Workmen's Compensation in California

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COMPULSORY INSURANCE, to most of us, has an unsavory connotation. Yet there is one form of insurance that we are all compelled to pay, and that we pay cheerfully: workmen's compensation insurance.

Every time we buy a loaf of bread, every time we buy a car, clothing or other manufactured articles, every time we build or alter a dwelling or attend a play or opera, part of the cost to us is workmen's compensation.

Workmen's compensation insurance functions generally as follows. Every employed person, with a few exceptions to be mentioned, is assured that if he is injured on the job he will receive medical care and, if necessary, hospitalization for the duration of his disability. He will also receive a part of the salary he loses by being off work. He will be supplied with such articles as braces, crutches or other devices that reasonably could be expected to hasten recovery or make him more comfortable while recovering. In case of his death there are allowances for funeral expenses and for benefits to survivors. These are supplied without direct cost to the workman.

This was not always so, of course, and the inception and growth of the concept, chiefly in Germany (under Bismarck) and England (during the Industrial Revolution), is of interest and will be touched on. In the United States the movement began in the state of New York in 1910 and since then gradually has spread to all our states, though some of the southern states took a long time to join the ranks.

Before 1910, the situation in which an injured workman found himself left a good deal to be desired. According to Warren L. Hanna, nationally known for his contributions in the field of workmen's compensation, the opportunities for redress on the part of an injured workman were circumscribed by English common law. Modification of this situation began to appear in the early part of the nineteenth century, but it was not until much later that more specific benefits for workmen were outlined.

Until that time, and under the precepts of English common law, the employer's responsibilities were vague and not very extensive. The need for change was pointed up in the Industrial Revolution when vast changes in manufacturing techniques, new forms of transportation and general economic expansion forced a realignment of the relationships between employer and employee. Even so, for a considerable period after this the main provisions of the common law prevailed.

The employer, under the common law and even following the minor modifications mentioned, was obligated to do only certain things. He had to provide a reasonably safe place to work. He had to provide reasonably safe tools and appliances. He had to be reasonably careful in hiring employees and servants fit for the work they had to do. He had to lay down suitable instructions for carrying out the work to be done. He was obligated to provide instruction for youthful and inexperienced employees in regard to the dangers that they might encounter. Here his responsibilities ended, and unless the employee could demonstrate that the employer had failed in one of these respects, there was little chance of compensation for injury.

Even then a suit for damages was the only course of action open to the employee. And, of course, a lawsuit presented great obstacles for an employee who was without funds and possibly ignorant. Moreover, the employer could drag out such a trial for a considerable length of time. Possible witnesses might drift away. And a possible witness who remained on the scene naturally was reluctant to testify against an employer for fear of losing his own job. If the case did reach the courtroom, there still remained three formidable hurdles in the path of redress. These were "contributory negligence," "the fellow servant rule" and the doctrine of "assumption of risk."

Contributory negligence was a common defense. An employer often alleged that the employee himself had been negligent and had contributed to the occurrence of the injury. The fellow servant rule also was a plausible defense against an action: If an action proceeded from the negligence of another employee of the same master, the employer could be judged not liable. Finally, the doctrine of assumption of risk was often invoked. If an employee was fully informed that a job he was about to undertake was dangerous, then chose to undertake it anyway and as a result was injured, he was apt to find himself without recourse.

Though the foregoing probably was consistent with Victorian ideas of fair play and justice, dissatisfaction with these provisions arose. Beginning

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in England in 1880, and later in this country, some slight modifications appeared. These, at first, were still inadequate and the real birth date of effective workmen's compensation laws throughout the nation, and specifically in California, could be put down as 1911.

Even now, in various states, there is no uniformity with regard to the system used. Administration of the laws varies. Provisions of the laws, the philosophy with which they are applied and the benefits awarded differ widely in the different states. But all, now, offer some redress in event of injury at work.

The author once asked an otherwise friendly attorney for a copy of the California Workmen's Compensation Law. His reply was somewhat sardonic: "There isn't any such thing, and if there were you couldn't understand it." The law in its present form, in addition to basic provisions, is a volume of amendments and records of rulings handed down in specific controversies.

