Compendium on Workmen's Compensation

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Major Issues of Workmen's Compensation Law

One of the most effective ways of learning about a legal system is to explore its areas of controversy. Anything of importance will be litigated sooner or later, as it has been in workmen's compensation. Although it may be difficult to understand how it is possible to avoid litigation, the issues discussed in the following pages do not create a conflict in every workmen's compensation claim. To the contrary, the overwhelming majority of claims are routine with no controversy whatsoever. Still the areas of potential controversy need to be identified and the way the legal system has dealt with them should be understood.

One of the major objections to common law and statutory schemes which preceded workmen's compensation was that too much time and money was expended in litigating questions concerning the injured worker's entitlement to benefits and the extent of such entitlement. It was expected that workmen's compensation would avoid such issues so that claims could be settled without attorneys and litigation. In retrospect, it is difficult to understand such optimism. Despite the inclusion of detailed definitions and predetermined benefit schemes in most workmen's compensation enactments, many issues of principle or interpretation stand between the dream of a litigation-free system and the reality.

In order for an injured individual to receive compensation benefits, he must show that he was an "employee" of a "covered" "employer" and suffered an "injury" "by accident" "arising out of and in the course of his employment". All of the terms in quotes are subject to interpretation. He must have given the requisite notice to the employer and filed a timely claim or show some legal excuse for his failure to do so. The wage basis upon which his compensation rate is computed must be accepted. The duration of temporary disability must be determined. The existence and degree of permanent disability must be proved. In event of work-related death, statutory relationships or degree of dependency or both must be established. Those are only the basic issues.

Page after page of possible sources of litigation could be listed but would serve only to emphasize the point that, in its present statutory condition, workmen's compensation not only fails to avoid litigation but often requires it. A study of major sources of litigation, merely indicating the broad questions which arise, will show why we are still far from fulfilling the hopes for workmen's compensation without controversy.

THE ELEMENTS OF COMPENSABILITY

The question of compensability is where controversy between employee and employer begins. The almost universal test for compensability, that one suffer (a) personal injury, (b) the result of an accident, (c) which arose out of and (d) in the course of employment, invites litigation. This four-stage test must be met for an injury to be deemed compensable. The interpretations that have been sought and given to these phrases have produced some of the most interesting developments in the law.

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Injury

The first step in the test is proving that one has suffered an "injury." In the coverage clause of approximately 35 jurisdictions, the term "personal injury" is used. The remainder merely use the term "injury," which is sometimes defined as "damage or harm to the physical structure of the body and such diseases or infections as naturally result therefrom".[1] Although early interpretations of these provisions limited their application to traumatic physical injury, the courts have expanded on this definition. Following modern concepts of disability, the courts have construed various nontraumatic events as injuries, including various mental and nervous effects. Thus, when the issue has presented itself and all other parts of the test are met, recent court decisions have uniformly held that a physical injury which is caused by some mental stimulus and, conversely, a disabling mental defect which is the result of some physical trauma or accident are, indeed, injuries as the term is defined for compensation purposes.[2] Furthermore, the majority position among courts holds that a nervous disorder (i.e., a disabling neurosis) which is the result of some mental stimulus (i.e., shock) is also a compensable injury, notwithstanding the fact that there are no elements of trauma or physical impairment.[3]

Accidental

The second part of the test of compensability, one that is closely alined with the first, is proving that the injury was accidental. Indeed, one may clear the first hurdle only to be tripped by the second, for employees who suffered an "injury" have been denied compensation for lack of an accident.[4] All but six jurisdictions [5] require that the injury be accidental. In 29 statutes, the phrase is "an injury by accident". In the laws of nine States [6] and the District of Columbia, and in the Longshoremen's and Harbor Workers' Compensation Act, the phrase is "accidental injury." Other statutes use different terminology with the same effect. Whatever the variations may be, the one basic and necessary element of "accident" is that a least some part of the incident be unexpected. In addition, most jurisdicions have required the element of definiteness; the injury must be traceable to a reasonably definite time, place, and occasion or cause.

Most jurisdictions hold that the "by accident" requirement is satisfied if either the cause of the injury was unanticipated or the injury itself was the unexpected result of routine performance of the job. Thus, the vast majority of jurisdictions will hold an injury to be accidental if usual work or exertion results in such injuries as breakage or herniation, with an obvious change in the physical structure of the body.[7] Similarly, a less one-sided majority hold the "by accident" requirement satisfied where usual exertion leads to heart, back, or other problems that are less definite than those injuries described above.[8] In both of these situations, the majority of jurisdictions which do not compensate such injuries require a showing that the exertion was in some way unusual. The requirement of "unusualness" is concerned that the work performed be unusual for the injured worker, not for other workers, although a few cases and some dicta have modified this view.

In a related situation, where usual exposure creates unexpected effects such as freezing or sunstroke, the courts have uniformly classified such injuries as accidental. Where routine exposure produces effects such as pneumonia, rheumatism, arthritis, or other diseases directly caused by exposure, however, a majority of jurisdictions refuse to classify such results as accidental apparently they are not sufficiently sudden or definite.[9]

The "by accident" requirement is important also for infectious diseases which result from unusual or unexpected event or exposure. Diseases are usually compensated under a special "occupational disease" provision. However, most workmen's compensation laws make reference in their general injury coverage to diseases which result from what one would ordinarily consider an accident. The most common statutory provision, found in approximately 20 jurisdictions,[10] covers diseases which follow some type of injury. Other statutes usually require some physical or traumatic injury or an injury which produces objective symptoms.[11] A significant amount of litigation has centered around the question of whether or not an infectious disease, by itself, can be considered an accidental injury. Again, the issue is definiteness, of tracing the inception of the disease to a definite time, place, or cause. The majority of decisions have held that the sudden and unexpected contraction of an infectious disease is an injury by accident. A number

of jurisdictions with the disease-following-injury statutory provision [12] have justified this position on the theory that the invasion of the body by microbes is itself the injury.[13] The minority, however, adhere to the requirement that physical injury be present before an "accidental" infectious disease is compensable.

Arising Out of Employment

The steps in the four-part test of compensability that have produced the most litigation, are those proving that the injury "arose out of" and "in the course of employment." Virtually every jurisdiction has at least one of these two basic components and, although the exact phraseology may vary in many States, the purpose of the test essentially is universal. The "arising out of" portion is interpreted to mean that the injury must be work related, and the "course of employment" portion means the injury must occur generally during working hours. There is no single rule that one can point to, however, in attempting to catalog the requisite elements of this test. Each component is surrounded by a myriad of variations and exceptions. A separate discussion of each is required to explain their relationship to the compensation scheme.

In determining a causal relationship between the injury and the employment, the "arising out of" concept is concerned with the type of risk to which a claimant is subjected by his employment: Thus, risks which are directly associated with a particular type of job are uniformly held to be compensable, while risks which are personal to the employee are found generally to be noncompensable. The greatest controversy has centered around those risks which are neither distinctly job related nor personal but rather "neutral". To deal with these risks, a number of tests have been employed by various jurisdictions to determine whether or not a sufficient causal relationship between job and injury exists. The most common of these tests was and to some extent is the "peculiar or increased risk doctrine" which requires that the risk which resulted in injury be peculiar to or increased by that employment and not common to the general public.[14] This test has generally been modified or rejected as general concepts of compensability have changed. A large number of courts now adhere to the "actual risk" doctrine which requires only that the employment subjected the employee to the actual risk that injured him.[15] Also, there is the "positional risk" doctrine which, although it has not received general acceptance, has been used to support awards of compensation in those situations where the employment required the claimant to be at a particular place at the particular time he was injured. The rule states that an injury arises out of the employment if it would not have occurred but for the fact that employment obligations placed the employee in the position where he was injured.[16]

Certain examples serve to illustrate how these principles operate. If an injury is produced by an "act of God", i.e., lightning or earthquakes, the large majority of courts apply the increased risk test and hold that such an injury arises out of the employment if the working conditions, such as height or wetness, increase the probability of injury from such events.[17] Where the claimant is in the same position as the general public, however, such injuries are noncompensable.[18] A few courts have avoided this result by adopting the positional risk test and finding a causal connection if the claimant's employment required him to be at a particular place at a particular time where he suffered an injury due to an act of God, even though anyone else there at the same time would have met with a similar injury.[19]

