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BASIC PROBLEMS IN THE ADMINISTRATION OF WORKMEN'S COMPENSATION*

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I. SCOPE AND NATURE OF THE TASK IN GENERAL

THE acceptance and growth of workmen's compensation as a modern approach to the human and social losses resulting from work-injuries¹ naturally create some very basic and crucial problems in the administration of the system. Administration is here used in the widest sense of the word and comprises the basic elements of the benefit structure, the range of the beneficiaries, and methods of claim determination, as well as the financing of the program and its coordination with other branches of our social security system, and the legal framework at large.

The recognition that workmen's compensation is fundamentally a branch of social insurance, designed to protect a segment of the population against substandard living conditions brought about by a typical hazard of modern society² furnishes, at the most, a very vague guide for the actual design of a modern and, as it were, ideal workmen's compensation program. The realities of the task to be performed serve possibly as much more reliable guide posts

*This article constitutes the annotated form of the second of two lectures which were given on Nov. 25th and 27th, 1950, at the University of Minnesota as the Gleason Lectures on Workmen's Compensation, sponsored by NACCA. It is the slightly modified version of an article printed concurrently in the NACCA Law Journal by arrangement with its editor. The first lecture, entitled *Forty Years of American Workmen's Compensation*, was printed in 35 Minn. L. Rev. 525 (1951).

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1. For the history of the evolution of workmen's compensation in the United States see Riesenfeld, *Forty Years of American Workmen's Compensation*, 7 NACCA L. J. 15 (1951); 35 Minn. L. Rev. 525 (1951).

2. For the development of this idea see Riesenfeld, *Forty Years of American Workmen's Compensation*, 7 NACCA L. J. 15, 21 (1951); 35 Minn. L. Rev. 525, 530 (1951).

toward the ultimate goal of a socially adequate and workable system. It is perhaps wise to aim high and think of workmen's compensation primarily in terms of adequate if not full social rehabilitation of the injured worker³ rather than merely as "a compromise in the public interest."⁴

While the problems centering around the benefit structure and effectuation of the benefit side are, in the nature of things, of paramount and preponderant importance, nevertheless ignoring the financing and coordination angles would result in a grossly distorted picture if not serious impairment of the workability. The facets of the problem of fashioning a modern workmen's compensation program are thus manifold and require studying a multitude of practical and technical questions. Naturally the present paper can only highlight the area and canvass the terrain cursorily. It should be noted therefore that a more detailed exploration is aided immeasurably not only by a few special studies regarding various phases of the administration of workmen's compensation⁵ and a multitude of reports by legislative and gubernatorial committees for the improvement of the existing individual state laws⁶ but especially by the proceedings and reports of the two associations formed by the administrators of the two main operational aspects of the program, viz., the International Association of Industrial Acci-

3. The idea that socially adequate (i.e., physical and economic) rehabilitation of the injured worker is the goal and function of workmen's compensation has been stressed by a number of students and practical administrators of the program, see for instance recently Dawson, *Present Conditions of Workmen's Compensation Laws and Possible Changes*, Proc. of the 36th Annual Convention of the Int. Assoc. of Ind. Acc. Boards and Comm's., U. S. Dept. of Labor, Bureau of Labor Stds., Bull. No. 142, at 61 (1950).

4. The idea of workmen's compensation as a "compromise" is unfortunately dear to many courts and even members of the administrative agencies, see for instance Campbell, *Basic Principles of Workmen's Compensation*, Proc. of the 36th Annual Convention of the Int. Assoc. of Ind. Acc. Boards and Comm's., U. S. Dept. of Labor, Bureau of Labor Stds., Bull. No. 142 at 120 (1950). However, the latter author correctly recognizes rehabilitation as the purpose of the program, *Id.* at 129.

5. The chief relatively modern studies of the administration of American workmen's compensation are Dodd, *Administration of Workmen's Compensation* (1936) and Dawson, *Problems of Workmen's Compensation Administration*, U. S. Dept. of Labor, Bureau of Labor Statistics Bull., No. 672 (1940). A more recent work centering primarily on the scope of coverage, the benefit levels and the costs of the systems is Reede, *Adequacy of Workmen's Compensation* (1947). A comparatively detailed presentation of the various problems of workmen's compensation is also contained in Riesenfeld and Maxwell, *Modern Social Legislation* 127-440 (1950).

6. The most comprehensive recent reports by legislative committees are the Report of Senate Interim Committee to the Senate on Workmen's Compensation Benefits, 59th Sess., Calif. Legisl. (1949) and the (1st) Partial Report of Senate Interim Committee to the Senate on Workmen's Compensation Benefits, Calif. Legisl. 1951 Reg. Sess. (1951).

dent Boards and Commissions⁷ and the National Association of Insurance Commissioners.⁸

Speaking in the most general terms it should be noted that the administration of workmen's compensation is characterized by two outstanding properties which I like to designate, for lack of better terms, with the labels *standardization* and *de-technicalization*. Although the specific needs of an injured individual even for adequate rather than full social rehabilitation might vary greatly in each individual case and could be correctly determined only by a rather refined process, it is obvious and an inexorable fact that the enormous workload of the system⁹ and the necessity for speedy action compel a certain amount of typification and informality foreign to the rather sophisticated standards of judicial administration in tort cases. The true crux of the problem in drafting a modern compensation act lies in the proper scope and degree of this standardization of benefits without sacrifice of the ultimate goal of adequate rehabilitation and the proper extent of de-technicalization without violation of the rudiments of fairness to which all parties are rightfully entitled.

II. THE PROBLEM OF THE MEASURE OF BENEFITS

Undoubtedly the central problem in the administration of workmen's compensation (as defined in the previous section) is the establishment of the proper standards for determining the measure of benefits. This task is by no means easy or obvious. It depends upon complicated problems of social policy and defies attempts of easy generalization. Its intrinsic difficulties can be best understood by contrast with the accepted standards for the determination of the measure of redress in the law of torts.

The leading theme of the law of torts is the payment of money *damages*. Leaving aside the outmoded notions of exemplary (punitive) and nominal damages—the idea of compensatory damages proceeds on the basis that the injured party shall be fully relieved, at least economically from the detrimental results of the tortious conduct. In other words, the economic status of the victim shall retain its level despite the interference by the tort-feasor. Theoreti-

7. The proceedings of the annual conventions of the association, excepting the first two (1914, 1915) and the thirtieth meeting (1944), are published in separate bulletins by the Bureau of Labor Statistics (1916-1933) and the Bureau of Labor Standards (1934-1950).

8. The proceedings of the annual conventions of the association are published in separate volumes beginning with the first meeting in 1870, but not covering the 6th to the 18th meeting (1875-1887).

9. For statistics regarding disabling work-injuries in the United States see the references cited in my previous lecture, 7 NACCA L. J. 15, 17 n. 17 (1951).

cally all deleterious results expressable in monetary terms shall be taken account of in the award.¹⁰ This includes not only palpable monetary losses such as the expenses for medical treatment and physical rehabilitation or the reduction of past and future earnings (considering the whole lifespan, beginning with the tort and extending over the period to be expected without injury), but also less tangible ill effects such as pain, suffering, shock, loss of standing in the community, humiliation, mortification, etc. The translation of the latter items into monetary figures is not always readily accomplished. Yet apparently social conventions are sufficiently crystallized to ascribe economic values to the freedom from such intangible and more sophisticated consequences.¹¹

The benefits payable under workmen's compensation are admittedly not designed to provide for full compensation of all injurious consequences of the injury expressable in monetary terms. They merely aim at an alleviation of the deterioration in the living standards of the victim and his family flowing from the injury. They are as much predicated on the idea of *need* as on the idea of *loss*.¹² Thus compensation includes in general no amounts for pain, suffering, humiliation and other social discomforts.¹³ The basis for the computation of benefits in all American compensation laws is an elusive and somewhat flexible concept called *disability*.¹⁴ The

10. For a detailed and provocative study of the various considerations to be presented by counsel in order to secure a proper recovery see Belli, *The Adequate Award*, 39 Calif. L. Rev. 1 (1950).

11. The process of this crystallization is one of long standing in Anglo-American law. As early as 1198 we find a complaint alleging that plaintiff "received such a beating and bruises that he would not have wanted to receive such ill treatment for 100 soldi." See the Latin original, quoted in the introduction by Richardson and Sayles to *Select Cases of Procedure Without Writ under Henry III*, 60 Selden Society, CIX (1941).

