SHOULD THE PROPOSED WDPA REPLACE WORK-RELATED TESTS FOR OCCUPATIONAL DISEASES?

A Response to John Burton's Recent Article on Worker's Compensation Policy

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"*Never believe that a few caring people can't change the world. For, indeed, that's all who ever have."*

-Margaret Mead

"It is not your responsibility to finish the work, but neither are you free to desist from it."

-Ethics of the Fathers, Pirkei Avon (Sayings of the Elders) 2:16.

I. INTRODUCTION

In his article, "Is the Work-Related Test Desirable for All Diseases That Disable Workers?,"[1] John F. Burton, Jr., sets forth a well thought out proposal to provide cash benefits, medical care, and rehabilitation services to American workers denied Workers' Compensation (WC) benefits because of the difficulties imposed by the fundamental nature of the work-related test. His solution is that the work-related test is not desirable for all diseases that disable workers. He is referring specifically to multi-causal diseases such as heart attacks, mental disorders, back disease, or cancer. Such diseases generally develop over a period of time, until at a certain point the worker's health and ability to work is impaired to the extent that there is a temporary or permanent loss of earnings. Burton would place many diseases with multiple causes in a separate category from the part of the workers compensation programs that more readily tend to compensate discreetly

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1. John F. Burton, Jr., *Is the Work-Related Test Desirable for All Diseases That Disable Workers?*, 39 COMP. LAB. L. & POL'Y J. 247 (2017).

physical and single injuries. The Burton proposal would compensate workers suffering from multi-causal diseases if (1) a worker proves (2) that he or she has the disease, (3) which caused an impairment, and (4) which in turn caused a loss of earnings. For Burton, *ef ah hah mah druthers*, as Lil' Abner would say, this proposal will be incorporated into a statute, which he calls The Workers' Disease Protection Act (WDPA).

I applaud Burton's proposal as both altruistic and ideally functional. The proposed Act is a compassionate alternative to WC for multi-causal diseases in the American social system in the absence of other options for such disabled workers. Unfortunately, it may be unrealistic in the current American political climate and, at the same time, unnecessary in Israel where the social safety net is intact.

This response will begin by addressing two main issues presented by Burton's article:

- **The first issue: should work-related tests be eliminated for multi-causal diseases?** This involves adopting a separate statutory alternative to the Workers' Compensation system that compensates all workers suffering from certain disabling diseases resulting in a loss of earnings, without reference to work-related causation.[2]
- **The second issue: can work-related tests determine if multi-causal diseases are work-related?** Unless and until the WDPA is adopted, what kinds of work-related tests can accommodate those multi-causal diseases, the same diseases proposed to be included in WDPA?[3] Despite Burton's doubts that any legal test can be devised to determine if certain such diseases are work-related, I maintain that the WC system and the courts are reasonably able to do so, given appropriate guidelines.[4]

II. ISSUE ONE: SHOULD WORK-RELATED TESTS BE ELIMINATED FOR MULTI-CAUSAL DISEASES?

When evaluating whether to retain the work-related test we should consider the particular jurisdiction's general social welfare system. Is there a

2. The elimination of the work-related injury test under Burton's WDPA would result in almost universal coverage for the working age population (between approximately ages eighteen to sixty-seven) for the covered diseases.

3. This issue necessarily arises in the current absence of U.S. legislative acceptance of the WDPA (which is yet to be adopted, despite the unanimous recommendation of The Report of the National Commission on Workers' Disease Protection Acts).

4. *See* Mervyn Gotsman & Stephen Adler, *Under What Circumstances Can and Acute Myocardial Infarction Be Regarded as a Work Accident? Multi-Causal Diseases as Work Accidents*, 1 INT'L [INTERNET] J. SOC. SECURITY & WORKERS COMP. 21 (2009); Stephen Adler & Rivka Schochet, *Workers' Compensation and Psychiatric Injury Definition*, 22 INT'L J. L. & PSYCH. 603 (1999).

secure safety net for disabled workers? What happens to the worker whose WC claim is denied? Does he or she have other programs, which provide income replacement, medical care, rehabilitation, and other benefits? If there are no such programs then it makes more sense to broaden the scope of workers' coverage. A disabled worker should not be impoverished because of a multi-causal disease.