THE BEGINNING IN CALIFORNIA

The California laws dealing with these matters began, in a rather halting fashion, with the Roseberry Act of 1911. This act was rapidly modified and has undergone many alterations since. In California, injuries to workmen are under the jurisdiction of the state's Department of Industrial Relations, through the Industrial Accident Commission. Officers are the Governor, the Director of the Department and a Chairman of Commissioners. There are two "panels" of commissioners—one for San Francisco, one for Los Angeles. Under them are referees, attorneys and other officers. In most instances controversy does not arise and these officers act in a supervisory capacity—to see that orderly procedures are followed and that the employeee's rights are protected.

Although the Industrial Accident Commission has jurisdiction over the great majority of employees, there are certain exceptions, some of which are listed below:

- A domestic who works for one employer less than 52 hours a week does not have to be insured and the Commission has no jurisdiction.
- A person who is a casual worker and not part of the employer's trade, business or profession does not come under the jurisdiction of the Industrial Accident Commission.
- The newsboy who delivers papers to your door usually has acquired ownership of the newspaper or periodical before he delivers it. The householder is not responsible for insuring him.
- Farm laborers whose earnings for the previous year were less than $500, and whose employer has properly rejected the provisions of the compensation laws, do not have to be insured by the farmer.
- Employees of religious, charitable or relief organizations who are paid in aid or sustenance do not come under the compensation laws.
- Convict laborers are not covered.
- Self-employed persons or contractors do not have to be insured by the persons they are working for, with the exception of the laborer hired by an individual to do a certain job under the individual's instruction.
- Another worker who is not under the jurisdiction of the Industrial Accident Commission is the occasional watchman in a non-industrial building who is paid by subscriptions of several persons.
- A "volunteer"—somebody who might come into another person's home to fix a curtain rod or revamp the kitchen without pay, does not have to be covered.

These are not hard and fixed rules. On investigation, it may turn out that there was some element in the case of an injured worker that came under the jurisdiction of the Industrial Accident Commission. Accordingly, the Commission is on its guard to work out these situations carefully and to give the injured person whatever protection he may be entitled to.

Following an injury the usual course of events is as follows. An employer must, under risk of penalty, report any injury to an employee promptly. He reports to his insurance carrier (unless he is permissibly self-insured) and the insurance company then arranges for medical attention.

Medical attention usually is put in the hands of a physician selected by the carrier. This may seem an unfair arrangement since the injured man's choice of a physician is not entirely free. The free choice of a physician has been tried in the past and has not worked out well. The patient's own physician may be unfamiliar with the reports and forms required by the Commission. He may be unfamiliar with the points to be covered in a report. In addition, the work usually is specialized, and the physician chosen by the patient may not be competent to carry it out. So the insurance carrier selects the physician, and usually the claimant does not object. However, if the patient is dissatisfied with the physician to whom his case is assigned, he may complain to the Commission. The Commission then will give him the names of three physicians in whom it has confidence, and he may elect any one of them to conduct the medical management of the case from then on. The injured person is cared for, whether the situation calls for application of a simple bandage or a surgical operation and extensive hospitalization. Payment of compensation to the

injured person begins after a short waiting period and continues until temporary disability has ended and the patient is judged able to return to work.

If there is a permanent disability the case may go to the Industrial Accident Commission for a "rating" that ostensibly compensates for the disability, and the case is closed.

The foregoing, as was noted, is the usual procedure; but if there is a dispute over the extent of disability, the course of events becomes more complicated—of which, more later.

Other issues, such as liability or the statute of limitations, may have to be resolved by the Industrial Accident Commission, but the majority of cases are concerned with the responsibility of the state and the insured to an injured workman.

Let us say that a workman has an injury to his back. The physician representing the insurance company, after rendering treatment, may report that there is no remaining disability, or recommend a low "rating"—say 20 per cent permanent disability. But the workman may feel that this is a grave injustice. He believes he is totally or maybe 80 per cent disabled and, rightly or wrongly, feels aggrieved.

The Industrial Accident Commission then may come into the picture in a more active way. Owing to the technicalities and legal papers to be handled, the Industrial Accident Commission prefers that the workman retain an attorney at this juncture, although this is not mandatory.

The attorney sends the claimant to another physician of his selection, who records the case history, examines the patient and submits his estimate of the situation. The case is now ready for a hearing before a referee of the Industrial Accident Commission.