12. The difference between the character of compensation payments and money damages is not infrequently invoked by the courts. Occasionally the judicial language is so emphatic that it seems to overshoot the mark. Certainly workmen's compensation benefits are designed to relieve the workman from his more drastic losses, although they do not constitute *full* compensation for *all* losses and may, as in the case of dependents' allowances, not in all respects depend on loss. But compare judicial comments such as the following: "Compensation is a concept *wholly different* from that of damages," *Henrie v. Rocky Mountain Packing Corp.*, 196 P. 2d 487, 493 (Utah 1948) (modified in 202 P. 2d 727 (Utah 1949)).

13. See, for instance, *Shaw v. Salt River Valley Users' Ass'n.*, 69 Ariz. 309, 311, 312, 213 P. 2d 378 (1950): "There is no provision in the act which allows compensation for pain and suffering. Therefore pain and suffering which do not lessen the employee's ability to earn wages is not compensable." Many states have, however, inserted into the compensation laws provisions for "disfigurement" which in a few instances take account of the social inconveniences flowing therefrom although they do not manifest themselves in reduction of employment opportunities. For details see Riesenfeld and Maxwell, *Modern Social Legislation* 299, 300 (1950).

14. See Horovitz, *The Meaning of "Disability" Under Workmen's*

courts of some jurisdictions have considered this concept in most if not all cases as being practically equivalent with a *reduction in physical capacity*, though sometimes they have seen fit to add a few thoretical reservations.¹⁵ To that extent therefore disability depends completely upon a purely *medical* value judgment. But in the preponderant majority of jurisdictions the term disability is used in the sense of a *reduction in earning capacity*. It thus involves in the last analysis an *economic* value judgment, although the extent of the underlying medical disability will constitute an important but not solely controlling factor in arriving at the final result.¹⁶ In most jurisdictions the extent of the disability alone does not determine the amount to be received. Subject to stated floors and ceilings, the benefits are computed as a percentage of the wage received at the time of the injury. Only four of the western jurisdictions specify the amounts of benefits to be paid in flat sums¹⁷ or percentages thereof, two of them,¹⁸ however, with the qualification that the flat benefit system applies only to the permanent disabilities.

In addition to granting death benefits the American benefit formulae differentiate universally between various classes of disability depending upon the duration and degree thereof. Thus we find separate provisions for permanent total disability, permanent partial disability and temporary total disability.¹⁹ A number of states add a fourth class called temporary partial disability.²⁰

It is generally agreed that total disability does not require the existence of a state of complete helplessness or incapacity for *all*

Compensation Acts, 1 NACCA L. J. 32 (1948).

15. The leading jurisdictions which emphasize the medical side (loss of bodily functions) as the chief aspect of disability, at least in all permanent disability cases, are New Jersey and Washington. The principal case responsible for that approach which is mostly due to statutory language was *Burbage v. Lee*, 87 N. J. L. 36, 93 Atl. 859 (Sup. Ct. 1915). For recent applications and, perhaps, qualifications see *Cooper v. Cities Service Oil Company*, 137 N. J. L. 181, 184, 59 A. 2d 268 (1948), and *Franks v. Department of Labor & Industries*, 35 Wash. 2d 763, 215 P. 2d 416 (1950), see also *infra* note 34 and in general *Riesenfeld and Maxwell, op. cit. supra* note 13, at 299.

16. As examples of the multitude of cases stressing the latter approach see *Zeigale's Case*, 325 Mass. 128, 89 N. E. 2d 264 (1949); *Enrico v. Oliver Min. Co.*, 199 Minn. 190, 271 N. W. 456 (1937); *Anderson v. Northwest Motor Co.*, 233 N. C. 372, 64 S. E. 2d 265 (1951).

17. Alaska, Oregon, Washington and Wyoming, cf. *State Workmen's Compensation Laws*, as of Sept. 1950, U. S. Dept. of Labor, Bureau of Labor Stds. Bull. No. 125, at 11 (1950).

18. Alaska and Oregon.

19. See the survey in *State Workmen's Compensation Laws*, as of Sept. 1950, U. S. Dept. of Labor, Bureau of Labor Stds., Bull. No. 125, at 11 (1950).

20. See, for instance, Cal. Labor Code § 4654 (*Deering 1943*); Md. Code Ann. Art. 101 § 35(6) (*Flack 1947*); Minn. Stat. Ann. § 176.11 subd. 2;

work.²¹ The courts deem sufficient for a finding of total disability that the victim has suffered an injury which prevents him under normal conditions of the labor market to find any substantial and steady gainful employment without subjecting himself to unreasonable danger or discomfort.²² But most courts also insist on the presence of all these conditions and refuse to find total disability as long as the injured worker is still fit for light and menial work of the type which is ordinarily sought by employers.²³ Accordingly, mere incapacity to follow the customary occupation, i.e., the pre-injury calling or a calling reasonably similar thereto, is not considered as amounting to total disability²⁴ except in a few jurisdictions, especially Louisiana²⁵ and Michigan, although even in the latter state the *general* wage-earning capacity after the injury enters as a *set-off*.²⁶

N. Y. Workmen's Compensation Law § 15(5), 64 McKinney's Cons. Laws (Cum. Supp. 1951); Okla., Stat. Ann., Tit. 85 § 22(4) (Cum. Supp. 1951).

21. See, for instance, the statements to that effect in *Endicott v. Potlatch Forests*, 69 Idaho 450, 455, 208 P. 2d 803, 806 (1949); *Pullman Co. v. Industrial Com.*, 356 Ill. 43, 48, 139 N. E. 874, 876 (1934); *Cornett-Lewis Coal Co. v. Day*, 312 Ky. 221, 225, 226 S. W. 2d 951, 953 (1950); *Frennier's Case*, 318 Mass. 635, 639, 63 N. E. 2d 461, 463 (1945).

22. See, for instance, the holdings or dicta to that effect in *National Fuel Co. v. Arnold*, 214 P. 2d 784 (Colo. 1950); *Osterlund v. State*, 135 Conn. 498, 66 A. 2d 363 (1949); *Pullman Co. v. Industrial Com.*, 356 Ill. 43, 139 N. E. 874 (1934); *Joilet & Eastern Traction Co. v. Industrial Com.*, 299 Ill. 517, 132 N. E. 794 (1921); *Frennier's Case*, 318 Mass. 635, 63 N. E. 2d 461 (1945); *Lee v. Minneapolis Street Railway Co.*, 230 Minn. 315, 41 N. W. 2d 433 (1950); *Colantonio v. Kingsbury Machine Tool Co.*, 79 A. 2d 633 (N.H. 1951); *Cleland v. Verona Radio Inc.*, 130 N. J. L. 588, 33 A. 2d 712 (Sup. Ct. 1943); *Dierks Lumber & Coal Co. v. Lindley*, 182 Okla. 185, 77 P. 2d 44 (1938); *Oklahoma Gas & Electric Co. v. Hardy*, 179 Okla. 624, 67 P. 2d 445 (1937).

23. See, for instance, *Clark v. Henry & Wright Mfg. Co.*, 136 Conn. 514, 72 A. 2d 489 (1950) (lack of earning capacity in other types of employment produced by slack in labor market). *But cf.* *Czeplicki v. Fafnir Bearing Co.*, 78 A. 2d 339 (Conn. 1951); *Colantonio v. Kingsbury Machine Tool Co.*, 79 A. 2d 633 (N.H. 1951) (denial of total disability because of lack of conclusive evidence to the effect that claimant could not find other types of light work); see also *Leavor v. Midvale Co.*, 162 Pa. Super. 393, 57 A. 2d 698 (1948) (requirements satisfied by post-injury military record of victim).

24. See the express statements to that effect in *Osterlund v. State*, 135 Conn. 498, 505, 66 A. 2d 363, 367 (1949); *Congoleum Nairn v. Brown*, 158 Md. 285, 148 Atl. 426 (1929). *But cf.* *Gowe v. Davis Coal & Coke Co.*, 78 A. 2d 195 (Md. 1951) (different definition of disability under occupational disease law); *Colantonio v. Kingsbury Machine Tool Co.*, 79 A. 2d 633 (N.H. 1951); *Oklahoma Gas & Electric Co. v. Hardy*, 179 Okla. 624, 67 P. 2d 445 (1937); *Leavor v. Midvale Co.*, 162 Pa. Super. 393, 57 A. 2d 698, 701 (1948); *Texas Employers' Insurance Association v. Mellard*, 143 Tex. 77, 182 S. W. 2d 1000 (1944).