As Professor Burton has described, in the United States the general welfare system and the social safety net is relatively thin. Many disabled workers denied WC benefits are in difficult economic situations. Many American workers are without adequate medical coverage or cannot afford important treatment under the medical coverage they do have. Furthermore, without WC benefits many American workers, whose diseases limit or prevent their ability to work, have no income replacement. When the injured worker can no longer perform his former work, he is dismissed, and receives unemployment benefits for a limited period. However, when these benefits expire, it may be difficult for the disabled worker to find a job. The Burton proposal includes a partial income replacement solution by providing a generally more comprehensive benefit package than the unemployment benefits currently granted to disease-disabled workers. Burton and others interested in social justice for disabled workers believe that the cost of eliminating the work-related test is justified.

Israel, on the other hand, has a comprehensive and robust social welfare system. The Israeli safety net includes, but is not limited to, universal health care that provides all residents' medical care; minimum guaranteed income that will replace lost work income; disability benefits; and mobility benefits, including a car, for those whose disability limits their mobility. The guaranteed minimum income is a partial income replacement and the vocational rehabilitation programs attempt to return the worker to the workforce. This is also the situation in Nordic and most Western European countries. Therefore, when an Israeli worker's disability is caused by a disease that falls outside the WC coverage, he or she is not impoverished. The broad social welfare net provides a minimum of human dignity and even some hope of rehabilitation and return to the workforce.

Burton's proposal to eliminate the work-related test has far-reaching economic implications. Enactment of the WDPA would result in most of the working age population receiving workers' benefits for the various diseases covered. For example, since some estimate that 80% of the working population suffer from low back pain sometime during their working life, much of the working population will be eligible to receive WDPA benefits at one time or another when they suffer from low back pain to the extent that it

prevents them from working.[5] The percentage of the population that suffers from cancer and heart disease during their working life is also significant. If all these people are covered by Burton's proposal, there will surely be a significant cost increase to be borne by the employer, the government, and ultimately the society as a whole. However, from this cost increase should be deducted the savings to the economy and society of welfare programs that assist workers who are rejected by WC. Also to be deducted is the added value of the workers who are rehabilitated and able to return to the workforce. Another deduction should be allowed for the medical care of disabled workers cared for in hospital emergency rooms, in the absence of any programmed insurance coverage. While difficult to quantify precisely, under Burton's WDPA, additional economic value and social benefit will result from reducing unemployment and increasing human dignity for individuals and their families. However, even with all these deductions, there will still be a significant direct cost factor to Burton's proposed WDPA.

To properly assess the net cost of the WDPA, it would be necessary to prepare a cost estimate, based on reliable statistics and information. These estimates should also take into account the economic benefits mentioned above that would result from the elimination of the work-related test. When the costs of recognizing each disease without a work-related test are estimated, it might be more economically feasible to eliminate the work-related test for certain diseases, and not for others. Alternately, it might be possible to eliminate the work-related test only for a certain disease, if the worker has been exposed to certain conditions for an extended period. A more accurate and rational evaluation of Burton's WDPA proposal could be deterimed when there are cost estimates for every disease proposed to be covered by the elimination of the work-relation test.

Once the net cost of the WDPA proposal can be estimated, another factor that must be considered is who will bear those costs. Employers traditionally finance the WC system, partly because the accident occurs at work or arises out of work, and partly because the WC program generally protects the employer from workers' tort-negligence suits. The positive result of this system is that work accidents are compensable without the necessity to prove employer negligence. However, one of the negative results of the WC system in the United States is that employers pressure the states to limit coverage in order to reduce WC costs, which they pay.

An argument can be made that the WDPA program should be an exception to the general WC cost allocation rules and part of the economic burden will be financed by the state governments. While most of the diseases

5. *See* references cited in *Low Back Pain*, WIKIPEDIA, https://en.wikipedia.org/wiki/Low_back_pain.

covered by the WDPA develop during the worker's lifetime, only some of that time is spent at work, and most of the causes are non-work related. Therefore, it is legitimate to reduce the employers' participation in the added cost of eliminating the work-related test. Certainly, the state, and society as a whole, will benefit from the WDPA. Moreover, the added cost of the Burton proposal may be so great as to be feasible ***only*** if there is government subsidy.

The subsidy can be made a part of the general welfare budget. WDPA payments can replace welfare and other such social disability payments. Viewed as an investment in the health and rehabilitation of disabled workers, the WDPA could benefit both the economy and society by returning disabled workers to the workforce, rather than leaving them unemployed and impoverished. This is a positive investment of resources in the work force, which is an important factor of any country's economy.