Assault cases also provide interesting examples. When it can be shown that the employment involved an increased risk of assault due to the dangerous duties involved or the dangerous environment, the courts have uniformly held that injuries resulting from such assaults arise out of the employment.[20] However, when the assault is of an unexpected origin, such as an attack by a raving lunatic, there is a difference of opinion. Although most jurisdictions find such injuries noncompensable for lack of proof of a particular employment risk, the recent trend is to apply the positional risk test and award compensation for such injuries when sustained in the course of employment.[21]

As for injuries that are related to a personal condition of the claimant, such as a preexisting weakness or disease which leads to some injury, the issue is whether or not the resulting injury, produced in part by the personal condition, is an injury arising out of employment. The general rule is that such injuries are compensable if the em-

ployment contributed to the final disability by placing the employee in a position where the injury was aggravated or the condition was weakened or accelerated by strain or trauma. This principle applies to claims dealing with idiopathic falls. Thus, a claimant who suffers a noncompensable heart attack or epileptic fit and falls off a high building or into a machine will be deemed to have received an injury arising out of the employment (but only as to that portion of the resulting impairment due to the employment hazard, not the original attack or stroke), because the nature of the employment clearly contributed to the resulting injury.[22] However, if the claimant had simply fallen onto a level floor due to the same seizure and suffered a fractured skull, a majority of jurisdictions would deny compensation on the theory that the cause of the injury was personal and the employment did not significantly add to the risk.[23] Similarly, a weak heart which, but for some exertion or other employment condition might have functioned well indefinitely (or merely for another day); or a tubercular condition which might have remained dormant if not provoked by injury or exposure are examples of accelerated injuries that arise out of the employment and are compensable.[24] The same holds true for cancer, mental or nervous disorders, allergies, and other related infirmities if they are aggravated by the nature of employment.[25] Indeed, the general rule of law stated above is so widely applied in practice that most denials of compensation for injury associated with personal defects are based on holdings that the medical evidence did not support a finding that the employment contributed to the claimant's disability. When the employment activity does aggravate the effect of a preexisting disease, the employer must pay compensation for the full disability in all but five States [26] where compensation is payable only for the percentage of the disability attributable to the accident.

The "arising out of" concept plays an interesting role concerning the range of compensable consequences that flow from an original compensable injury. The majority of decisions have followed the principle that when the original injury is proved to have arisen out of and in the course of employment, every natural consequence that results from the injury likewise arises out of the employment unless it is the result of an independent intervening cause attributable to the claimant's own intentional conduct.[27] When an original injury or condition progresses into serious complications, or when the existence of a compensable injury in some way worsens the effects of an independent weakness or disease, the results are fully compensable.[28] Also, when a compensable injury has led to the weakening of a member and should a claimant as a consequence suffer additional injuries, for example, from a fall, such injuries are compensable if the causal connection is shown.[29] The controversy for such subsequent injuries has centered around what kind of negligent act constitutes an intervening cause which will break the chain of causation. It has been suggested [30] that when the subsequent injury arises out of some activity directly related to the initial compensable injury, such as a trip to the doctor's office, only intentional conduct should break the chain but, if the activity is not of such a nature, then either negligence or intentional conduct would be an intervening cause. Thus, when a claimant rashly engages in some activity with a knowledge of the risk created by his injury, the chain of causation is broken and any subsequent injury is deemed not to have arisen out of employment.

These same general principles apply to situations in which the original injury is aggravated. If the aggravation is due to medical or surgical treatment or to the negligence of persons connected with the process of treatment or recovery, then such injuries are within the range of compensable consequences.[31] Here again, the claimant's conduct is significant: If he refuses to undergo reasonable surgery or refuses to go along with treatment that involves no risk with the result that disability is aggravated or cure is impeded by such refusal, his benefits may be terminated or reduced to take into consideration the improvement which would have taken place if the claimant had acted properly.[32] What constitutes "unreasonable refusal" is a question of fact to be determined in each case. As a general rule, a claimant may refuse without penalty any procedure which involves total anesthesia, a possibility of worsening the condition, a risk, even slight, of death, or a questionable chance of success.[33]

Arising in the Course of Employment

The "course of employment" concept is concerned primarily with the time and place of the injury and the activity of the claimant when he sustained the injury. Of course, a hard-and-fast rule would compensate only those injuries received during working hours on the employer's premises while engaged in activities that were unquestionably work-related, but the harsh results of such a rule would be at odds with the basic policy of workmen's compensation. For this reason, the "course of employment" has received interpretations in line with modern concepts of social responsibility.

Statements about the circumstances which determine whether the "course of employment" test has been met vary with three categories of employees. An accident occurring in the same factual circumstances can result in either an award or a denial of compensation, depending on the type of work performed.

The three categories are: (a) Inside workers; (b) outside workers; and (c) those who live on the premises of their employer or are on 24-hour call or both. Inside workers typically are in a store or factory at the same general location during the working day. Outside workers are typically a traveling salesman or truck driver. The others include ranch workers who are provided room and board as part of their salary, and those who, while living in their own homes, are on call for either regular or emergency work at any time.

Inside workers.—The rules applicable to inside workers are fairly well defined and uniform among the jurisdictions, although a few States apply rules which are more restrictive than those mentioned here. Such workers are considered to be in the course of their employment from the moment they step on the employer's premises immediately prior to the start of the workday to the moment they leave the premises after work. This period includes a "reasonable" time before and after the actual working hours, so that an employee is not required to proceed directly, with absolutely no detours or stops, to and from his workplace in order to remain within the course of the employment. The "premises" include, in most jurisdictions, company parking lots and the common elements, such as stairways, elevators, and walkways, in buildings in which the employer has space.[34] During the working day, the employee remains in the course of his employment even when not performing the direct duties of his employment, so long as his activity is reasonable. Thus, injuries occurring during rest breaks and lunches on the premises, use of toilet facilities, and similar activities are within the course of the employment.[35] Even injuries occurring during recreational activities and horseplay may be in the course of employment, particularly if similar activities were known to the employer and condoned or if there was some other distinct link between the employment and the activity.[36] For an inside worker, the course of the employment ends the moment he steps off the premises of the employer, although a number of jurisdictions extend coverage beyond the premises if the injury is a result of some occurrence that has taken place on the premises or if the normal route to and from work lies across a particular hazard and the injury occurs as a result of that hazard.[37]

Questions of coverage for travel to and from work have arisen so often, so as to be placed in a special category, the "coming and going" rule. Under this rule, as stated in the preceding paragraphs, coverage begins when the employee enters the employer's premises at the start of the workday and ceases when he leaves at the end of the day. When he is no longer under the employer's control, normal coming and going activities off the premises are not ordinarily compensable. Exceptions to this rule are based on the theory that these activities can be covered if the worker for some reason is still in the employer's services while traveling. For example, if the employer provides the transportation, or pays for the time and expense of travel, almost all jurisdictions will hold the travel activity compensable.[38] The same may hold true if the employee is on a special errand for the employer, although this proposition is not clearcut. What constitutes a "special errand" is difficult to determine. Although one jurisdiction may hold that having to come to work early or leave late or take work home is a "special errand," the same facts can bring a denial of compensation in another jurisdiction.

Outside workers.—The "course of employment" concept is much broader for outside workers. Not only are they covered for all activities reasonably incidental to employment duties; they are

in the course of the employment from the time they leave their home at the start of the work period, whether for a day or for a month, and remain covered until they return. Thus, the "coming and going" cases which result in denial of compensation for inside workers often achieve the contrary result for outside workers. Of course, the outside worker is subject to the same test of reasonableness as other workers. If he strays too far from employment-related activities, such as taking a substantial side trip for personal purposes, he may be held to have removed himself from the course of his employment.

On-premises or on-call workers.—It is much more difficult to state general rules which apply to on-premises or on-call workers. Most jurisdictions have decisions which, in similar factual circumstances, reach contrary conclusions. It can be said that the range of activities which, for this class of workers, will be considered "in the course of employment" is potentially extremely broad. Commonplace activities such as eating, bathing, and dressing, which do not appear to be employment-related to any extent, can be considered "in the course of employment." [39] As in the other categories, additional employment-related characteristics of the accident, such as being the result of a defect in living quarters provided by the employer, increase the probability that the injury will be held compensable.