25. *Hughes v. Enloe*, 214 La. 539, 38 So. 2d 225 (1948); see *Scott v. Hillyer. Deutsch, Edward*, 217 La. 595, 599, 46 So. 2d 914, 915 (1950).

26. *MacDonald v. Great Lakes Steel Corp.*, (1st case), 268 Mich. 591, 594, 256 N. W. 558 (1934), (2 case), 274 Mich. 701, 265 N. W. 776 (1936);

The measure of the degree of partial permanent disability as well as the line of demarcation between partial and total permanent disability has perplexed the courts and given rise to a mess of confusion and doubt. All but one²⁷ of the 54 American workmen's compensation acts contain more or less elaborate catalogues of specified types of injuries and eliminate the necessity for a determination of the exact degree of disability flowing therefrom in the individual cases by fixing the compensation to which these injuries entitle either by setting out flat amounts,²⁸ or (in the majority of jurisdictions) by prescribing the length of time for which compensation computed as a stated percentage of the pre-jury wages is payable.

The introduction of these schedule injuries was conceived as a (perhaps arbitrary) standardization of the degree of disability—whether conceived as an economic or a medical concept²⁹—and was designed to simplify and expedite the administration of the workmen's compensation laws. Experience has proven that these schedules are at best a mixed blessing. While in many instances they eliminate the necessity of determining the actual degree of disability on the basis of complex and conflicting medical and economic evidence, their applicability in the individual case will frequently be dubious and might as easily result in a hardship to the injured

Lynch v. Briggs Mfg. Co., 329 Mich. 168, 45 N. W. 2d 20 (1950).

27. California does not possess a catalogue of schedule injuries but fixes the benefits according to classes formed for percentages of permanent disability incurred, Cal. Labor Code § 4658 (Deering 1943). The Federal Civil Employees' Compensation Act acquired its schedule in 1949, 5 U. S. C. A. § 755 (Cum. Supp. 1949).

28. Alaska, Washington, Wyoming. Cf. *supra* text to notes 17 and 18.

29. The apparent "anomaly" of the schedule injuries has puzzled the courts in practically all jurisdictions. The majority of them seems to have considered the schedule injuries as more or less arbitrary legislative standardization of the degree of disability whether conceived as reduction of earning capacity or physical ability. For leading cases from various jurisdictions struggling with the character of schedule injuries see *Swift & Co. v. Industrial Com.*, 302 Ill. 38, 44, 134 N. E. 9, 11 (1922); *In re Denton & Good*, 65 Ind. App. 426, 437, 117 N. E. 520, 523 (1917); *Washington v. Independent Ice & Cold Storage Co.*, 211 La. 690, 30 So. 2d 758 (1947); *Merchant's Case*, 118 Me. 96, 99, 106 Atl. 117, 119 (1919) (arbitrary compensation); *Clements v. Chrysler Corp.*, 321 Mich. 558, 562, 33 N. W. 2d 82, 83 (1948); *Everhart v. Newark Cleaning & Dyeing Co.*, 119 N. J. L. 108, 111, 194 Atl. 294, 296 (1937); *Marhoffer v. Marhoffer*, 220 N. Y. 543, 548, 116 N. E. 379, 380 (1917); *State ex rel. Dudley v. Industrial Com.*, 135 Ohio St. 121, 125, 19 N. E. 2d 895, 897 (1939); *Mudge Oil Co. v. Wagon*, 193 Okla. 466, 145 P. 2d 185 (1943); *Consolidated Underwriters v. Langley*, 141 Tex. 78, 81, 170 S. W. 2d 463, 464 (1943); *Beane v. Vermont Marble Co.*, 115 Vt. 142, 144, 52 A. 2d 784, 785 (1947); *Franks v. Dept. of Labor & Industries*, 35 Wash. 2d 763, 773, 215 P. 2d 416, 424 (1950). In Massachusetts the specific compensation under the schedule is merely "additional compensation," IV-A Mass. Stat. Ann., Ch. 152 § 36 (1950).

workman as in an advantage.³⁰ The worst hardship cases produced by the schedules occur especially in the instances—a) where the loss of a member, such as a leg or an arm, hits a completely unskilled and uneducated laborer and thus results in total destruction of his earning power, or b) where an injury which ordinarily is considered as of comparatively minor consequence destroys the use of a member vital to the pursuit of a highly skilled profession, such as is illustrated by the loss of the first phalange of the left index finger by a violinist. Numerous courts have held to the position that they are bound by the compensation set out in the schedules in the cases to which they apply, and this apparently despite the fact that the injury in the particular case produces an unusually high degree of partial or even total disability.³¹ Fortunately, however, to an increasing degree they tend to be inclined to alleviate some of the harshest results by finding that the injury in question goes beyond the particular schedule because it extends to zones of the anatomy not included in the description of the schedule injury or affects the whole body otherwise than the injury envisaged by the schedule.³² Also apart from these inequities here mentioned the schedules have presented complicated questions of construction, especially in the cases of simultaneous multiple injuries and additional temporary disabilities.³³

30. The "advantage" occurs frequently in the form that the injured workman is considered as disabled although he actually suffers no permanent loss of earnings as a result of the injury, see cases collected in note 149 A. L. R. 413 at 449; and Horovitz, *op. cit. supra* note 14, at 35.

31. See, for instance, Kentucky Cardinal Coal Corp. v. Delph, 296 Ky. 295, 176 S. W. 2d 886 (1943); Consolidated Underwriters v. Langley, 141 Tex. 78, 170 S. W. 2d 463 (1943). Notable exceptions from the general rule are Louisiana, New Hampshire, and apparently also Massachusetts and Tennessee. In Louisiana it has been held that the schedule applies only in the absence of adverse effect on earnings, Scott v. Hillyer, Deutch, Edwards, 217 La. 597, 46 So. 2d 914 (1950). In New Hampshire the schedule is by statute specifically declared to be merely elective, N. H. Laws 1947 c. 266 § 2511, see also Bernier v. Mills, 93 N. H. 299, 41 A. 2d 221 (1945). In Massachusetts the specific compensation for schedule injuries is according to the act only "additional compensation" and does not preclude compensation for total incapacity, Hummer's Case, 317 Mass. 617, 39 N. E. 2d 295 (1945). In Tennessee the Supreme Court, after prolonged vacillations, seems to have recently arrived at the conclusion that the provisions for total disability override the schedule, Johnson v. Anderson, 188 Tenn. 194, 217 S. W. 2d 939 (1949), see also Cox v. Black Diamond Coal Mining Co., 93 F. Supp. 685 (E.D. Tenn. 1950), noted 7 NACCA L. J. 103 (1951).

32. Illustrative cases for this rule are Wood Mosaic Co. v. Brown, 303 Ky. 741, 199 S. W. 2d 433 (1947); Olson v. Griffin Wheel Co., 218 Minn. 48, 15 N. W. 2d 511 (1949); Consolidated Underwriters v. Langley, 141 Tex. 78, 170 S. W. 2d 463 (1947). For further references see Horovitz, *op. cit. supra* note 14, at 37; Riesenfeld & Maxwell, *op. cit. supra* note 13, at 307.