This hearing has the standing of our superior courts, but is somewhat more relaxed and informal. The presiding officer is the referee. Present are the claimant, an attorney for the claimant and an attorney for the defendant, plus any witnesses called by either side. Physicians may or may not be among the witnesses called for examination and cross-examination. Testimony is recorded but not necessarily transcribed at the time. Witnesses are sworn and each side presents its case. The referee takes the matter under advisement, and later renders his decision.

THE INDEPENDENT MEDICAL EXAMINER

If there is a conflict of medical testimony, the situation may be still more complex. The referee may decide on his own, just as a judge does, which testimony is most credible. On the other hand, either he or the attorney for the plaintiff or the attorney for the defendant may request the appointment of an independent medical examiner in order to have a third opinion. This physician is chosen from a panel. Usually he is a specialist—internist, orthopedist, neurosurgeon or the like. Like his colleagues who may have appeared in the original hearing, he is not infallible and there is no assurance that his opinion will prevail.

In any case, the function of the independent medical examiner is as follows. He is required to take an independent history and to carry out an independent examination of the claimant, without immediate recourse to other records. Then he reviews the medical file in the case, which is usually voluminous. It holds opinions on both sides and includes a record of the legal procedures that have taken place. The independent medical examiner thereafter reviews the x-ray films and laboratory reports, and possibly transcripts of testimony elicited in other hearings or legal proceedings.

The independent medical examiner may not communicate with the claimant or any attorney during his deliberations. If he wishes additional information he must request it of the Industrial Accident Commission, which usually gives it to him promptly.

Thereafter he prepares a summary and writes an opinion. These are expected to be as impartial as is humanly possible. The report of the independent medical examiner is added to the record. The examiner may be subpoenaed to uphold his opinions in a new hearing later on.

The author of the present communication has tabulated 147 cases in which he acted as independent medical examiner. The Industrial Accident Commission agreed completely or in general with 70 per cent of his evaluations. In the remaining 30 per cent, the Commission was more liberal than he was in 19 per cent and vice versa in 11 per cent.

A hearing before the Industrial Accident Commission can be, and often is, a routine, humdrum procedure in which each side states its case. The referee conducts the presentation of testimony, takes matters under consideration and, several weeks later, renders his decision. The hearing becomes more lively when there is a conflict somewhere along the line. This may be in controversy between the testimony of the claimant and the carrier or the carrier's representative, or between the medical experts. Disagreement between medical examiners is not difficult to understand. Given identical data, in the form of history, findings on examination and the like, physicians on either side may disagree sharply. One may believe that there is a large degree of disability while another may conclude that disability is minimal or nonexistent. In this connection it has to be recalled that the physician's history of the case is that given to him by the claimant. The claimant

may misrepresent the actual chain of events and may change his story from time to time. This may put one or both physicians in a highly undesirable position.

It is true that there is a medical file to fall back on to help in resolving discrepancies in the history. Nevertheless, the physician relies chiefly on the story as he gets it from the claimant.

As in the superior courts, motion pictures may be admissible as evidence. These are sometimes informative and sometimes entertaining as well. The technique used is much like that used in the familiar "Candid Camera" show on television. The claimant does not know he is being photographed. After testimony to the effect that he has such-and-such disability, the introduction of "movies" may do a good deal to clarify the situation.

When a lull comes during a hearing and an intermission is requested, one can be pretty sure that a projector and a silver screen will soon appear. The operator must give assurances that the pictures were taken at a certain place and at a certain time.

I can remember two occasions in which the result was a surprise. In one, a claimant who had sworn to great disability was shown doing heavy work on a truck. The claimant, who was present, rose up and shouted, "Hey, that's not me; that's my twin brother." The referee cautioned him to be patient. Very shortly, another man, who did bear a striking resemblance to the first, appeared on the film and proceeded to help out with the heavy work. In this case there was no award for the claimant.

In another that I recall, cameras were spaced over a distance of several hundred yards. The claimant alleged great disability as regarded his right arm and upper extremity. He was shown emerging from a supermarket carrying his groceries with his right arm. Apparently he preferred to use the disabled arm rather than its mate. The claimant was shown not only coming out of the supermarket but walking about a block and a half to his car, very blithely, without shifting his load.