Dual-purpose trips.—The general agreement as to the compensable nature of accidents occurring during business trips has led to a great many attempts to turn personal trips into business trips and vice versa. For example, it has been claimed that a personal vacation was turned into a business trip by virtue of a single business phone call made during the trip.[40] This area of the law is known as the "dual-purpose trip" doctrine. Although numerous variations exist, the rule can be stated as follows: if the trip would have been made had the business purpose been cancelled, then the injury is noncompensable; but if the trip would have been made had the personal purpose ceased to exist then the injury is within the course of the employment.[41]

Intoxication, willful misconduct, and substantive deviations from work.—The foregoing statements are merely general principles. A worker injured on the premises of his employer is not guaranteed compensation. If his injury is the product of intoxication or willful misconduct, recovery may be barred or benefits reduced by virtue of a statutory provision or a judge-made rule. Similarly, substantial deviations from the work such as fighting, unreasonable horseplay, or other conduct which represents a substantial departure from employment duties can support a finding that the employee stepped outside the course of his employment in the events which led to injury.

OCCUPATIONAL DISEASE COVERAGE

While occupational disease coverage is often thought of as the stepchild of workmen's compensation law, occupational diseases have received a fair share of attention. Unfortunately, much of this attention has been negative in effect and possibly contrary to the purpose of workmen's compensation.

Reasons for Limitations on Coverage

The reasons for limiting coverage of occupational diseases are many. Physicians have had comparatively little knowledge about occupational diseases. Many thought that the risk was covered by specifying a small number of well-defined diseases. This method had the additional benefit of avoiding coverage of nonoccupational ills, as broad coverage might convert workmen's compensation into a general health care and disability insurance program. Also, a primary factor was the fear that occupational diseases were so prevalent, particularly in industries such as coal mining and quarrying, that full coverage would bankrupt employers and extend unemployment.

Methods of Limiting Coverage

These fears were reflected in statutory methods of limiting or avoiding payment for occupational disease. Avoiding payment completely is accomplished first, by limiting those occupational diseases which can be compensated to those listed in a schedule contained in the law. Approximately 19 States use this restriction; some go so far as to limit coverage to 12 categories of diseases only. The primary attack on the use of such schedules, aside from attempts at statutory amendments, has been to broaden the scope of the individual diseases listed in the schedule, for example, by including pulmonary fibrosis, a disease not specifically listed, within the meaning of silicosis, which is in the schedule. Obviously, this tactic can provide a

satisfactory solution, from the worker's standpoint, only in a few cases.

Even if a particular disease is compensable, additional restrictions may still bar a disabled worker from benefits. The time limit for filing a claim may be phrased so as to make it impossible for some workers to comply. If the running of the claim period dates from the time of last exposure rather than from the date of disability, the first signs of the illness may not be seen until well after the claim period has run. As to silicosis and other dust diseases, a fairly common requirement is that the disabling condition must be preceded by a specified number of years, months, days, or shifts of exposure during some period of time preceding disability. Several States require that the exposure be within the particular State before it can be counted in determining eligibility.[42] These limitations are quite difficult to avoid, although some progress has been made by the courts by interpreting "injurious exposure" broadly.

Finally, many States have provided special limitations on the quantity and quality of benefits which can be obtained once the worker has passed the maze of eligibility tests. Benefits can be denied for partial disability: weekly benefits for disease can be lower than for accidental injuries; special maximum dollar limits can be placed on disease benefits paid; and different tests can be used to define disability from occupational diseases. Over the years, statutory changes in many States, have tended gradually to reduce restrictions on compensation for occupational diseases.

Miner's Pneumoconiosis and Federal Action

If occupational diseases are as prevalent as some claim, then it can be expected that many workers are disabled by such diseases without compensation. Given this probability and the serious effects of debilitating occupational diseases, outcries against neglect of protection in various occupations were inevitable.

The strongest reaction arose from coal miner's pneumoconiosis, commonly known as black lung disease.[43] For many years, the medical profession had testified that coal dust was not harmful and might be beneficial. Ultimately, when physicians determined that inhalation of coal dust could bring on pneumoconiosis, workers found that compensation laws ignored the disease entirely or restricted treatment or awards. Despite some progress in easing restrictions, hardly anything was done for those disabled by the disease before the laws improved. A few physicians and coal miners began a public campaign which led to the recogniiton of pneumoconiosis as a compensable disease in West Virginia beginning July 1, 1969,[44] and at the Federal level beginning December 30, 1969.[45]

The Federal Coal Mine Health and Safety Act of 1969, represented the first major incursion by the Federal Government into the States' workmen's compensation system.

The declared intent of Congress in title IV of the Federal Coal Mine Health and Safety Act of 1969,[46] was to provide benefits, in cooperation with the States, to employees "totally disabled due to pneumoconiosis," and to their dependents in the event of death.[47] Established under the Act is a system of compensation federally financed from the general revenues for claims filed through December 31, 1972.[48] In the event that an award is received from State workmen's compensation, unemployment compensation, or disability insurance, benefits under the Act are reduced accordingly.[49]

The law provided that after January 1, 1973, all claims for benefits were to be filed pursuant to applicable State workmen's compensation laws unless the Secretary of Labor determined that a State's law failed to provide adequate coverage for black lung. This determination was to be made no later than October 1, 1972.[50] If a State's law proves inadequate, the Act permits miners and their dependents to recover benefits from individual mine operators under stipulated provisions of the Longshoremen's and Harbor Workers' Compensation Act.[51] In determining adequacy of coverage, the Federal Coal Mine Health and Safety Act of 1969, requires the Secretary of Labor to use five guidelines:

(1) Benefits must be paid for total disability or death of a miner due to pneumoconiosis.
(2) The amount of such cash benefits must be substantially equivalent to or greater than the amount of benefits under the Federal act.
(3) The standards for determining death or total disability due to pneumoconiosis must be substantially equivalent to those established under the act, and by regula-

tions of the Secretary of Health, Education, and Welfare.

(4) Any claim for benefits shall be deemed to be timely filed if filed within 3 years of the discovery of total disability due to pneumoconiosis, or the date of death.

(5) There must be in effect provisions with respect to prior and successor operators which are substantially equivalent to the provisions contained in the Federal act.[52]

In examining the compensation laws, it becomes apparent that the State workmen's compensation systems as presently drafted fail to satisfy the Federal requirements of substantial equivalence. Awards under the West Virginia Workmen's Compensation system are more liberal than those of most States. Yet, the cash benefits under this system in some cases fall short of the amount that may be awarded under the Federal Coal Mine Health and Safety Act. Several jurisdictions condition an employee's right to compensation upon a minimum period of exposure within the State. Others require that disability or death occur within a certain number of years after last exposure, although medical evidence indicates that the effect of the disease may not become readily apparent for 10 to 15 years. In addition, several jurisdictions, unlike Congress, have failed to recognize the latent nature of the disease as their filing deadlines are dated by the time of leaving employment rather than the time of learning of the disease. Finally, the medical standards employed by the States in determining total disability often fail to meet those established under the Federal act.

Since adequacy of State coverage will ultimately be measured by the standards of the Federal act, the Federal intervention takes on a much greater significance than that of a stopgap solution.[53] Although the President emphasized that the act was to be "temporary, limited, and unique", it appears entirely possible that its provisions may provide an irreversible precedent for States administering their own workmen's compensation systems. For example, the law was amended in 1972 to extend Federal responsibility for new claims until December 31, 1973, as well as to liberalize benefit provisions and eligibility requirements.[54]

It is unrealistic to expect that agitation for coverage of specific occupational diseases will not continue in the future. Concerned parties are urging Federal action on categorical diseases such as byssinosis or "brown lung" in textile workers and cancer generated by asbestos fibers. If their concern leads merely to additional categorical legislation, the basic problem, that of incomplete disease coverage, may persist indefinitely.

EXTRATERRITORIAL COVERAGE AND THE CONFLICT OF LAWS

The conflict of State laws in workmen's compensation comes to focus on the proper jurisdiction where a claim may be filed and on the proper State law that may be applied. Such issues have increased importance in today's society of multistate and multinational corporations. It is common for employees to have three or four States with some contact with the employment relationship.[55] An employee who is hired in one State, sent to work in another, and hurt at work in a third is presented with two distinct problems: When can the courts of one State award the benefits provided for in the statute of another State, and when can a State apply its own law to an out-of-State injury?