33. The different jurisdictions show great variation as to the limits within which "pyramiding" of injuries and tacking of benefit periods are

In all other cases of permanent partial disability, that is where the schedules apply neither directly nor as standards of comparison, the courts have likewise been faced with extraordinarily difficult questions. Since in these cases, according to the majority of statutes,³⁴ the actual reduction of the earning capacity is the criterion which determines the degree of disability, the problem is solved neither by ascertaining the degree of medical disability³⁵ nor by simply comparing pre-injury and post-injury wages. It is apparently generally recognized that the amount of wages actually received after the injury is by no means conclusive of the earning capacity actually subsisting, since the amount may be based on other considerations than the value of services of the injured employee on the regular labor market.³⁶ Even where the post-injury wages are the same as are paid for services of that type on the open labor market, the correct comparisons of the pre- and post-injury earning capacities may properly necessitate complicated wage level adjustments.³⁷ There exists, however, wide disagreement, how far other factors, especially age, should be weighted in determining

permissible. For illustrative cases relating to multiple injuries see *Tennessee Coal, Iron & R.R. Co. v. Long*, 251 Ala. 492, 38 So. 2d 18 (1948); *Lysowsky v. White*, 177 Md. 377, 9 A. 2d 599 (1949); *Hanson v. Hayes*, 225 Minn. 48, 29 N. W. 2d 437 (1947); *Cooper v. Cities Service Oil Co.*, 137 N. L. J. 181, 59 A. 2d 268 (1948); *Matter of Sokolowski v. Bank of America*, 261 N. Y. 61, 184 N. E. 492 (1933); *Barlock v. Orient Coal & Coke Co.*, 319 Pa. 119, 178 Atl. 840 (1935); *Griffith v. Goforth*, 184 Tenn. 56, 195 S. W. 2d 33 (1946). For a well considered case relating to tacking of benefits for temporary total and permanent partial disability, see *Peerless Sales Co. v. Industrial Com.*, 107 Utah 419, 154 P. 2d 644 (1944).

34. There is a steady growth of the area of cases involving permanent partial disability in which the compensability is determined not by determination of the actual reduction of the earning capacity, but by comparison of the medical severity of the injury with related schedule injuries or injuries producing total disability, see especially *Clark's Case*, 120 Me. 133, 113 Atl. 51 (1921); *E. I. duPont deNemours & Co. v. Spencer*, 195 Okla. 300, 157 P. 2d 186 (1945); *Silver King Coalition Mines Co. v. Industrial Comm. of Utah*, 92 Utah 511, 69 P. 2d 608 (1937); *Beane v. Vermont Marble Co.*, 115 Vt. 142, 52 A. 2d 784 (1947); *Northern States Power Co. v. Industrial Com.*, 252 Wis. 70, 31 N. W. 2d 217 (1947). This approaches, of course, the New Jersey and Washington system, as exemplified by *Everhart v. Newark Cleaning and Dyeing Co.*, 119 N. J. L. 108, 194 Atl. 294 (1937) and *Franks v. Dept. of Labor & Industries*, 35 Wash. 2d 763, 215 P. 2d 416 (1950), *supra* text to note 15.

35. *Standard Acc. Insurance Co. v. Industrial Commission*, 66 Ariz. 247, 186 P. 2d 951 (1948); *Enrico v. Oliver Iron Min. Co.*, 199 Minn. 190, 271 N. W. 456 (1937).

36. See, for instance, *Davis v. Brenn & Co.*, 170 Kan. 177, 223 P. 2d 958 (1950), noted 7 NACCA L. J. 105 (1951); *Sporcic v. Swift & Co.*, 149 Neb. 246, 30 N. W. 2d 891 (1948). See also *Riesenfeld & Maxwell, op. cit. supra* note 13, at 303, 304.

37. See, for instance, *Whyte v. Industrial Com.*, 227 P. 2d 230 (Ariz. 1951), noted 7 NACCA L. J. 106 (1951); *Franklin County Coal Corp. v. Industrial Commission*, 398 Ill. 528, 76 N. E. 2d 457 (1947).

the degree of the disability.³⁸ Some states have special provisions in that respect.³⁹

Yet, even after all the proper adjustments, the resulting benefit levels payable under the workmen's compensation acts may still engender grave inequities. Since most states compute the benefits ultimately as a specified percentage of the pre-injury wages, the system discriminates severely against the young worker who, of course, ordinarily will receive lower wages than his more experienced elders. As a result he will be compensated at a lower sum despite the fact that actually both his *loss* and his *wants* may be greater than those of the older worker. For the disabled young worker faces a whole life of lower earning capacity and his children may still be small and in need of care. It was precisely this social inconsistency which prompted some American labor leaders in the early days to object to workmen's compensation.⁴⁰

To alleviate some of these hardships which result especially for the younger worker from the existence of dependent children an increasing number of states have made provisions for additional disability benefits where there are such children involved.⁴¹ In addition Massachusetts, Ohio and Utah, for instance, have also provided for a special rule in determining the basic wage of a young worker which permits to consider the fact that his wages are expected to increase under natural conditions in view of his age and experience.⁴² But this authorization, beneficial as it could be, has unfortunately been given a very limited applicability. In Massachusetts it has been held to apply only to such wage increases as "might be expected from the particular employer in conducting

38. For an excellent discussion of the effect of age on disability ratings and of the divergent views on the subject see (1st) Partial Report of Senate Interim Committee to the Senate on Workmen's Compensation Benefits, Calif. Legisl. 1951 Reg. Sess., 107 (1951).

39. See, for instance, Ariz. Code Ann. § 56-957(d) (1939); Md. Code Ann. Art. 101 § 35(4) (Flack. Supp. 1947), as amended by Md. Laws 1951 c. 451. Wisconsin provides specifically for a reduction of the amounts recoverable for permanent partial disability as a result of increasing age, Wis. Stat., § 102.44(3)(b) and § 102.53(2) (1949).

40. See the letter of July 28, 1910, by W. S. Carter, President of the Brotherhood of Locomotive Firemen and Enginemen to Edwin Wright, President of the Illinois State Federation of Labor, reprinted in Report of the Employer's Liability Commission of the State of Illinois 225 (1910).

41. For a survey of the jurisdictions which granted dependents' allowances in disability cases as of Sept. 1950, see State Workmen's Compensation Laws, U. S. Dept. of Labor, Bureau of Labor Stds., Bull. No. 125 at 29 (1950).

42. IV-A Mass. Laws Ann. Ch. 152 § 51 (1949); Ohio Code Ann. § 1465-85 (Throckmorton 1948); Utah Code Ann. § 42-1-71 (1943).

his industry 'under natural conditions.'"⁴³ The statute thus construed does not compensate the young worker for the loss of definite earning opportunities in a profession other than that in which he suffered the loss. The tremendous hardships which might flow from this limitation can be seen from a case which recently came to the attention of the writer. A gifted young violin student in a great state university suffered an injury to the first phalange of the index finger while working in a factory to earn some money to finance his lessons. Apparently the foreman was negligent. The injury completely wrecked the promising professional career of the young man. His total compensation was in the neighborhood of \$300! Of course, the argument presents itself immediately that industry should not be responsible for extraordinary individual losses of the workers.⁴⁴ Yet in a tort action such losses would undoubtedly be considered in the computation of the damages. Should not the definite loss of job opportunities in general at least be a factor in the computation of the worker's benefits despite the necessity for standardization of the risk imposed on industry?

The above mentioned Massachusetts statute likewise does not alleviate the intrinsic shortcomings from which a system that predicates benefits upon past earnings at a fixed date and operates with fixed amounts and specified ceilings is bound to suffer in a period of steadily rising price and wage levels.⁴⁵ A recent study of the operation of state workmen's compensation acts made with the view of a possible adoption of such system for railroad employees has conceded that the benefit schedules now in general use for permanent partial disabilities are "arbitrary, inconsistent and often inadequate."⁴⁶ Other and more hostile critics have emphasized in even stronger terms the illusory nature of the presently existing protection in severe cases.⁴⁷

There is without doubt much truth in these statements.⁴⁸ It is

43. *Gagnon's Case*, 228 Mass. 334, 338, 117 N. E. 321, 323 (1917); but see the intimation of a broader scope of applicability for the Utah statute in Justice Wolfe's concurring opinion in *Royal Canning Corp. v. Industrial Com.*, 101 Utah. 323, 334, 121 P. 2d 406, 411 (1942).

44. See the reasoning of Chief Justice Rugg in *Gagnon's Case*, *supra* note 43.

45. *Bursey's Case*, 325 Mass. 702, 92 N. E. 2d 583 (1950).

46. Pollack, *Workmen's Compensation for Railroad Work Injuries and Diseases*, 36 Cornell L. Q. 236, 267 (1951).

47. See, for instance, Richter and Forer, *Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers*, 36 Cornell L. Q. 203 (1951).

48. The Federal Security Agency, in surveying the benefit payments under state workmen's compensation acts, found in 1950 that the ceilings on the weekly benefit amounts prevented the majority of workers in most

significant that since the original adoption of the compensation acts no detailed legislative investigations into the actualities of the benefit levels have been made that could compare with the care the fact finding committees which studied the operation of the common law system in the field of industrial accidents forty years ago. In the opinion of the writer it is high time that the legislatures investigate the fate of the families in which the breadwinner has suffered a permanent disability and study the possibility of benefit formulae which are consistent, not overstandardized, and flexible enough to be and remain socially adequate.