In addition, it is generally accepted that most of these diseases have only a partial relation to the workplace. As multi-casual diseases, many of the causes are non-work related. The non-work related causes that were present during the person's working life are part of what the employee brings to the employer and his employment. Moreover, some of the factors contributing to the development of some of the diseases are related to causes over which the government has partial control. For example, certain types of cancer are related to environmental factors, which can be reduced by government regulation. Accordingly, requiring the government and not the employer to provide support for environmental disease-disabled workers is appropriate.

Even if the work-related test is abandoned, another definitional problem is raised by Burton's proposal. It will be difficult to determine whether the disability occurred when the person was a worker, especially for a multi-causal disease. The WDPA law will apply to workers, as do the WC laws. American WC laws specifically cover "workers." Entitlement to WC benefits arises when the injury or accident occurs during a person's employment or arises out of the person's employment. In Israel and in some European countries, the WC laws also apply to "independent contractors." Burton's WDPA will expand the population covered by WC, but will apparently still apply only to workers.

This raises significant questions: What happens when a person works for twenty years, is unemployed for two months or becomes a freelancer for two months, and only then is diagnosed as suffering with lung cancer? Is he or she entitled to coverage under the WDPA as a "worker"? If lung cancer developed while this person was working, but only was diagnosed during a period when he was not working, did that person lose or retain the status of a "worker" for coverage under the WDPA?

More questions abound. Burton's proposal could be interpreted to apply only to an employed worker whose disease prevents him from working.

However, many of the diseases mentioned by Burton can be diagnosed months or years after they have begun to develop, and the worker might be able to work while suffering from the disease, such as back disease or certain types of cancer. What happens when that worker becomes totally disabled and unable to work after being dismissed from his job prior to retirement age? What kind of coverage would Burton's WDPA proposal grant them? A possible legal theory to cover such instances would be the idea of the "arising out of" clause of the WC laws. The argument would be that even when the worker becomes disabled a short time after leaving his job, the disability "arose out of his employment" because it developed while he was working. If the WDPA will cover only people whose disease prevents them from working while they are employed, and not during their working life, it will eliminate fewer of the social problems caused by the current American WC system.

Burton refers to my article "Should Work Injuries and Nonwork Injuries be Compensated Differently?,"[6] where the cardiologist Professor Mervyn S. Gotsman and I discussed the issue of elimination of the work-related test for workers' compensation programs. I also addressed the issue regarding the work-related test for workers suffering mental disability in the Adler and Schochet (1999) article,[7] which Burton also mentions. Both articles suggested a methodology to permit compensation for specific multi-causal diseases within the framework of the existing WC system, providing a broad multi-factor test to determine if the disease or injury was sufficiently work-related. The very basis of the WC system requires a work related disability. Burton apparently recognizes this limitation by proposing an entirely separate statutory framework eliminating the work-related test.

III. WE RETURN TO THESE RELATED QUESTIONS: SHOULD WORK INJURIES AND NON-WORK INJURIES BE COMPENSATED DIFFERENTLY? SHOULD THE WORK-RELATED TEST BE ELIMINATED?

It is my position that the overall answer depends on the specific context of the social welfare net. If there is no broad social welfare net, there are many reasons to justify eliminating the work-related test to treat work and non-work diseases equally.

In the American context, I can agree with Burton's proposal for a WDPA to eliminate the work-related test for selected diseases, such as heart disease, cancer, back cases, hearing impediments, and mental disease. With a comprehensive and inclusive definition of "worker," the Act can provide

6. INTERNATIONAL EXAMINATIONS OF MEDICAL-LEGAL ASPECTS OF WORK INJURIES (Elizabeth Yates & John F. Burton, Jr. eds., 1998).

7. *See supra* note 3.

coverage for disease-disabled persons who develop a multi-causal disease during a long working life, even if they are diagnosed during a subsequent period of unemployment. The primary obstacle to acceptance may well be the economic burden this would impose on the workers' compensation system (insurers, employers, and government): the cost of providing compensation, rehabilitation and medical benefits for additional disabled workers. These costs inevitably will be passed on to the American consumer, and the competitiveness of American-made products may suffer. Any state adopting Burton's WDPA will probably have to subsidize the cost of the program, in order to keep American industry competitive internationally, and for the other reasons outlined above. Nevertheless, the WDPA can be justified in the absence of a solid social safety net. A caring society should not leave diseased disabled workers without an option when faced with a loss of earned income.