Although a State may have jurisdiction to hear a claim, this does not necessarily mean that the forum in which the claim is brought can apply the law of another State. Under the general rule that a claim, to be valid, must follow certain prescribed procedures, and under the requirement that only the special agency created by the particular State can administer claims, rights created by the workmen's compensation act of one State may not be enforceable in another nor in a Federal court.[56] This rule is not dictated by the full faith and credit clause but is compelled by "sound judicial administration." [57]

An advanced compensation scheme does more than provide a sum of money to a claimant. The administering commission also maintains supervision over medical care, rehabilitation programs, and necessary adjustments. It would be impossible for the courts of one State to confer the benefits of another State on the claimant when such benefits are an inseparable part of the entire administrative process set up by the second State. Thus, the fact that claimant may prefer the convenience of proceeding in his home State is of little consequence because one State's commission adminis-

tered compensation act will not be applied in other States.

The next problem a claimant must deal with is when a State can apply its own law to a particular injury. It is now held constitutional for any State having a legitimate social interest in the injury and its effect on the workman, the employer, or the community to apply its statute without violating its obligation to give full faith and credit to the statutes of other States also having an interest.[58] However, virtually no State has expanded its coverage of extraterritorial injuries to the constitutional limit. Instead, each jurisdiction requires that certain requirements be met before its statute is applicable to an out-of-State injury.

Furthermore, while the vast majority of States have express statutory provisions which define when an out-of-State injury is covered, only about seven jurisdictions [59] specifically cover all in-State injuries. Although this broad coverage prevails in a majority of States, usually by judicial ruling,[60] there remains a significant number of States which will not accept jurisdiction if the only contact they have with the claim is that the injury occurred within their borders.[61] Thus, when an employee finds himself injured in one of these few States, it is imperative for him to meet the criteria of another State for coverage of an out-of-State injury.

Statutory provisions.—An analysis of the various statutory provisions finds that the requirements for coverage most often used by the States can be categorized as follows:

First, those which hold the place of contract as the primary criterion;

Second, those stressing the place of regular employment; and

Third, those requiring some combination of the places of contract and employment together with either the place of the employee's residence or the place of the employer's business, or both.

The majority of States are in the first or second group. About 11 jurisdictions adhere to the "place of contract" test as the sole requirement; [62] seven require that they be the place of contract or the place of regular employment,[63] and three rely solely on the "place of regular employment" test.[64] Among the States in the third group, North Carolina, South Carolina, and Virginia, before they will cover an out-of-State injury, require that the place of contract, the place of the employer's business, and the employee's residence be in the State.

About 15 jurisdictions have no provision on the conflict of laws question or only a general provision that the workmen's compensation act will be given extraterritorial effect.[65] With one exception, the courts of these States have adopted the traditional requirements and have held that at least one of the aforementioned criteria must be present before an out-of-State injury can be covered. In New York, however, the courts have apparently abandoned tradition and held that jurisdiction will be asserted if there are "sufficient significant contacts" with the State.[66] These include, but are not limited to, the standard criteria discussed previously.

Owing to the lack of uniformity among statutes, it is not difficult to foresee trouble. Assume, for example, that a worker is hired in State A, sent to work in State B, and is injured in State C. State C does not cover an in-State injury without additional contacts, State B requires that the contract of employment be made in the State, and State A requires the place of regular employment to be within the State. The worker receives no compensation benefits because he has failed to meet the necessary criteria of any of the States involved for extraterritorial coverage.[67]

Several States have attempted to solve such problems among themselves by entering into agreements whereby one recognizes the law of another as the exclusive remedy for an employee who is injured while temporarily working out of the State in which his employer is insured. Although the use of these reciprocal agreements is difficult to appraise, they are authorized by a significant number of statutes, usually by neighbor States where employees are frequently required to cross a common border. In these jurisdictions, they reduce the possibility of conflct and avert the possible loss of coverage.

DETERMINING DEGREE OF DISABILITY

Determination of the extent of disability is perhaps responsible for more litigation than any other single issue in workmen's compensation. It requires not only correct application of legal principles but also evaluation of facts, subjective complaints and opinions, and attempts to predict the future.

Temporary Disability

As a general proposition (some jurisdictions use different terminology and slightly different classifications), disability can be categorized in one of four classes: Temporary total disability, temporary partial disability, permanent partial disability, and permanent total disability. Temporary total disability occurs when an injured worker, incapable of gainful employment, has a possibility or probability of improvement to the degree he will be able to return to work with either no disability or merely partial disability. Temporary partial disability is similar to temporary total in that it assumes a physical condition which has not stabilized and is expected to improve. The difference lies in the worker's current abilities. When temporarily partially disabled, the worker is capable of some employment, such as light duties or part-time work, but is expected to improve to the degree that he will attain much of his former capability.

Permanent partial disability is reached when the injured worker has attained maximum improvement without full recovery. That is, the worker has benefited from medical and rehabilitative services as much as possible and still suffers a partial disability.

Permanent total disability represents the same physical situation except that the disability is total.

The determination of temporary disability, either total or partial, is least difficult as it requires merely a determination of the employee's present physical condition in comparison with the work opportunities available. In practice, evaluation of temporary disability is concerned only with the ability of the employee to return to work for his last employer. Assuming that an employee will be able at some point to return to work for his employer, and given the difficulties involved in obtaining employment for workers still under medical care, compounded by the probability that the new employment will be temporary, most adjudicators have either expressly or in practice adopted the proposition that unless the worker can return to his last job, or can be supplied with temporary light or part-time duties with his last employer, he remains temporarily totally disabled, even though he might be able to perform another job involving duties within his temporary physical limitations.

Permanent Partial Disability

The determination of the extent of permanent partial disability depends on what the jurisdiction chooses to label permanent partial disability. Three basic theories have been discussed in conjunction with the payment of workmen's compensation benefits for such disability. Their underlying philosophies differ somewhat, as do the factors to be considered in applying each to a specific situation.

The "whole-man" theory is concerned solely with functional limitations. Here, the only considerations are whether the worker has in fact sustained a permanent physical impairment and, if he has, to what extent does it interfere with his usual functions and abilities. Age, occupation, educational background, and other factors are not considered.

In the application of the "wage loss" theory, the aim is to determine what wages the worker would have been able to earn had he not suffered a permanent impairment. When, owing to impairment, his earnings dip below the estimated wage figure, he is paid compensation equal to some percentage of the difference between the wages that he should have earned and those he is actually earning. Here the actual degree of physical impairment is of little or no importance. The only concern is the actual wage loss which has been sustained and whether it is due to the impairment.

Finally, with the "loss of wage-earning capacity" theory, it is necessary to peer into the future. After the worker has reached his maximum physical improvement, many factors, such as impairment, occupational history, age, sex, educational background, and other elements which affect one's ability to obtain and retain employment are all considered in an effort to estimate, as a percentage, how much of the worker's eventual capacity to earn has been destroyed by his work-related impairment. The worker is awarded benefits on the basis of this computation. Benefits may be paid at the maximum weekly rate for a limited number of weeks or they may be based upon a percentage of the difference between wage-earning capacity before and after disability, to be paid until a dollar or time maximum has been reached.

These three basic theories are capable of being used also in combination. For example, some States expressly or in practice provide for the use of either the "wage loss" theory or the "loss of

wage-earning capacity" theory but also provide a benefit floor determined by the actual medical impairment.[68] Thus, a worker who sustains impairment but no loss of wage or of wage earning capacity would still receive some permanent disability benefits.