On the other hand, "movies" frequently do not add much. One carrier sent a crew from San Francisco to Sacramento to photograph a claimant. The films showed the claimant doing just about what he admitted he was able to do—very light work, tying up bundles, smoothing a tarpaulin, and the like. Nobody in the hearing was impressed. I can recall other examples of the same sort in which the carrier hoped to accomplish great things by the introduction of movies but movies failed to carry the point.

Those workmen who come under the jurisdiction of the Industrial Accident Commission are insured by agencies generally referred to as "carriers" or "insurance carriers." Federally insured workers are not discussed in this article.

The employer who is obligated to "cover" his employees, and who does not, may find himself in serious difficulties, and few of them risk this. Of the "carriers" there are two main groups: the commercial carriers, and the company-owned and financed carriers acting for the "permissibly self-insured." One of the commercial carriers, the State Compensation Insurance Fund, has a status that is unique and will be discussed as a subdivision of the portion on commercial carriers.

The Commercial Carrier

As far as the author knows, any person or group that is financially sound (this would assume considable reserves) and who can point to some experience, may ask the state's permission to serve as the compensation insurance carrier. With the ratification of the insurance commissioners and subject to the rules they impose, the firm is then in business and may seek customers.

The firm's obligations and rights are clearly set forth in the code and in an extensive and complex list of precedents and rulings in special situations that have arisen and have been adjudicated over the years. But, in spite of the rules and regulations, there are still, in the author's opinion, "good" carriers and "bad" carriers. Some of the features of both kinds will be discussed.

The more or less unique organization mentioned earlier, the State Compensation Insurance Fund, came into existence with money advanced by the state of California in 1914. It is now entirely self-supporting and writes about one-third of all the compensation insurance in the state.

The "State Fund," as it is commonly referred to, is largely independent. It may sue or be sued regardless of reference to the state. The Industrial Accident Commission, on the other hand, exercises a great deal of control over the Fund.

The Fund originated very soon after our state's first compensation laws were passed. The purposes to be served were four. The Fund was to provide insurance at the lowest possible cost. It was to be in free competition with other carriers. It was supposed to be a "warm" rather than a "cold" organization, and to concern itself more with moralities than legalities. It was to carry out an educational campaign against industrial hazards. Opinions vary as to how successfully these objectives have been achieved.

Permissibly Self-Insured

Some firms, such as California Packing Corporation, the Matson Navigation Company and the local representatives of the Bethlehem Steel Corporation, are of such size and financial competence that they are allowed to be permissibly self-insured.

This simply means that they have been able to convince the State that they are competent to run their own insurance companies.

I once asked an attorney who is experienced in compensation work about the general features of the various companies and plans. His reply was to the effect that there were good and bad carriers in both general groups—the commercial carriers and the self-insured firms.

Before going further it might be a good idea to mention authorization. In most instances, when surgical operation or some special examination is contemplated by the physician, it is necessary to receive authorization from the insurance carrier. The necessity for authorization is a nuisance. Some firms are very cooperative and the physician may proceed with what he has in hand and seek authorization later. In other instances there is more difficulty. Sometimes when a carrier is a local office of a larger eastern firm, authorization may have to come from the eastern office, which may be galling to a physician who must treat a patient over a week-end, say, and cannot reach a responsible officer of the company for authorization.

Finally, there is a good deal of variation between companies as to liberality of benefits. Some firms are liberal indeed as to the benefits they disburse. Others may rigidly stay within the obligations imposed by law and may have to be forced to extend a benefit that to some observers would seem only reasonable. Even then, compliance with orders from above may be delayed interminably by legal maneuvers.

In a great majority of cases an employer's sympathy is with the injured workman. Some of the self-insurance funds are very liberal indeed, but since the self-insured employer is, in effect, spending his own money, there can be a tendency, in some instances, to do as little for the injured workman as the law will allow. There is, at least theoretically, a sort of conflict of interests.

On the other hand a company that buys its compensation insurance from a carrier would appear to have no such conflict: When an employee is injured, the employer gets in touch with the compensation carrier and expects the carrier to do a good job. If it does not, the employer can choose another carrier when contract renewal time comes around.

One other inconvenience with regard to self-insured companies is the fact that very often large firms of the sort that self-insure, also have health and welfare plans in addition to their compensation insurance subdivision. It is not uncommon for these two subdivisions to bicker between themselves as to which should do what for the patient.

In short, our compensation procedures have, as might be expected, good and bad points.