III. PROBLEMS IN CLAIM ADMINISTRATION

While the law relating to the structure and level of benefits shows the distressing signs of legislative lethargy and patching and repatching, the picture of the claim administration is much more encouraging.

Originally a number of the American states followed the English example⁴⁹ and provided for the settlement of compensation claims either by arbitration subject to an extensive control by the courts⁵⁰ or by out and out "court administration."⁵¹ In the course of time this method of adjudicating claims was abandoned as unsuitable

states from getting the statutory standard percentage of their weekly wages. McCamman, *Workmen's Compensation: Coverage, Premiums, Payments*, 13 *Social Security Bull.*, No. 7 at 3 (1950). The Illinois Industrial Commission demonstrated the inadequacy of the Illinois compensation benefits at the 1949 level by comparing the benefits actually paid for various types of injuries with the corresponding "standard economic time charges" allocated to such injuries by the Bureau of Labor Statistics with the approval of the American Standards Association. The following table resulted:

<i>Extent of disability</i>	<i>Average Compensation per day lost or charged</i>
All cases closed	\$1.28
Fatal	.66
Permanent Total	1.15
Permanent Partial	1.37
Disfigurement	1.02
Temporary Total	2.45
Temporary Partial	2.74

Ill. Industrial Commission, *Annual Report on Industrial Accidents in Illinois During 1949*, Pt. II, 15 (1950). See also the tables *infra* note 73.

49. 6 Edw. 7, c. 58 § 1(3) and 2d Schedule (1906).

50. *E.g.*, Ill. Law 1911, 315 §§ 10 ff; Kan. Laws 1911 c. 218 §§ 24 ff.

51. Minn. Gen. Stats. 1913 § 8225; Neb. Laws 1913 c. 198 §§ 37 ff; N. J. Laws 1911 c. 95 §§ 18 ff.

for the purpose⁵² and most states today entrust the administration of the acts, including the determination of contested claims to special administrative agencies.⁵³

These agencies were at first separate boards, frequently called Industrial Accident Boards.⁵⁴ Since, however, the workmen's compensation acts belong to that group of statutes which were passed in the interest and for the protection of labor a number of states followed a proposal conceived and developed by John R. Commons of Wisconsin and created special "Industrial Commissions" for the integrated administration of all these laws, including workmen's compensation.⁵⁵ Gradually, however, with the increased governmental intervention in the field of labor relations, the preference for the commission form of the state department administering industrial legislation underwent an eclipse and many of the states of industrial importance reconstructed their labor departments along different organizational charts.⁵⁶ This reorganization naturally has had its repercussion on the allocation of, and responsibility for, the administration of the various functions and tasks to be performed under the workmen's compensation acts.⁵⁷

At any rate, most states entrust the final adjudication of controverted compensation claims to a special board or commission⁵⁸ which

52. For the history of the abandonment of court administration in Kansas, Minnesota, Nebraska and New Jersey see Dodd, *Administration of Workmen's Compensation* (1936) 70 ff. Among the pioneer states which created Industrial Accident Boards for the administration of their acts were California, Cal. Stats. 1911 c. 399 §12; Massachusetts, Mass. Acts 1911 c. 751 pt. III; and Wisconsin, Wis. Laws 1911 c. 50.

53. Today only five states have retained court administration, viz. Ala., La., N. M., Tenn., and Wyo. Usually special rules of practice apply. See Riesenfeld & Maxwell, *op. cit. supra* note 13, at 337.

54. Industrial Accident Boards were created in the original acts of California, Massachusetts and Wisconsin. Illinois established an Industrial Board in its (second) workmen's compensation act of 1913.

55. For details and further references, see Riesenfeld & Maxwell, *op. cit. supra* note 13, at 337. See also Altmeyer, *The Industrial Commission of Wisconsin*, 17 U. of Wis. Studies in Soc. Sci. and Hist. (1932).

56. For illustrative references see Riesenfeld & Maxwell, *op. cit. supra* note 13, at 338.

57. For the reorganization in California and New York see Corten, *Experiences in Reorganizing a Workmen's Compensation Commission*, in Proc. of the 1946 Convention of the Int. Ass'n of Industrial Accident Boards and Commissions. U. S. Dep't of Labor, Div. of Labor Stds., Bull. No. 87 at 83 (1947); Donlon, *Reorganization of Workmen's Compensation Administration in New York*, *ibid.* at 87.

58. A few states entrust the final administrative determination of workmen's compensation claims to single officials, see for instance Iowa Code, § 86.24 (1950) (final administrative decision by Industrial Commissioner); N. J. Stat. Ann. § 34:15-49 and § 34:1A-11 (Cum. Supp. 1950) (decision by Division of Workmen's Compensation in the Department of Labor); N. H. Laws 1949 c. 277 § 1 (decision by Commissioner of Labor); R. I. Gen Laws 1938 c. 300 Art. III, Acts 1941 c. 1064 § 150 (decision by Director of Labor).

—while frequently affiliated in some fashion with the state “labor department”—possess the independence requisite for an administrative tribunal and whose decisions are subject to a limited judicial review by the courts (in many instances the court of last resort) according to the general principles of administrative law.⁵⁹ In a few states, however, the agency adjudication of compensation controversies does not possess this customary finality given to administrative findings, but can be upset by a more or less complete trial de novo at the judicial stage.⁶⁰ Notable examples of the latter system are Nebraska,⁶¹ New Hampshire,⁶² New Jersey,⁶³ Oregon,⁶⁴ Rhode Island,⁶⁵ and Texas.⁶⁶ It is, however, more than doubtful whether such duplication serves any useful purpose.⁶⁷

Experience has shown that approximately 90% of all workmen's compensation claims do not reach a contested stage.⁶⁸ For the handling and supervision of the compensation cases prior to any dispute administrative experience has devised three prototypes of approaches called the *Hearing System*, the *Voluntary Agreement System* and the *Direct Payment System*.⁶⁹ Each system has its followers among the states⁷⁰ and each has its virtues and disadvantages, although apparently the agreement system is now somewhat on the defense.⁷¹ Under the hearing system cases appearing

59. For the proper scope of judicial review of administrative action in general see Davis, *Administrative Law* 868 ff. (1951).

60. For details see Dodd, *op. cit. supra* note 49, at 358 ff.

61. Neb. Rev. Stat. 1943 § 48-181 (trial in equity).

62. N. H. Laws 1949 c. 277 § 1 (“full trial” without jury).

63. N. J. Stat. Ann. § 34:15-66 (trial de novo limited to record).

64. Ore. Comp. Laws § 102-1774 (Cum. Supp. 1947) (jury trial if requested).

65. R. I. Gen. Laws 1938 c. 300 Art. III § 6 (summary trial without jury).

66. Tex. Rev. Stat. Art. 8317 § 8307a (Vern. 1948) (full jury trial).

67. In recognition of the wastefulness of the existing system, the Governors of New Jersey and Rhode Island recommended to their 1951 legislatures the abolition of the review by trial de novo and the creation of administrative appeal tribunals in lieu thereof.

68. See Riesenfeld & Maxwell, *op. cit. supra* note 13, at 349.

69. For a more detailed description of the operation of these systems see Dodd, *op. cit. supra* note 49, at 135 ff.; Dawson, *Problems of Workmen's Compensation in the United States and Canada*, U. S. Dep't of Labor, Bureau of Labor Statistics, Bull. No. 672 at 117 ff. (1940); Riesenfeld & Maxwell, *op. cit. supra* note 13, at 348 ff. (with further references).

70. The hearing system exists in New York. Representative states for the agreement system (which prevails in about one-half of the American jurisdictions) are Pennsylvania and North Carolina. The prompt payment system is followed in the remaining jurisdictions, for instance in California, Michigan, Minnesota and Wisconsin.

71. For evaluations of the various systems see especially Burczyk, *Advantages and Disadvantages of the Agreement System, Especially in Relation to Prompt and Full Payment of Compensation*, Proc. of 1946 Convention of the Intern'l Ass'n of Ind. Acc. Bds. and Com's, U. S. Dept. of Labor,

to be compensable after a preliminary sifting procedure, are automatically placed on a hearing calendar and thus the injured worker is given a specific opportunity for an administrative review of his rights.⁷² Under the voluntary agreement system the insurance carrier must conclude a formal agreement with the injured worker even where there is no dispute and submit it to the agency for approval. The prompt payment system emphasizes the need for speedy action. It dispenses therefore with initial formalities in undisputed cases and exercises supervision of the payments by requiring certain notices.