The tedious or controversial aspects of rating for a significant proportion of permanent partial disability cases have been relieved by the use of schedules. The typical schedule covers injuries to the eyes, ears, hands, arms, feet, and legs. It states that for 100 percent loss (or loss of use) of that member, compensation at the claimant's weekly rate will be paid for a specified number of weeks. If loss or loss of use is less than total, the maximum number of weeks is reduced in proportion to the percentage of loss or loss of use. Only physical impairment is considered and the effect of the injury on wages or wage-earning capacity is ignored. If an injury is confined to a scheduled member, the benefits provided by the schedule are exclusive, even though disability rating on a wage loss or loss of wage-earning capacity basis might result in greater benefits. While this statement is true generally, some States provide additional benefits if use of one of the other theories does result in higher benefits being paid, if diminished wage-earning capacity continues after the scheduled amount is paid, if the scheduled injury results in permanent total disability, or if several scheduled injuries are sustained in the same accident.[69] Use of the schedule may be avoided also by showing that the effect of the scheduled injury, such as radiating pain, extends into other parts of the body.[70] A few jurisdictions limit the use of schedules to amputation or 100 percent loss of use of a member, as opposed to partial loss of use.[71] Another group not only makes the schedule exclusive for permanent disability awards but requires that the weeks for which benefits are paid during the healing period be deducted from the number of weeks authorized by the schedule before an award is made for permanent partial disability.[72]

Despite commentary and statutory language to the contrary, the workmen's compensation systems of the United States, with a few exceptions, operate primarily on the "loss of earning capacity" theory. Even where statutory language seems to indicate clearly that only functional impairment is to be considered, the courts have managed to hold that loss of earning capacity is the real consideration. Even the use of schedules has been justified on an earning capacity basis as merely a legislative determination of irrebuttably presumed wage loss resulting from the impairment listed in the schedule.

It is questionable that any legislative history would back up this rationale. A consideration of its practical day-to-day application shows that in individual cases the presumption is without basis in fact. When one considers that a concert pianist and a laborer who have both lost two fingers would receive exactly the same compensation under a schedule award, the justification for the use of schedules, that of administrative efficiency, is questionable by all who hold equity is a basic aim of workmen's compensation.

Permanent Total Disability

Permanent total disability evaluation is, in most respects, merely an extension of the determination of permanent partial disability. In fact, it is a part of the same process, since the factfinder's only additional task is to determine whether the worker's wage-earning capacity is so destroyed that he is unable to compete in the job market.

Two aspects of the permanent total disability question warrant special attention.

First, most States employ presumptions, some even irrebuttable, which make the factfinder's job much easier. For example, it may be presumed that the loss of sight of both eyes or the loss of any two limbs will constitute permanent total disability and thereby relieve the factfinder of the difficult task of evaluating all the factors previously mentioned. These presumptions in some cases may be rebutted by evidence of an established wage-earning capacity or may only apply for a limited period of time.

Second is the concept of what permanent total disability actually means. The injured employee need not be completely helpless nor unable to earn a single dollar at a job. His limitations need only prevent him from competing in a practical way in the open job market and are such that no stable job market exists for him. The practical application of this rule is known as the "odd-lot" doctrine which means that an injured worker who is able to earn small amounts over a period of time will

not necessarily be deprived of benefits for a permanent total disability. It is recognized that these occasional earnings do not establish an earning capacity, although a record of continuous earnings at any type of job will generally be sufficient to result in benefits less than permanent total. The glaring exception to this rule is found in Louisiana, where a skilled or semiskilled worker is considered permanently totally disabled if he is unable to perform the job at which he was working at the time of injury.[73] As a result, workers whose injuries were relatively minor receive benefits for permanent total disability even though their post-injury wages exceed those being earned at the time of injury. The application of such a rule is of such dubious merit it has been criticized and questioned [74] even by the Louisiana courts.[75]

Permanent Disability Theories

The practical application of any of the permanent disability theories, or a combination of several, can be difficult. Primarily because of the number and kinds of factors which must be considered, the factfinder may have to determine which if any of the claimant's complaints are genuine, which of two or more doctors to believe, which lay witnesses to believe, and, more importantly, what effect the various factors will have on a given individual during the course of his life. The difficulty is compounded by the possibility of a series of short hearings over an extended period of time, the fact that many witnesses, even expert witnesses, may have some bias, and that other testimony may be by deposition, denying the factfinder the opportunity of interviewing the deponent. Naturally, the result obtained is often subject to question since many of the considerations are purely subjective and are such that reasonable minds could easily differ.

Despite these difficulties, the determination of the actual extent of disability is generally left to the factfinder: a referee, commission, or jury. The factfinder is given little or no assistance other than the testimony of witnesses, of whom many are interested in the outcome of the case financially or otherwise.

To relieve the factfinder of some of his burdens, California has provided a separate rating bureau to provide opinions, both formal and advisory, as to the extent of an individual worker's disability. The rating bureau receives requests for rating from the referee or from the parties themselves. The request for rating includes a description of the physical limitations of the claimant, as agreed to by the parties or determined by the referee, with other information such as age, sex, prior occupation, or education. These factors are weighed and applied in accordance with a preestablished guide, so as to obtain mechanically a determination of disability. Although this determination is not binding upon the factfinder, it is in practice extremely difficult to have the rating set aside unless inaccuracies can be shown in the factors upon which the rating was based.

Previous Impairments

The difficulties encountered in awarding benefits for permanent disability are compounded, both in the selection and statutory implementation of philosophy and in the practical application of the statute, when the worker had a previous impairment or sustained a compensable injury which aggravated or accelerated a preexisting condition. As a general rule, if a compensable injury aggravates or accelerates a preexisting condition, the employer is responsible for all the resulting disability. However, five States (California, Florida, Kentucky, Mississippi, and North Dakota) require that the part of the resulting disability which is attributable to the preexisting condition be apportioned out of the award for permanent disability and borne by the employee or a special fund. In California and Florida, the worker does not receive permanent disability benefits for that portion of the disability which would have resulted from the natural course of the preexisting condition or disease by the time of the award for permanent disability benefits. In the remaining States, the amount to be apportioned out is based upon the doctor's evaluation as to how much of the resulting disability is "due" to the preexisting condition or disease.

There is another serious problem which concerns workers who already suffer from a physical impairment. With the introduction of workmen's compensation legislation in America, employers soon realized that they had to consider disability

in their hiring and retention policies. After a few judicial decisions interpreting "disability", it became obvious that an employer's workmen's compensation experience and his premiums or self-insurance payments could depend on his selection of employees. An injury resulting in loss of an eye could cost 200 weeks of benefits for one worker, and lifetime benefits for another worker who had previously lost sight in his other eye. Workmen's compensation legislation, originally intended to help the injured, may prejudice employers against previously impaired workers, regardless of the source of their impairment. Even disabled war veterans are at a disadvantage.

The proposed solutions were, for the most part, not particularly satisfactory. If the employer was required to pay for the entire disability resulting from a second injury in combination with the first injury, in combination with the first injury, the employee would be reimbursed to the fullest extent possible. However, employers facing that risk would hesitate to employ the handicapped. The option of paying benefits only for the effect of the second injury considered by itself, might have been more satisfactory to the employer and might have reduced prejudice against employment of impaired workers. For the worker who sustained a second injury resulting in greatly increased disability, however, the result could hardly be considered satisfactory or in keeping with the purpose of workmen's compensation. A similar proposal, that of permitting an employee to execute a specific waiver of disability as part of his contract of hire, offered the same prospect: an impaired worker might be able to obtain or retain work but when he was injured again the chances of winding up on the welfare rolls were unfortunately high.

Second-Injury Fund

The solution, or compromise was the introduction of the second-injury fund, also known as the subsequent-injury fund, special fund, or similar designation (chapter 11).

Although the intent of the various fund provisions is basically the same, the statutory schemes do vary in a number of combinations and permutations of types of prior and subsequent injuries covered, methods of payment, and sources of financing.

THE EXCLUSIVE REMEDY DOCTRINE AND THIRD PARTY LIABILITY

Before workmen's compensation laws were enacted in the States, an employee, in order to recover damages for a work-connected injury, always was required to show some degree of fault on the part of his employer. Under what is now known as the quid pro quo of workmen's compensation law, employers accepted, or were required to accept, responsibility for injuries arising out of and in the course of employment without regard to fault. In exchange, employees gave up the right to sue employers for unlimited damages. These agreements are usually referred to in the State acts as "exclusive remedy" provisions, a term that is quite misleading. In no State are workmen's compensation benefits necessarily the only remedy available to an injured worker. Depending upon the wording of the applicable statute, the worker may bring a negligence action against a fellow worker, another contractor on the same job, or some other entity or individual who caused the compensable injury. From the employer's viewpoint, it is best to refer to the doctrine as the "exclusive liability rule". As the employee sees the rule, it remains an "exclusive remedy" for obtaining compensation from the employer. But neither liability nor remedy are perfectly exclusive.

