receive adequate reports if it is to supervise effectively the medical care, physical rehabilitation, and vocational rehabilitation functions of workmen's compensation. In large States, the medical care and rehabilitation unit should be a separate division within the workmen's compensation agency. In small States, the administrator may find less formal arrangements are satisfactory, such as the use of a part-time medical director to advise the administrator on employees requiring medical and rehabilitation services. (See Chapter 4)

FIGURE 6.2. Flow of information through a workmen's compensation agency



Reports and Statistics

An active workmen's compensation agency, to perform its tasks well, must acquire information from its clients. Figure 6.2 suggests the reports that might be required and their possible uses. The specific needs for data can best be determined by the administrator.

R6.19

We recommend that the administrator have the authority to prescribe the reports which must be submitted by employers, employees, attorneys, doctors, carriers, and other parties involved in the workmen's compensation delivery system.

This Commission has been directed to examine "the feasibility and desirability of a uniform system of reporting information concerning job-related injuries and diseases and the operation of workmen's compensation laws." We believe that portion of the directive relating to injuries and diseases is moot because

the Occupational Safety and Health Act of 1970 requires such reports.

The feasibility and desirability of a uniform system of reporting information on the operation of workmen's compensation laws are not readily determined. It is evident that each State agency requires the receipt and analysis of substantial data on the State's program, and that many States do not collect sufficient data. It is not so clear that data on workmen's compensation should be uniform among States as to terminology, definitions, categorization, and style. At our hearings, however, we received testimony from several State workmen's compensation administrators indicating that uniform data would be desirable. Also, the International Association of Industrial Accident Boards and Commissions, the professional association of workmen's compensation administrators, for many years has urged collection and dissemination of data that are comparable among the various States.

Comparable data would enhance that virtue of the Federal system which enables States to serve as experimental laboratories in the administrative sciences and to learn from one another's successes and failures. Lacking comparable data, States find it hard to tell a failure from a success. Given comparable data, our Commission would have been able to be more definitive in our evaluations and recommendations for improvements in the State program.

We have, as part of our investigation, submitted several questionnaires to the States for data on the operation of their programs. For many of the most important questions in workmen's compensation, data comparable among the States are not available. For instance, State agencies have no consistent data on the number of employees covered by their workmen's compensation laws. Most States do not have data on the promptness of payment to injured workers. Almost no State has information on the number of workers receiving the maximum benefit in the State. The general lack of data, and the particular lack of comparable data, hinder objective analysis of State workmen's compensation programs.

Realistically, it would probably take most States several years to collect all of the data which would have been useful to the work of this Commission. This is not to suggest that no data are available on the operation of the State programs or that we are unable to draw confident conclusions about the strength and weaknesses of the present State workmen's compensation systems. Nevertheless, we would be remiss not to call attention to the deficiencies of present data and the handicaps to effective evaluation and administration of workmen's compensation. No one desires unnecessary reports or uniformity for its own sake, but more data on a uniform basis is a practical and worthwhile goal.

C. SECURITY ARRANGEMENTS

Workmen's compensation laws require employers to demonstrate ability to satisfy their statutory obligations either by self-insurance or by purchase of insurance from private carriers or from State funds.

Importance of the Three Insurance Methods

Private carriers provide 63 percent of all workmen's compensation benefits; State funds, 23 percent; and self-insuring employers, 14 percent. Private insurance is allowed in 44 States, and under the Longshoremen's and Harbor Workers' Compensation Act. In 12 States, private insurance competes with State funds, but in 6 States, State funds operate without competition from private carriers. Self-insurance by financially responsible employers is allowed in all but 4 States.

Evaluation of the Three Basic Methods of Insurance

Evaluation of the cost and quality of the three types of insurance is complicated by the lack of appropriate data. For example, States have rarely attempted to determine the rate of return of profits on the net worth of carriers, nor have they collected sufficient data on many aspects of performance, such as promptness of payment and adequacy of rehabilitation services. Despite the paucity of data, a tentative evaluation of the three methods of insurance is possible. This evaluation is aided by a recent study sponsored by the Department of Labor. (C. Arthur Williams, Jr. "Insurance Arrange-

ments Under Workmen's Compensation," U.S. Department of Labor.)

A comparison of the relative costs of providing workmen's compensation coverage by the three insurance methods is often clouded by the charge that private carrier costs are excessive since there is a 40 percent loading factor built into the rates. This assertion is misleading because the 40 percent load is used only to establish the gross insurance rate (termed the manual rate). The net insurance rate paid by employers is often less than the gross rate. Most premiums are experience-rated or subject to quantity discounts which on average reduce the cost of insurance by about 6 percent. Another factor which lowers the cost of insurance is that dividends are paid to policyholders by both mutual insurance carriers and participating stock companies. In recent years, such dividends have reduced the cost of insurance by approximately another 6 percent. These discounts may reduce the loading charge to less than 25 percent on average.