The good features are immediately recognizable. The injured workman is provided with financial protection, medical care and the various appliances and devices that may be needed to speed his recovery or lessen his handicap. The death benefits and the pension provisions are good points.

Some of the unsatisfactory features are susceptible of remedy, some not. For instance, we have no way, except through objective tests, of determining the true extent of disability. A malingerer or a psychoneurotic person who claims to have pain and disability may receive awards to which he is not properly entitled. It is impossible for a physician, referee, or anybody else to know how much a person suffers. Unless there is real objective evidence, the case may be rated on subjective complaints—to the detriment of the carrier (and ultimately of the public).

DIFFICULTIES OF EVALUATION

Edward O. Allen, who has served as a referee, an attorney and a commissioner with the Industrial Accident Commission, has the following to say in regard to the difficulties in evaluation.

"It would be of great value to the work of the Commission and to the medical profession in general, as well as to civil practice for damage claims, if a systematic follow-up of approved compromised claims in compensation could be established and there could be compiled statistical information on the sequels of all cases of traumatic neurosis, thus affording information as to the success and failure of this settlement mode of therapy. The Commission at one time was about to inaugurate such a system and employ investigators, but an economy urge in one of the incoming state governors put a stop to it in the budget. The writer, in several cases of alleged traumatic neurosis, where as referee he urged settlement which was approved, happened to learn by accident long after the case was concluded that there was full and permanent recovery to normal after the payment of the compromise."

Another inequity arises, it seems to me, in the method of determining the amount of weekly compensation to be paid. This is designed to be less than the claimant could make if he were at work, so that there may be some incentive for him to get back to the job. I have encountered, however, incidents in which, through a combination of benefits received through other insurance organizations, from other "sick benefits," social security and other like sources, the injured person's income, combined with his compensation, added up to a good deal more than he could get by working. There is no pecuniary incentive in such circumstances to get back to work. Moreover, in weekly payments the law makes no distinction between a single man who

has no dependents and the worker who, in addition to himself, may have to support a wife and several children on what the state allows him.

Difficulty also arises in the rating system. Take, for example, the matter of dealing with laborers. For some of them, hard labor is all they are able to carry out. For the Commissioner to assign, say a 20 per cent disability to a worker of that kind is unrealistic. Actually, if the injured man can do nothing but hard work, and is disabled for this, he is 100 per cent disabled. Often there is no prospect of educating him. The suggestion that he go to work as a watchman or an elevator operator is not helpful if there are no such jobs to be had.

A great deal has been said about rehabilitation for such persons. Harry Bridges in a recent television appearance mentioned this as a possibility in coping with the unemployment problem that will be raised among the longshoremen by mechanization. President John F. Kennedy, in a recent message, urged education and rehabilitation for other displaced workers. It is the writer's feeling that these measures will have a very limited success.

Finally, I think it is quite apparent that awards under the workmen's compensation set-up will continue to be more liberal. Compensation is being awarded in more and more instances of "stroke" and heart disease. Through changes in the Labor Code injured members of the Highway Patrol and city policemen and city firemen (this excludes stenographers, telephone operators, et cetera) are entitled, regardless of the period of service, to leave of absence with full salary up to the period of one year.

It seems to the writer that compensation, medical benefits, social benefits and even the attempts at rehabilitation, eventually will come together under one protective blanket—the blanket that ex-President Dwight Eisenhower has called "government by big brother."

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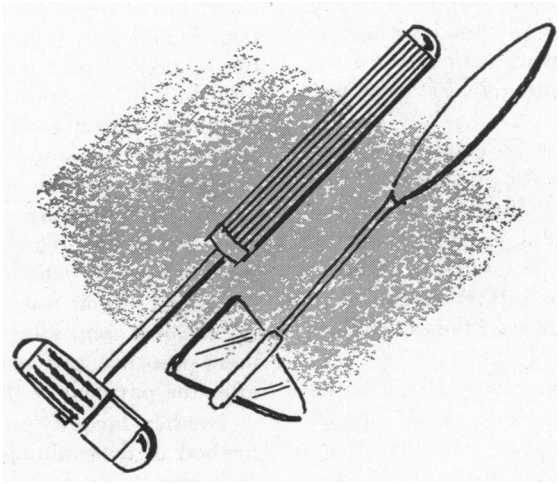
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