However, in social welfare countries like Israel, the Nordic countries, and many European countries, there are persuasive reasons to give workers preferential benefits when they suffer diseases during their working life. In these societies, the general welfare system and much of the national budget is financed by workers' taxes. A WC system which gives workers preferential treatment under the WC system is an incentive to get people into the workforce, and to keep them there. Workers rejected for WC benefits have other social protections within the broad social welfare system.

We must also remember that studies in comparative social welfare and social law systems can be both illuminating and misleading if not understood properly. The American and Israeli social welfare systems and safely nets are quite different. The former is limited in scope while the latter is broad and all encompassing, similar to that in Europe.

IV. ISSUE TWO: IS IT POSSIBLE TO ESTABLISH A REASONABLE WORK-RELATED LEGAL TEST FOR MULTI-CAUSAL DISEASES?

Professor Burton's contends, among other objections, that it is not desirable to have a work-related test to determine disability for all workers because it is not possible to establish a reasonable test for some (or all) diseases. In particular, Burton doubts whether the tests for heart attacks and psychological injuries are sound, and asserts that the tests used by American courts for back disorders contradict modern medical knowledge.

In his article, Burton summarizes the legal tests used in various jurisdictions to determine whether there is a work-related connection for heart attacks, psychiatric injuries and back disorders. Cancer and hearing disorders are additional diseases that further complicate the search for a workable test.

Determining the work relationship of these diseases is difficult because they generally develop over a period of years and have multiple causes, some of which are unknown and many of which are unrelated to the person's work. For example, coronary artery disease can begin developing before the person begins to work and continue throughout his work life. It has multiple causes, such as genetics, high cholesterol, obesity, improper diet, smoking, stress, and others, most of which are unrelated to work. However, while the person is working the heart disease can develop into a heart attack, which is sometimes held to be a work accident. This is the reason that Burton referred to these diseases as "problematic conditions" or "gray areas." They do not fit into the usual WC definition of a single injury which can be defined precisely in place and time.

It is true that the work relationships of some diseases are more difficult to evaluate than others. Each should be evaluated separately to determine whether a work-relation exists. Each multi-causal disease has its own development pattern; a unique combination of causes and symptoms. Today the causes of some diseases are better known to medical science than others. Where the determination of the work-relation is so complicated, a case can be made to either eliminate the disease from WC coverage or, as Burton proposes, cover every worker who gets the disease during his or her working life. Alternatively, an imperfect but workable multi-factor test can be designed for reasonable administrative application.[8]

I submit that it is possible to find a work-relationship where the cause of the disease or the "trigger" for the "outbreak" of the stage of the disease results in the employed worker's inability to work. For each disease, we can ask whether it is possible to isolate the work-related cause, and determine how it influenced the diseases' development and the "outbreak" stage that results in the workers' disability. We also try to determine what factors at work can be connected to the appearance or "outbreak" stage of the disease.

For example, it is difficult to determine accurately the casual relationship between factors at the person's work and his heart disease. Nevertheless, modern medical knowledge supports the proposition, that when a heart attack occurs immediately after a "trigger" event at work, there is a sufficient work-injury relation to qualify for benefits under WC law. It is more medically and legally sound to make the connection between the appearance of the heart attack and its "trigger" than between causes of the disease.

8. *Id.* Gotsman & Adler, *supra* note 4; Adler & Schochet, *supra* note 4. *See also* Stephen Adler, *Should Work Injuries and Non-work Injuries be Compensated Differently?*, *in* INTERNATIONAL EXAMINATIONS OF MEDICAL-LEGAL ASPECTS OF WORK INJURIES 1 (Elizabeth Yates & John F. Burton, Jr. eds., 1998).

While this "trigger" approach may be workable for diseases such as heart disease and psychiatric disorders, it is not helpful for other diseases, such as cancer. With cancer, and most hearing disorders, the worker can become disabled without a "trigger" event. The disease develops during the person's work life and at some point he or she becomes disabled. The work connection is generally examined around the period from when the disease is first diagnosed until the worker becomes disabled. Therefore, each of these diseases has its specific tests to determine work-relation based upon medical knowledge of what factors, if any, at work can cause the disease to develop to the disabling stage. The test for each disease will also have to consider whether the factor at work was enough of a contributing cause to the disease to warrant recognition as an injury under WC law.