The greatest shortcomings of the present workmen's compensation procedure appear, of course, in the contested cases. The cases involve, as is to be expected, especially controversies in which substantial amounts for medical costs and indemnity benefits are in issue, i.e., injuries resulting in permanent total or major partial disability.⁷³ In proceedings of that type the extent of the disability

Div. of Labor Stds., Bull. No. 87 at 127 (1947); Allie, Michigan's Experience Under the Direct Payment Plan in Workmen's Compensation, *ibid.* 130; Wilson, Effect of the Agreement System on Promptness of Compensation Payments, *ibid.* 134.

72. During the year 1950 the number of accidents reported for the entire state of New York totaled 786,768 cases. Out of this number 181,319 were indexed for hearing by the Claims Bureau of the Workmen's Compensation Board and transferred to the Referee Bureau; see N. Y. Workmen's Compensation Board, Ann. Rep. 1950, 6 (1951). It is interesting to note that during that same year only 390 cases reached the Appellate Division of the Supreme Court on appeal, *ibid.* at 10.

73. The following tables taken from N. Y. Workmen's Compensation Board, Compensated Cases Closed in 1948, p. 37 (Res. & Stat. Bull. No. 6-1950), and Ill. Dept. of Labor, Ann. Rep. on Industrial Accidents in Illinois, Pt. II: Compensation Cases Closed in 1949, p. 13 (1951) may illustrate the relation between frequency, cost and average case cost of the various types of disability.

ILLINOIS 1949

Types of Disability	No. of Cases	Tot. Comp. Cost	Average Case Cost
All Types	40,421	14,251,565	353
Fatal	361	1,429,916	3,972
Permanent total	29	199,691	6,886
Permanent partial	16,100	10,814,309	672
Disfigurement	2,061	272,065	132
Temporary total	21,851	1,532,296	70
Temporary partial	20	3,294	165

NEW YORK 1949

Types of Disability	No. of Cases	Tot. Comp. Cost	Average Case Cost
All types	112,389	67,956,369	605
Fatal	976	8,616,473	8,828
Permanent total	323	6,580,913	20,374
Permanent partial	38,353	39,735,382	1,036
Temporary	72,737	13,023,601	179

resulting from, and attributable to, the accident is often the center of the dispute and presents in consequence the vexed question of *disability rating*. Not only, as has been pointed out, are the factual bases of the statutory benefit formulae frequently inconsistent or uncertain, but the methods of ascertaining them in the individual cases are costly and haphazard. One of the recognized leaders in the field of occupational medicine has voiced the following evaluation of the present state of practice:⁷⁴

"The most common type of system of rating disability . . . is not disability rating but a tournament. It isn't a decision to the individual's working capacity or loss of working capacity, but a victory or defeat in a medical-legal tournament."

This battle by teams of medical and legal⁷⁵ experts is not only demoralizing, time consuming and expensive⁷⁶ but produces of course unavoidable discrepancy and incongruity in the awards and in consequence thereof dissatisfaction among the injured.

But the diagnosis of an ailment does not necessarily furnish the key to a prescription for its cure. Thus a variety of approaches to a solution of the problem of disability rating have been suggested or adopted.⁷⁷ A number of states have taken definite steps to alleviate the situation. In Minnesota the Rules of Practice issued by the Industrial Commission limit the number of medical witnesses whom a party may call and the hearing officer is authorized to appoint a neutral physician to examine the employee for the effects of the acci-

74. Kessler, *Rehabilitation and Disability Rating*, Proc. 1946 Convention of the Int. Ass'n of Ind. Acc. Bds. & Comm's, U. S. Dep't of Labor, Div. of Labor Stds., Bull. No. 87, 54 at 60 (1947).

75. Statistics indicate that claimants employ legal counsel primarily in death, permanent total and permanent partial disability cases. Thus in New York in 1948 45.1% of the death cases, 42.4% of the permanent total and 14.0% of the permanent partial disability cases were conducted with legal assistance, N. Y. Workmen's Compensation Board, *Compensated Cases* in 1948, p. 27 (1950).

76. About the possible effect of the medical controversies on the injured worker himself see Dawson, *Problems of Workmen's Compensation Administration*, U. S. Dep't of Labor, Bureau of Labor Statistics Bull., No. 672 at 127 (1940).

77. See especially Kessler, *Rehabilitation and Disability Rating*, Proc. of the 1946 Convention of the IAIAABC, U. S. Dept. of Labor, Div. of Labor Stds., Bull. No. 87 at 45 (1947); Globe, *Medical Problems in Workmen's Compensation*, *ibid.* 64; Daily, *Medical Aspects of Workmen's Compensation*, *ibid.* 70; Duncan, *A Code of Ethics for Workmen's Compensation Medical Practitioners*, *ibid.* 73; Pingree, *A Code of Ethics for Workmen's Compensation Medical Practitioners*, *ibid.* 77; Hudson, *Evaluation of Disabilities*, Proc. 1948 Convention of the IAIAABC, U. S. Dept. of Labor, Bureau of Labor Stds., Bull. No. 105 at 225 (1949).

dental injury or occupational disease.⁷⁸ In Arizona the commission enjoys the services of a special medical referee and in addition resorts frequently to Medical Advisory Boards for rating purposes.⁷⁹ In California the Industrial Accident Commission maintains a Medical Bureau and in addition thereto a special Permanent Disability Rating Bureau. The latter, in consultation with the Medical Bureau, advises the hearing officer as to the percentage of permanent disability incurred.⁸⁰ Furthermore, the statute vests the commission with the power to adopt a schedule for the determination of the percentages of permanent disabilities incurred.⁸¹ In other states, as for instance New York, the compensation agencies have likewise developed and published special rating standards.⁸² While these experiments apparently have not been completely successful, they seem nevertheless to indicate that the scientific development of standard rating procedures to be applied in their medical and occupational aspects by disinterested medical experts in consultation with the attending physician seems to be the most promising approach to the problem.

Another defect in the handling of contested claims is the reluctance of the courts to free the commissions *completely* from the traditional rules which restrict the admissibility or confine the intrinsic probative value of certain evidence. Even in the most progressive states terms like "competent" evidence or "mere" hearsay linger on in the opinions and obscure the fact that all evidence

78. Rules of Practice Before Industrial Commission in Workmen's Compensation Cases, Rules 12 and 13 reprinted in Minn. Stat. Ann. subsequent to § 176.81 (1949).

79. The Supreme Court of Arizona has approved the practice of establishing the functional disability in such way, although the resulting legal disability in the proper cases must be found separately, see *Hoffman v. Brophy*, 61 Ariz. 307, 149 P. 2d 160 (1944); *Shaw v. Salt River Valley Water Users' Ass'n*, 69 Ariz. 309, 213 P. 2d 378 (1950); *Eagle Indemnity Co. v. Hadley*, 70 Ariz. 179, 218 P. 2d 488 (1950).

80. Cf. Hanna, *Industrial Accident Commission Practice and Procedure*, 82 ff. (1943). For details regarding the California Rating Plan see (1st) Partial Report of Senate Interim Committee to the Senate on Workmen's Compensation Benefits, Calif. Legisl., 1951 Reg. Sess. 101 (1951).

81. The authority to adopt and publish such schedules was granted by Labor Code § 4660. However, the adoption of a new rating schedule in 1950 resulting in an increase of benefits prompted an investigation by the Senate Interim Committee on Workmen's Compensation Benefits which recommended the curtailment of the power to increase benefits, (2d) Partial Report of May 11, 1951, at p. 6. The legislature, however, left the commission vested with the power to adopt such rating schedules and merely specified their prospective applicability, Cal. Stats. and Amendments to the Codes 1951 c. 1683. For a discussion of the history of the schedule and the amendments see (1st) Partial Report of the Senate Interim Committee to the Senate Workmen's Compensation Benefits, Calif. Legisl., 1951 Reg. Sess. 55 (1951).