Net insurance premiums can be calculated by allowing for the impact of experience-rating, dividend payments, and similar factors on gross premiums. A benefit ratio, comparing present and prospective benefit payments to net insurance premiums, can then be determined. In recent years, the benefit ratio for all private carriers has been about 0.7. The benefit ratio for State funds has been about 0.9. While data are fragmentary, it appears likely that self-insurers have somewhat higher benefit ratios than State funds. This is not surprising, since self-insuring employers are on the average larger than the employers insured by private carriers and State funds, and therefore benefit from the economies of scale, which reduce the percentage of administrative costs.

Differences in the benefit ratios for private carriers and State funds can be explained in part by the quality of services provided by private carriers and State funds discussed below and in part by the absence of significant selling expenses for State funds. The sales costs of nonparticipating stock insurers are more than 10 percent of premiums earned. Also, State funds generally are excused from State and local taxes, which cost private insurers about 2.5 to 3.5 percent of premiums earned.

The differences between State funds and private carriers are not due to high profits of private carriers. In recent years, the statutory underwriting profits of nonparticipating stock insurers have averaged only about 1 percent of premiums, and the rate of return on net worth for all private carriers is not out of line with the return in other industries. Expense variances have been much more important than stockholder profits in determining relative costs of private insurers and State funds.

The lower costs of State insurance often are associated with lower quality services. Most State funds provide less local claims service than private carriers; some pay less attention to the prevention of injuries. Although there is little data on the quality of service provided by self-insurers, it is likely that only large employers are capable of providing adequate service.

Despite differences of opinion among the Commission members on the desirability of the three approaches to insurance, we all agree that the most serious problems of the present workmen's compensation program can be solved without restructuring basic insurance arrangements. The Commission urges that efforts to improve workmen's compensation not be hindered by debate on the relative merits of the three types of insurance. There is as much difference in cost and quality of service within each of the three approaches to insurance as among the categories.

R6.20

We recommend that the States be free to continue their present insurance arrangements or to permit private insurance, self-insurance, and State funds where any of these types of insurance are now excluded.

State Supervision of Security Arrangements

Ideally, a State with an active workmen's compensation program will supervise performance of all three types of insurance. The workmen's compensation agency should collect a broad range of performance data on insurers' efforts, including information on promptness, accuracy, and sufficiency of payments, and on adequacy of safety and rehabilitation programs.

The agency should collect, analyze, and publish such data for all types of insurers, including State funds. Widespread dissemination of information on carrier and State fund performance will enable employers to select high quality insurers.

While most private carriers and self-insurers appear to be meeting their responsibilities, data on their performance should be reviewed by the insurance commission or whatever State agency holds the supervisory responsibility. When warranted, the right to insure should be revoked.

The supervisory agency should also review ratemaking procedures of private carriers and State funds. The review should cover costs of operation and profitability of private carrier operations, including the rate of return on net worth. The agency should also encourage experience-rating wherever it conforms to sound actuarial principles.

Role for Special Funds

There is a role for special funds in a modern workmen's compensation program. In addition to the second-injury fund (Chapter 4), a special fund is desirable to deal with insolvent carriers or with insolvent or noncomplying employers. In most social insurance programs, employees have little fear of losing their benefits because of insolvency, since the programs are funded by the government. In workmen's compensation, special arrangements are necessary to insure that statutory benefits are available.

R6.21

We recommend that procedures be established in each State to provide benefits to employees whose benefits are endangered because of an insolvent carrier or employer or because an employer fails to comply with the law mandating the purchase of workmen's compensation insurance.

Another special fund may be the appropriate means to protect the purchasing power of the benefits for workers or their dependents in cases of long duration. The value of the benefits which began 25, 10, or even 5 years ago has been eroded by declines in the purchasing power of the dollar. Our recommendations in Chapter 3 for increased benefits for permanent disability and death cases, linked to increases in the State's average wage, will protect the value of benefits which commence after our recommendations are adopted, but further protection is needed for those receiving compensation now.

R6.22

We recommend that, because inflation has adversely affected the payments of those claimants whose benefits began when benefits were not at their current levels, a workmen's compensation retroactive benefit fund be established to increase the benefits to current levels for those claimants still entitled to compensation.

Ohio and Oregon are examples of States which have established funds for this general purpose.

REFERENCES FOR CHAPTER 6

Section A, See *Compendium*, Chapters 4, 13, 14, 16, and 20
Section B, See *Compendium*, Chapters 4, 9, 10, 11, 13, 14, and 20
Section C, See *Compendium*, Chapters 4, 15, 16, 17, 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*.