Another factor to consider when evaluating a test established by courts to determine the work-relation is whether it is functional; that is, whether it can be applied by WC administrators in the field, WC tribunals and trial courts. A legal test applied by human beings will always have a certain percentage of errors. That is not a reason to stop using legal tests. However, when developing a legal test to determine work relationship, courts should consider that the test can be easily and efficiently applied with a minimum of errors.

Burton analyzes the tests used by courts in the United States and Israel regarding heart attacks and psychiatric injuries, and the tests used in the United States for back disorders. He notes that the test used in Israel to determine work-relation for heart attacks is used by a minority of American jurisdictions. However, the Israeli test is based upon modern medical knowledge, as my colleague the cardiologist Professor Gotsman explained.[9] On the other hand, the same understanding of modern medicine underlies the test adopted by a majority of American jurisdictions. American courts using both the majority and minority test look for an event, whether usual (majority of jurisdictions) or unusual (minority of jurisdictions and Israel). This makes the courts' task workable, since courts have expertise at fact finding: deciding whether an event actually occurred, and determining the facts relating to the event. With the majority and minority heart attack tests based on modern medical knowledge, and relatively easy to apply by administrators and courts, there is no reason to eliminate the work relation test.

Burton explains that the tests used in the United States to discern between herniated discs and other back disorders are not medically warranted. If so, I agree that such tests are unacceptable. Moreover, if a test cannot be found that is based upon modern up-to-date medical knowledge, then one of the following should happen: either Burton's proposal to

9. Gotsman & Adler, *supra* note 4.

eliminate the work-relation test for back disorder should be accepted in the United States or, as has been done in some European countries like Sweden, lower back pain should be eliminated as a WC disease and only back injuries (for example, a worker is hit in the back) should be recognized.

An important factor regarding any test to determine work-relation is whether it is based upon modern up-to-date medical knowledge. Here Burton and I concur. However, I suggest that instead of eliminating work-related tests based on outdated medical theory, they should be reconsidered periodically in light of advances in medical understanding of each disease. Legislatures and courts cannot determine the medical aspects of the work relationship of a disease and must rely on medical expert knowledge. The process of reconsidering legislation is lengthy and open to non-relevant considerations, while the updating of legal theories by courts can usually be accomplished in a more thoughtful and efficient process where only relevant factors are considered.

In general, Burton's criticism of the current work-relation tests established by U.S. legislators and courts is warranted. I agree that the recent legislation by many American states to limit workers' WC coverage by making the work-relation tests more stringent, without relation to current medical knowledge is not justified. His claims against court-made work-relation tests for back injuries that are not based on modern medical knowledge are also well taken. However, for some of the work related diseases, such as heart attacks and psychiatric injuries, courts have developed work-relation tests based on modern medical knowledge ensure a reasonable degree of accuracy and, therefore, can and should be maintained.

V. CONCLUSION

I want to emphasize that this response specifically addresses compensating workers for certain diseases and not for accidents. When a worker is physically injured by an external force occurring at work and/or arising out of his or her work, the work relationship is clear and WC systems are specifically designed to provide for him or her. On the other hand, when a worker is unable to work, partially or entirely, because of a disabling disease likely caused by multiple factors, only one or some of which are work-related, obtaining coverage under WC can be problematic.

Compensation for multi-causal disease certainly deserves attention because, although workers' compensation cases involving such diseases are only a part of the system, these cases result in a disproportionally greater number of legal disputes.

Burton's WDPA would certainly streamline the worker's application and award process by removing disease-based disabilities from the WC

system to a dedicated system without a work-related test. His proposed Act is a sweeping attempt to resolve these increasingly controversial claims by eliminating the work-disease-disability nexus in the hardest cases.

Burton's WDPA is, in my opinion, socially justified in the American context, I submit that it is unnecessary, and perhaps even irrelevant, in the Israeli or European context. My main reason, in short, is that when a disease-disabled American worker is not compensated by the WC system, he or she often has little recourse for income replacement or medical care. On the other hand, in Israel and most European countries, where there is a robust social welfare safety net, a disabled worker who is not compensated under the WC system has recourse to a broad spectrum of income replacement benefits, medical care and rehabilitation, making the WDPA unnecessary to correct a social injustice. Yet, in the absence of a comprehensive social welfare system in America, Burton's proposal has the potential to elegantly correct an acute injustice existing in the American social welfare system.