82. See Riesenfeld & Maxwell, *op. cit. supra* note 13, at 293.

which by reasonable standards may have probative value should not only be admissible but also serve to support a finding.⁸³

Perhaps the most needed and at the same time the most promising improvement in the administration of workmen's compensation is its extension to, and coordination with, the rapidly developing field of *rehabilitation*. While a growing federal-state cooperative program for vocational rehabilitation has existed since the passage of the federal Vocational Rehabilitation Act of 1920⁸⁴ the coordination of the programs established thereunder with workmen's compensation has been slow. Gradually, however, a number of states have inserted greatly varying special provisions into their compensation acts tending to provide financial support for, and administrative supervision of, the rehabilitation of the injured worker.⁸⁵ In 1950 the movement for the coalescence of workmen's compensation and rehabilitation gained further momentum with the holding of a National Conference on Workmen's Compensation and Rehabilitation, sponsored by the Federal Security Agency and the Department of Labor.⁸⁶ As a result the International Association of Industrial Accident Boards and Commissions adopted recently a careful report⁸⁷ which contained suggestions for 1) provisions allocating the costs of expenses and maintenance during rehabilitation, 2) a revision of the disability rating bases so as to facilitate rehabilitation, 3) administrative techniques for an early diagnosis and referral of rehabilitation cases,⁸⁸ 4) improvement of the co-operation between the various government agencies in charge of rehabilitation services.⁸⁹

83. For details see Riesenfeld & Maxwell, *op. cit. supra* note 13, at 356 ff.

84. 29 U. S. C. A. §§ 31 ff. For the present status of the program see Federal Security Agency, Annual Report 1950, 279 ff.

85. See, for instance, Ariz. Code Ann. § 56-955 (Cum. Supp. 1949); Mass. Ann. Laws c. 152 § 30B (Cum. Supp. 1950); Minn. Stat. Ann. § 176.11 (1946); Miss. Code Ann. § 6998-10 (Cum. Supp. 1950); N. J. Stat. Ann. § 34:15-12(b) (Cum. Supp. 1950); N. Y. Workmen's Compensation Law § 15(9), 64 McKinney's Cons. Laws (Cum. Supp. 1951); Ohio Code § 1456-80 (Throckmorton 1948); Ore. Comp. Laws Ann. §§ 102-1501 ff. (1940); Utah Code Ann. §§ 42-1-63 (Cum. Supp. 1951); Va. Code Ann. §§ 65-129 ff. (Michie 1949); Wis. Stats. § 102.61 (1949).

86. See Proceedings of the National Conference on Workmen's Compensation and Rehabilitation, U. S. Dept. of Labor, Bureau of Labor Stds., Bull. No. 122 (1950).

87. For the text see Proc. of the 36th Ann. Convention of the Int. Ass'n of Ind. Acc. Bds. and Com's, U. S. Dep't of Labor, Bureau of Labor Stds., Bull. No. 142 at 166 (1950).

88. For the description of an interesting pilot study on early referral procedures see N. Y. Workmen's Compensation Board, Ann. Rep. 1950, at 2.

89. On the last item see also Bohlin, *Cooperative Relationships Between Rehabilitation and Workmen's Compensation Administrators*, Proc. of the 36th Ann. Convention of the Int. Ass'n of Ind. Acc. Bds. & Com's, U. S. Dept. of Labor, Bureau of Labor Stds., Bull. No. 142 (1950).

IV. PROBLEMS IN FINANCING WORKMEN'S COMPENSATION

Workmen's compensation is the financial responsibility of industry. But the methods of discharging this burden vary in the different jurisdictions. When workmen's compensation was introduced in the United States the American legislators looked abroad for models, especially to England and Germany. In England the original law imposed the compensation liability upon the employer and left it to his judgment whether or not to protect himself by private insurance. In Germany the employers in different classes of businesses were compelled to form and finance special professional organizations called *Berufsgenossenschaften*⁹⁰ as carriers of the workmen's compensation liability. Eight of the American jurisdictions adopted a modified German system and set up a special state compensation fund to which all covered employers in the state are under a duty to subscribe (so-called monopolistic state fund system).⁹¹ Other jurisdictions adopted the English system but modified it either from the beginning or subsequently by compelling the employer to insure his liability with a private carrier. The remaining eleven jurisdictions finally chose a middle road by establishing state funds but leaving the employers the option of whether to subscribe to them or to insure with a private carrier (so-called competitive state fund system).⁹²

Even where workmen's compensation insurance is written by private carriers the insurance rates and the terms of the policy are subject to state control. Actually the rates are fixed annually by a procedure which has become fairly standardized.⁹³

It is obvious that the most fundamental and most hotly debated question in the field of workmen's compensation financing is the issue of (monopolistic) State Fund v. Private Insurance.⁹⁴ The heart of this problem, i.e., whether the field of social insurance should be considered as a legitimate field for private enterprise, is, of course, to a large extent of a political character. A correct appraisal of all of its aspects, however, requires an answer to the

90. At present the West German industrial and agricultural employees are organized in 51 such *Berufsgenossenschaften* for the purpose of carrying the compensation load. For a list see *Wirtschaft und Statistik*, N. S. 922 (1951).

91. It exists today in Nev., N. D., Ohio, Ore., Puerto Rico, W. Va., Wash., and Wyo.

92. Ariz., Cal., Colo., Idaho, Md., Mich., Mont., N. Y., Okla., Pa., and Utah.

93. For details and references regarding the standard rating procedure, see Riesenfeld & Maxwell, *op. cit. supra* note 13, at 375-381.

94. See the references cited in Riesenfeld & Maxwell, *op. cit. supra* note 13, at 368.

further and more concrete question of whether private insurance renders the necessary services efficiently, i.e., promptly, adequately and at a reasonable cost to the employers.

While labor's criticism is primarily directed against unjustified attempts by private carriers to defeat legitimate claims,⁹⁵ the employers' interest focuses primarily on the costs side of the picture, i.e., the efficiency of the rating process. On that score complaints have become recently more and more vociferous.

Rate making for compensation insurance today is a highly technical art, if not a science.⁹⁶ The basic principles and various steps to be performed are largely standardized and generally followed by the state authorities in the annual rate revisions. The methods have changed from time to time and undergone alternative periods of refinement and simplification. The modern techniques are largely the product of a prolonged⁹⁷ and close cooperation between the rating authorities represented by the National Association of Insurance Commissioners and the industry represented by a special technical organization formed for that purpose, the National Council on Workmen's Compensation.⁹⁸

Generally it should be noted that the various types of operations occurring in modern industry are broken down for rating purposes into approximately seven hundred classes (manual classifications) and that the rate for each class is fixed by a statistical process resulting in the so-called *manual classification gross rate*.

95. Of course, spokesmen for labor have also correctly insisted that high compensation insurance costs unduly depress the benefit levels.

96. For a description of present rating techniques see Kulp, *The Rate Making Process in Property and Casualty Insurance—Goals, Techniques and Limits*, 15 Law & Contemp. Prob. 493 (1950); Riesenfeld & Maxwell, *op. cit. supra* note 13, at 375 (with further references).

97. The cooperation began with the establishment of the Council, on the suggestion of the National Association of Insurance Commissioners, in 1921.

98. The revised rating procedure to be followed in current rate revisions was approved by the National Association of Insurance Commissioners in 1943, see Proc. of the 74th Ann. Sess. of the NAIC 142 (1943). It was modified in 1948 by the introduction of a Rate Level Adjustment Factor designed to compensate for the inevitable lag of the rating base—predicated on past *policy* year experience—behind the most recent *calendar* year experience, see Proc. of the 80th Ann. Sess. of NAIC 220 (1949) in conjunction with Proc. of the 79th Ann. Sess. of NAIC 432 (1948). Recently the NAIC has investigated the modification of the rating procedure by introduction of an Underwriting Profit and Contingency Factor and of Expense Constants for Smaller Risks. The NAIC has indorsed the insertion of both items into the rate-making process, but has not made a definite recommendation either of a percentage to be uniformly allowed for profit and contingencies or of a fixed amount for the expense constant and of the risk size to which it applies, see Proc. of the 81st Ann. Sess. of NAIC 539 (1951) and Proc. of the 82nd Ann. Sess. of NAIC 382ff., especially 393, 416, 421 (1951).

This rate then is adjusted to the individual risk of the insurance buyer by authorized standard types of merit rating plans. Each manual classification gross rate is composed of two main parts called "*pure premium*" and "*expense loading*."