Residual Employer Liability

Whatever might have been the intent of workmen's compensation statutes, in a number of situations, the employer remains open to suit by an injured employee or those claiming through him.

Noncomplying employers.—The employer who fails to comply with the coverage terms of a compulsory workmen's compensation law or chooses not to accept the protection of an elective law exposes himself to full liability. Employers who eschew protection of the workmen's compensation law, or neglect to conform to its requirements, are objects of negligence actions that remain in the workmen's compensation system. This is true particularly when employers fail to comply through result of a technical lapse, such as unintended delay in premium payments or failure to file required documents. Typically, in such situations, an injured employee may choose between recovering compensation benefits or suing the noncomply-

ing employer for unlimited damages, based either upon common law negligence or some statutory provision. If the employee elects to sue, the employer is deprived of his common law defenses (contributory negligence, fellow servant doctrine, and assumption of risk). In one jurisdiction,[76] no negligence on the part of the employer need be shown.

Where the law is elective, and the employer has decided not to be covered, the injured worker cannot claim compensation benefits but is limited to common law or statutory action. The defending employer here also is deprived of his common law defenses, which are of sufficient importance to provide employers with a significant incentive to elect coverage where possible.

Noncompensable injuries or diseases.—Those employers who have fully complied with the workmen's compensation law may still find themselves defendants in a valid law suit. For example, in all but a few jurisdictions, the exclusive liability doctrine applies only to those injuries or diseases which are compensable under the applicable workmen's compensation law.[77] If the employee's injury or disease does not qualify as "compensable", for reasons such as a failure to fall within the State's definition of "accident", the employer-employee relationship becomes irrelevant and the employee retains his common law or statutory right to sue.

Attempts to expand this doctrine to include the right to bring suit to recover damages for those elements of injuries which are not compensated for by the workmen's compensation law have been uniformly rejected by the courts. An employee who has sustained an injury arising out of and in the course of his employment but suffers only disfigurement which does not affect his wage earning capacity is entitled to no compensation for the disfigurement under a number of statutes.[78] Nevertheless, a negligence action, even if it sought damages only for the uncompensated disfigurement, would still be barred on the grounds that the underlying accident itself was compensable.

This doctrine applies also to occupational diseases and latent injury when the effects are not discovered or discoverable until after the claim period expires. Although the failure to file bars compensation benefits, no common law action by the worker is permitted.

Suits by persons other than employees.—A number of jurisdictions have held that the exclusive liability of the employer does not bar suits by persons other than the actual employee. Under the language of these provisions, actions have been held to lie by husbands or wives for loss of consortium resulting from an injury to their spouse and by those who are not entitled to claim compensation death benefits.[79] In a similar vein, parents of illegally employed minors have been permitted to bring negligence actions for injuries to their children on the reasoning that, since the employment itself was illegal, it cannot be held to disturb the parents' common law rights.[80]

Willful misconduct.—A complying employer often may be sued when he is guilty of what is generally referred to as willful misconduct, including intent to cause injury and willful failure to provide safety devices. Several jurisdictions have held that immunity does not attach to these situations on the theory that the injury was not "accidental",[81] or, in jurisdictions not having a "by accident" requirement, that the injury does not "arise out of the employment."[82]

In about five jurisdictions,[83] an injured employee has the option to sue at common law for intentional injury by the employer. In one State,[84] such a suit may be brought for willful misconduct and in another [85] for willful acts or gross negligence causing death.

Dual-capacity doctrine.—A recent line of cases in California established a "dual-capacity doctrine" treating employer-physicians and other similar combinations as split personalities.[86] An employee working for a physician may suffer a compensable injury and receive negligent medical treatment from his employer. For purposes of a malpractice action, the employer is treated as having a separate existence, apart from the employment relationship, and is looked at strictly as a physician providing medical care to a patient. He thereby remains open to suit, thus creating another exception to the exclusive liability rule.

Third Party Over Suits

A highly controversial question is whether a third party in an action brought by an employee can recover over against the employer when the employer's negligence has contributed to the injury.[87] While the U.S. Supreme Court has laid to

rest a number of the uncertainties, the law remains in a formative stage. There are three possible situations:

(1) Third party seeks a tort-type recovery (contribution).
(2) Third party seeks a contract-type recovery, with the source of the third party/employer relationship being contractual.
(3) Third party seeks a contract-type recovery, with no contract between the parties.

Contribution.—This is the least controversial of the third party actions. The great majority of jurisdictions, relying on the rationale that the employer's sole liability is statutory, holds that he cannot be sued or joined by a third party as a joint tort-feasor, either under a contribution statute or at common law. In the ordinary case, when an employee is injured by the joint negligence of an employer and a third party, any bid for contribution from the employer will fail. Furthermore, the employer will generally be relieved entirely of any liability, since compensation payments by him will be reimbursed after judgment is obtained against the third party. Pennsylvania has sought relief from this all-or-nothing policy by holding that contribution rests not upon common liability of the parties (since employer is liable only under the compensation law), but rather upon their common negligence.[88] Once the requirement of joint liability is removed, the employer's defense based on absence of liability to the employee collapses. Having overcome this hurdle, Pennsylvania has also arbitrarily limited the amount of contribution by the employer to the amount of his compensation liability.[89] North Carolina [90] and California [91] aim for a compromise of the interests of the employer and third party in this type of case by a more direct method. Both States follow a judge-made rule that where the employer's negligence contributes to the injury, the employee's third-party recovery is simply reduced by the amount of compensation received.

Contract-type recovery (indemnity).—The clearest exception to this exclusive liability doctrine of workmen's compensation is the third party's right to enforce an express contract in which the employer specifically or implicitly agrees to indemnify the third party for the kind of loss that he has suffered by having to pay the injured employee. An example of this is the landlord/tenant relationship in which an employer promises in his lease to hold the landlord harmless. Thus, if an employee is injured and recovers against the landlord, the landlord may be able to recover against the employer. The right to indemnity may be enforced without any express agreement, however, if the third party can show that he and the employer stood in a special legal relationship which carried with it the obligation of indemnification. An obvious example of this is the bailee/bailor relationship. Generally these cases will also reveal an additional factor of disparity between the minor, technical fault of the third party and the active negligence of the employer.

When the employer is a contractor doing work for the third party, there may be an implied obligation running from the employer to perform with due care, with a further accompanying implied agreement of indemnity for breach of this obligation. This doctrine, associated with and strongly influenced by the decision of the United States Supreme Court in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*,[92] circumvents the exclusive liability doctrine of workmen's compensation by relying on the contractual obligations between the employer and the third party.

The fact that a relationship is contractual, however, does not in itself mean that every activity pursued in fulfillment of the contract necessarily carries with it an implied obligation that will support an indemnity action. To begin with, it has been held that even if there exists a contract between the employer and third party, an independent duty to indemnify does not arise unless the functions being performed were a service to the third party under the contract.[93] Secondly, the misconduct of the parties must be compared. If the third party's negligence rests merely on a technicality, there lies no problem in requiring indemnification by the employer. Furthermore, there is clear authority for the proposition that there may be indemnity when an injury results from the concurrent negligence of the employer and the shipowner.[94] An analysis of the actual amount of relative fault in the employer and the third party that will sustain indemnity liability is required. Four principal patterns arise:

(1) Where the employer creates a dangerous condition and the third party fails to dis-

cover, the employer is generally liable for indemnity.

(2) Where the third party creates a dangerous condition and the employer fails to discover, the employer is generally not liable for indemnity.

(3) Where the third party creates the danger-out condition and the employer discovers it, but continues to work, there is a genuine split of opinion. The majority opinion is that continuing work is in itself a breach of the implied warranty of workmanlike service. On the other hand, the minority view reasons that the employer, although perhaps negligent, performed not in breach of his contract but in accordance with it.

(4) Where the third party creates a dangerous latent condition and the employer activates it by his own affirmative conduct, the Supreme Court has held the employer to be liable for indemnity if the employer's negligence amounted to a breach of his implied warranty of workmanlike performance.[95]

Noncontractual indemnity.—When no contractual relationship exists between the employer and the third party, the third party may still make its claim in the form of indemnity rather than in tort. The great majority of decisions, however, hold that when the relationship between the parties does not spring from a contract or a special position, the third party cannot obtain indemnification. Here there is no implied obligation capable of penetrating the exclusive liability rule.