The income from the pure premium portion of the total sums collected is statistically expected to produce the amounts necessary for the payments of claims. The income from the expense loading portion conversely is designed to take care of underwriting expenses and underwriting profit.

If the rating process were flawless the amounts corresponding to the pure premium portion of the rates would not produce any significant errors per year or, at least, cancel out over reasonable periods. The truth, however, is that since the end of the depression the total income from the pure premium part of the rates have consistently exceeded the amounts actually expended in the payments of benefits and produced a substantial excess profit for the industry as a whole.⁹⁹ The explanation of this failure of the rating process lies chiefly in the combination of two factors, namely (a) that the premium base is the total payroll of the employer and that this has risen faster than the benefit levels, and (b) that the standard rating process was based until 1948 upon past policy year experience and has ignored the most recent past experience in the rate-making process.¹⁰⁰ To cure the latter defect a special Rate Level Adjustment Factor was introduced in 1949 into the accepted procedure,¹⁰¹ but experience with it is still too short to evaluate its effects. It would perhaps be preferable to find means by which the industry is legally compelled to return an unreasonable large profit from shortcomings of the rating process to the insurance buyers. To be sure, even today many carriers, also when operating as stock companies, write participating policies, but this practice

99. In Minnesota, for instance, since the policy year 1933 the *actual* loss ratio has been consistently and substantially lower than the *permissible* loss ratio. The aggregate of the incurred losses for the premium years 1933-1948 amounted only to \$64,926,363, while the aggregate of the statistically expected losses for that period amounted to \$79,346,659. Consequently the statistical error amounted to 18.5%. See Minn. Compensation Board, 14th Bienn. Rep. 22 (1950). To properly evaluate the implications of these figures it must, of course, be realized that the carriers do not necessarily collect the premiums at the manual gross rates but make adjustments under the various approved merit and retroactive rating plans. Nevertheless the error seems to indicate a more than potential source for excess profits at the expense of insurance buyers.

100. See, especially, Proc. of the 77th Ann. Sess. of NAIC 438 (1946) and Riesenfeld & Maxwell, *op. cit. supra* note 13, at 376 n. 35.

101. See note 98 *supra*.

provides neither uniform nor necessarily adequate protection for the insurance buyers.

Another criticism is directed against the expense loading factor. Expense loading, as now widely in use, provides for 2.5% for underwriting profit and contingency and 40% for actual expenses.¹⁰² This means that out of each premium dollar (at manual gross rates) 42.5 cents are designed by the rate-making process to be used for the operation of the system and not the payment of benefits. This is at first blush a startling amount. It is, however, explained as the figure which rating authorities ought to allow, in view of the following breakdown, based on the *average* operating expenses incurred by carriers organized on the stock principle: Acquisition Costs, i.e., commissions and brokerage fees (17.5%); Taxes (2.5%); Profits and Contingency (2.5%); Claim Adjustment (8%); Administration and Audit (9.5%); Inspections (2.5%).¹⁰³ National expense exhibits by stock carriers generally substantiate these claims.¹⁰⁴ Interestingly enough the corresponding figures by non-stock companies show much lower operating expenses (around 25%), chiefly due to the fact that these companies engage generally in *direct* writing, i.e., incur no brokerage expenses, and also operate at lower loss adjustment expenses.¹⁰⁵ State funds are managed at even lower overhead, in California, for instance, at approximately 15%.¹⁰⁶

The soundness of the "principle" that the experience of the type of compensation insurance carrier with the highest operating cost should determine the expense loading factor¹⁰⁷ is not neces-

102. The figures given in the text are the ones now most widely employed. A number of states, however, have refused to accept the profit and contingency factor or permit only a slightly lesser amount for the remaining part of expense loading. Minnesota, for instance, has granted only 39% for actual expenses in recent rate revisions, see Minn. Compensation Insurance Bd., 14th Bienn. Rep. 13, 14 (1950).

103. See the table submitted in a report by the National Council on Compensation Insurance to a special committee of the NAIC and reprinted in Proc. of the 82nd Ann. Sess. of the NAIC 395, at 399 (1951).

104. See, for instance, the casualty experience exhibits for 1948 and 1949 reproduced in Minn. Compensation Insurance Bd., 14th Bienn. Rep. 20, 21 (1950).

105. See the pertinent data reproduced in Minn. Compensation Insurance Bd., 14th Bienn. Rep. 20, 21 (1950).

106. See Cal. Assembly Interim Committee on Finance and Insurance (3rd extra Sess. 1950), 2d Prelim. Rep. of Workmen's Compensation Insurance 27 (1950).

107. For assertions of this principle see, for instance, the statement by the California Insurance Commissioner of March 1, 1950, reprinted *op. cit. supra* note 106, at 30, or the statement by the National Council on Compensation Insurance of March 16, 1951, reprinted in Proc. of the 82nd Ann. Sess. of the NAIC 395 (1951).

sarily self-evident. However, it must be recognized that the relative costs of different systems in themselves are not completely reliable measures of their efficiency. Actually the Director of the Washington Department of Labor and Industries in reporting on the operations of the Washington State Fund himself has commented "on the lower quality of service rendered by the State in comparison with private companies."¹⁰⁸ Statistics also seem to prove that the average size of the risk underwritten by the direct writing companies is larger than that underwritten by the stock companies operating through agents,¹⁰⁹ which signifies that the latter type of carrier renders more effective services in policing the system against non-insurers. Whether this virtue by itself suffices to justify the great extra cost is basically more a question of politics than economics.

Lately the National Association of Insurance Commissioners instigated the undertaking of industry studies regarding the "graduation of expenses by size of risk."¹¹⁰ The data thus obtained revealed that underwriting expenses vary distinctly with the size of the risk, increasing sharply with small policies. As a result the Association concluded that the practice of applying a uniform expense loading factor to all manual rates produced inadequate expense provisions for small risks and excessive amounts for large policies.¹¹¹ It endorsed therefore the introduction into the rating process of expense constants payable by the buyer of smaller policies and a simultaneous commensurate reduction of the overall loading factor. While this idea that each insurance buyer should bear his "true" share of the underwriting expense possesses the appearance of fairness, the social wisdom of it is therefore by no means unquestionable. Since the whole system of workmen's compensation insurance is compulsory and part of a social insurance scheme there might be persuasive reasons which militate against a differentiation between small and big enterprises. In addition, by the same logic, a differentiation of expense costs according

108. Wash. Dept. of Labor and Industries, 11th Ann. Rep. 32 (1948).

109. In New York during the policy year of 1948 the stock companies wrote 246,569 policies earning \$80,219,379 (average \$326) while the mutuals wrote 65,592 policies earning \$66,817,378 (average \$1,018), N. Y. Compensation Insurance Rating Board, 37th Ann. Rep. Exhibit 3 (1951).

110. See especially, Proc. of the 80th Ann. Sess. of the NAIC 137, 470 (1949); Proc. of the 81st Ann. Sess. of the NAIC 515 (1950); Proc. of the 82nd Ann. Sess. of the NAIC 382, 391, 393 (1951).

111. See especially the report by the Special Subcommittee of the Workmen's Compensation Committee of the NAIC, Proc. of the 82nd Ann. Sess. of NAIC 391 (1951).

to occupational classifications and types of carriers would seem to become just as much a command of fairness. Perhaps greater than the need for a redistribution of the underwriting costs among the insurance buyers is that for an insistence by the rating authority on an improved overall efficiency of the carriers considering the expense distribution in the particular state.

V. CONCLUSION

The foregoing survey indicates, in the opinion of the writer, that the present status of workmen's compensation in the United States is far from being ideal and that the system is ripe for an extensive job of overhauling. Especially three basic shortcomings require attention:

- 1) Benefit structures and levels need urgent revisions as to adequacy, equity and consistency. They show great defects as the result of over-standardization and confused bases of disability as well as unrealistic amounts and outdated, inappropriate and inflexible ceilings.
- 2) The administration of the system should be improved as to the methods of disability rating and by increased emphasis on rehabilitation.
- 3) The costs of the system should be minimized by returning excessive profits resulting from shortcomings of the rating process to the insurance buyers and by reviewing apparently overgenerous allowances for claim adjustment and underwriting expenses.

There is no doubt that the standards aimed at are not easily attained, but the sound social aims of the program justify fullest attention to its improvement by the legislatures.