Liability of Individuals Other Than Employers

While the employer's liability to common law suit is limited to those specific situations noted above, as a general rule anyone else can be sued under generally available remedies such as tort or breach of warranty unless granted immunity. The laws of the various jurisdictions in one way or another grant immunity to certain classes of individuals who presumably bear some special relationship to the injured employee.

The largest group of individuals or entities immune to suit by an injured employee consists of insurers and independent contractors managing self-insurance operations. This category received considerable attention after an Illinois court decision[96] held that, under Florida law, an insurer could be sued by an injured workman for negligent performance of safety inspections. Since this action was not anticipated by most legislatures in the passage of "exclusive remedy" provisions, statutory amendments were quickly passed insulating the insurer from potential liability. At present, approximately 27 jurisdictions[97] forbid negligence actions by employees against their employer's insurer. Other jurisdictions have expressly held them open to suit.[98]

The next largest group immune to common law suit consists of fellow employees who, in the course of their employment, are the cause of a compensable accident. The major source of such litigation concerns parking-lot and carpool accidents. The prevalence of liability insurance has made law suits against fellow employees worthwhile in these situations. Some 26 jurisdictions[99] now confer immunity on this particular group. Approximately the same number of jurisdictions also forbid negligence actions by employees of subcontractors against the general contractor on the same job site.[100] This result is usually reached when the subcontractor is uninsured but there has been a trend toward granting immunity to the general contractor even if the subcontractor is insured on the basis of the general contractor's potential liability for compensation payments as the statutory employer of the employees of subcontractors.[101]

As a general rule, treating physicians remain amenable to suit unless they fall under some category of exclusion, such as fellow employee. However, two States, West Virginia and Oklahoma, provide specific exemption for treating physicians: West Virginia in all cases,[102] and Oklahoma in cases where the injured worker has accepted compensation benefits.[103]

Who May Bring Suits Where Permitted

Once it has been determined that a party is liable to suit, it remains to be determined who may bring action. Although an employee injured by a suable third party tort-feasor has always had the right to bring an action for damages against that party, such a course was not always advisable in the past. Several States required an absolute election by the employee between claiming compensation or bring-

ing suit. An unwise decision to sue could leave the employee entirely empty-handed.

The recent trend has been to abolish all requirements of election of remedy, although several States' statutes are still couched in terms of "election." [104] Only Texas continues to force the employee to risk his substantive rights by "making the proper choice." Even there, the election procedure is a one-way proposition; a prior third party suit bars a compensation claim but not vice versa. An election is not considered to have been made until a final determination in the suit has been rendered.

Allowing an injured employee to seek remedies in two directions does not necessarily allow him a double recovery as a windfall. Ohio and West Virginia are unique in permitting the worker to retain any amounts recovered under the compensation system as well as all damages awarded him in a civil action. Neither State has any third party statutory provisions whatsoever; both are exclusive State fund jurisdictions.

Subrogation Schemes

In order to determine which parties may sue after compensation has been paid or awarded, the theory of subrogation applied within a particular jurisdiction must be examined. There are, today, four basic schemes of subrogation:

(1) Only the employee has the right to bring the action against the third party. Four jurisdictions [105] presently follow this procedure.

(2) Suit may be brought by either the employee or the compensation-paying party. This scheme, employed in approximately 22 States, generally will include some form of notice and right-of-joinder provision.

(3) Employee priority, employed in approximately 24 States, entitles the employee in a given time to exclusive right to institute an action for damages. At the end of this prescribed period, the employer is allowed to bring the action. In about half of these jurisdictions, the right of action becomes exclusively that of the employer, while the other States allow either the employer or the employee to sue during this period. A growing number of States among those which treat the employee's failure to sue as an assignment of the right of action, now refuse to recognize such an assignment unless the employer has given the employee sufficient notice that an assignment shall occur.[106] A few jurisdictions [107] make this period intermediate, with a final right to sue remaining in the employee if the employer has taken no action.

(4) A small minority of jurisdictions [108] give an exclusive right to sue for some period of time not to the employee but rather to the employer.

Distribution of Proceeds From Suits

The final significant issue within the realm of third party liability, whether the employee or the subrogated payor of compensation brings the action, is the manner in which proceeds of such a suit are to be distributed. Although specific techniques differ, the majority of States allow the payor of compensation first claim on the recovery to the extent of the compensation it has paid or is liable to pay, with any excess going to the employee. Even if a statute merely provides for the employer to be reimbursed for the amount which it has actually paid to date, the excess of the recovery paid over to the employee will stand as a credit against the future liability of the carrier. Some States,[109] as an incentive, allow an employer who brings the action to retain a percentage of the excess over and above the amount necessary to reimburse him for his liability. On the other hand, some [110] have given the employee a certain percentage of the recovery regardless of whether or not the employer can be reimbursed. Here the aim is to give incentive to the employee to bring the action or cooperate with the employer who does. A small minority of jurisdictions to some extent split the cause of action by setting the amount of compensation paid or to be paid as the maximum recovery permitted in an action brought by the employer.

Florida has attempted to introduce a concept of equity into the distribution process. In those actions in which the employee exercises his right to sue the negligent third party, the court distributes proceeds on an "equitable distribution" basis.[111] Reimbursement to the employer, therefore,

depends entirely upon what the court determines to be fair under the circumstances.

The question of attorney's fees and expenses enters into the distribution of proceeds. Usually costs of collection are deducted before determining either an employer's lien or an employee's excess recovery so that reimbursement and payments are calculated upon net recovery. Under a large number of statutes, however, when recovery is achieved by an employee, the payor of compensation is required to pay a share of the costs proportionate to his share of the recovery. The distinction can be quite an important one for, under the proportionate system, an employer will never realize full reimbursement. In contrast, the employer does realize full reimbursement under the net recovery system unless the net recovery will not cover the amount due him.

TWILIGHT CONDITIONS

There is far from complete agreement as to the propriety of compensating all job-related injuries. No one questions the entitlement to compensation of a worker whose hand is crushed by defective machinery, yet many would hesitate to award benefits to a worker who suffers a nervous breakdown under pressures of the assembly line. There are several kinds of "injuries" or "disabilities" which arouse such reluctance or outright antagonism to awarding compensation. Although the reasons for this attitude may differ from case to case, a thread of continuity among them creates a category of compensation problems called "twilight conditions."

Heart Attacks

One of the most emotional and controversial issues in workmen's compensation law, heart attacks have been treated somewhat differently than other work-related injuries. In the past, the majority of jurisdictions refused awards in heart cases without a showing of either a blow to the heart or unusual strain followed by an immediate heart attack. However, the ratio has gradually changed. Those jurisdictions which will compensate heart attacks on the basis of causal connection without the need for a showing of unusual exertion or trauma outnumber approximately 2 to 1 those which will not. The division is not precise. Jurisdictions which do not require a showing of unusual exertion may, in a given case, somehow tighten their requirements for compensability or proof of compensability because of a fear that "gates are being swung open too wide." On the other hand, courts requiring the showing of unusual exertion sometimes go to extremes to find unusual exertion in what would ordinarily appear to be the most commonplace effort in the course of a particular job.[112]

The trend is perhaps best illustrated by the history of New York's heart cases. Originally requiring a showing of unusual exertion, the New York system developed a tendency to find unusual exertion where in reality there was little exertion, and a small degree of "unusualness."[113]

In its attempts to reconcile these decisions with its judicial pronouncement of the unusual exertion test, the New York courts introduced a three-part test. Compensation may now be awarded in heart cases if the exertion or strain was greater than the employee's usual work, or was greater than the wear and tear of ordinary life, or was greater than the usual work of other employees; a far cry from what other jurisdictions consider the "unusual exertion test", which requires that the exertion be unusual for this particular worker.[114] In such jurisdictions, the degree of exertion necessary to award compensation to a laborer is much greater than that necessary for an award of compensation to a salesman.

Several factors arouse concern about compensating heart cases. Heart disease is common in the United States and appears in many circumstances. An acute episode is almost always preceded by degenerative vascular system changes which are found in almost all adults and are to a great extent not work related. Finally, the medical profession is divided as to the actual causes of acute episodes. Almost every contested case hears medical testimony presented from opposing sides with one set attributing the heart attack to work related causes and the other denying any causal connection.

The concern with heart cases extends both to the question of compensability and the question of how much compensation should be paid once a heart attack is held to be compensable. Some feel that heart attacks are not legitimate work-related injuries and should under no circumstances be compensated. Others feel that, while heart disease may

be a legitimate class of compensable injuries, the etiology is so complicated and questionable that all heart cases should be removed from the preview of workmen's compensation law.

Even when it is agreed that a heart attack is compensable, the amount of compensation benefits to be paid is often questioned. Given what may well be a large non-work-related component of a heart attack, the question arises as to whether it is equitable to insist that the employer bear the full cost of the heart attack. The overwhelming majority of jurisdictions apply the rule which is well established in the common law: As the employer takes the employee as he finds him, with all his infirmities and degenerative conditions, the employer is liable for the entire expense which results when a work-connected incident acts upon these preexisting conditions in such a way so as to cause injury.

Five jurisdictions, California, Florida, Mississippi, Kentucky, and North Dakota, apportion awards for permanent disability where the compensable problem is the result of a work-connected cause acting upon the preexisting condition. The methods of apportionment vary as do the circumstances under which the apportionment may be applied, but the basic intent is that the employer should not bear the full cost of the heart attack. Either the employee or a special fund is required to share the burden.

New medical diagnostic techniques may be created, old ones refined, and the etiology of heart disease may be better understood. Even so, the different philosophies of those concerned suggest that no resolution of the issue will be satisfactory within the concept of workmen's compensation.

Mental Injury [115]

Three distinct groups of cases associated with mental or nervous injuries are:

(1) Mental stimulus causing physical injury
(2) Physical trauma causing nervous injury
(3) Mental stimulus causing nervous injury

Mental stimulus causing physical injury.—The first category is accepted as compensable almost universally. A sudden impulse followed by an immediate physical impact; i.e., a sudden emotional event causing paralysis is clearly compensable. An injury from extreme, protracted fright also creates little controversy. Although agreement is less likely when sustained job pressure is said to cause a heart attack or cerebral hemorrhage, in only three cases [116] have such injuries been held noncompensable, in sharp contrast with the majority of decisions.

Physical trauma causing nervous injury.—It has been held uniformly that the full effects of a physical injury, including neuroses, are compensable. An endless variety of disabling psychic conditions have been recognized as legitimately compensable. As in other aspects of compensation law, a preexisting weakness in the form of a neurotic tendency does not lessen the compensability.

Mental stimulus causing nervous injury.—This third group of cases is a battleground where new law is developing. Into 1972, decisions on the issues of compensability were evenly divided.

Bailey v. *American General Insurance Co.*,[117] is held to be the "most significant case yet to appear on the subject of nervous injury".[118] In this decision, a nervous injury was held compensable under a statute defining injury as "damage or harm to the **physical** structure of the body" [119] (author's emphasis). The court based its decision on the rationale that the physical structure is not assorted organs and tissues but the entire functioning being. More and more cases follow such reasoning as the courts, in order to determine compensability, look simply to the question of whether there has, in fact, occurred a real disability.

Other considerations.—Decisions cited in each of the categories above deal exclusively with the concept of "injury". Even if a mental disorder qualifies as a compensable injury, other grounds may limit recovery. The claimant may fail to satisfy the basic test of "by accident" or "arising out of the employment". In *Liebmann Artic Ice Co.* v. *John T. Henderson*,[120] the court held that the employee's stroke was not compensable because it arose from his own temper rather than "in the course of his employment". In addition, even after having met these conventional tests, a claimant might fail to establish a satisfactory causal connection between the stimulus and the injury.

Probably the most provocative mental injury issue concerns "compensation neurosis". Such a disability may take the form of an unconscious desire to prolong or attain compensation or sheer anxiety over the outcome of pending compensation litigation. Both of these categories represent genuine

disability neuroses and must be distinguished from conscious malingering.

Of the comparatively small number of cases that have been reported in this area,[121] a majority have accepted the compensability of such a neurosis. Those decisions which have denied compensation may have been influenced by a fear that the fine line between malingering and compensation neurosis cannot, as a practical matter, be drawn successfully.

Summary.—Any element of the "physical" present either in the cause or the effect will virtually ensure compensability of a mental or nervous injury, if work-related. Decisions on cases involving both a mental stimulus and injury, although still sharply divided, indicate a trend towards coverage and an emphasis simply on "disability" rather than "physical" or "nervous".

Suicide

Closely related to claims for mental injuries is the question of compensation for suicide. The basic issue usually is whether or not the suicide is determined to have an intervening cause, thereby relieving the employer of liability on the theory that the death did not arise out of the employment. Controversy centers on the degree of mental disorder which a court will regard as relating a suicide directly to occupational injury. In the past, decisions almost always turned on whether the employee killed himself through a voluntary (though insane) action or through a delirious impulse. Suicides awarded compensation usually employed a violent or eccentric method. The landmark decision applying this "voluntary versus delirious" test derived from *In re Sponatski* (1915).[122] The "Sponatski Rule" reads:

> It is that, where there follows as the direct result of a physical injury an insanity of such violence as to cause the victim to take his own life through an uncontrollable impulse or in a delirium of frenzy "without conscious volition to produce death, having knowledge of the physical nature and consequences of the act", then there is a direct and unbroken causal connection between the physical injury and the death.[123]

Before this workmen's compensation case, this standard was used in *Daniels* v. *New York, New Haven, and Hartford Railroad Co.* (1903),[124] which involved a tort action.

While some jurisdictions continue to adhere to the rationale of *Sponatski*, a large number have either abandoned it or, in cases of first impression, adopted a "chain-of-causation" test. The reasoning in these jurisdictions is that the backbone of the *Sponatski* ruling is largely derived from standards of negligence and criminal law, standards which have no place in the law of workmen's compensation based on "work-connection" rather than fault.

According to the modern courts, there can be no intention to commit an act, in the sense of the workmen's compensation law, if the mind of the employee is not sound, i.e., if because of compulsion due to a work-connected injury he is unable to exercise sound discretion. Arthur Larson summarizes this position in his treatise on workmen's compensation, concluding:

> If the sole motivation controlling the will of the employee when he knowingly decides to kill himself is the pain and despair caused by the injury, and if the will itself was deranged and disordered by these consequences of the injury, then it seems wrong to say that the exercise of will is independent, or that it breaks the chain of causation. Rather, it seems to be in the direct line of causation.[125]

It should be noted that even in the modern trend of thought, the act of suicide may be seen as an independent, intervening cause, unless the evidence shows that, without the injury, there would have been no suicide.

Few suicides have been held compensable if they were not preceded by definite physical injury. With advances in compensation for mental disorders, however, it appears possible that eventually compensation will not be denied simply because of lack of a physical injury.

Cancer

The compensation of occupationally-related cancer cases does not present any particular problems not discussed above. The same sources of disagreement and reluctance persist here as in cases on heart conditions or mental ailments. The general public does not think of cancer as an occupational hazard. The etiology of the disease is often uncertain. Many compensation claims are based on aggravation rather than direct causation of cancer. Such factors combine to encourage litigation. The

most difficult issues are medical. Despite extensive research, the precise etiology of many, if not all, forms of cancer is either completely unknown or at least uncertain. As in heart cases, medical witnesses testify on opposing sides. Moreover, in many jurisdictions the opinion of a general practitioner may be accepted over the opinion of a specialist. As a practical matter, family physicians who are familiar with the claimant or the decendent's dependents may be inclined, with or without intent, to favor compensability. Furthermore, because of the emotional element in many forms of cancer, judges and other fact-finders often are susceptible to giving the claimant the extreme benefit of the doubt. Such cases and decisions tend to obscure basic issues and hamper arrival at proper solutions. Cancer issues in workmen's compensation will grow more acute. As epidemiologic studies confirm suspicions that many occupations present cancer hazards, and as their findings become known, more claims against employers may be expected and more legal changes may be demanded.

MISCELLANEOUS

In addition to the foregoing sources of litigation in workmen's compensation, touched on all too briefly for those seeking full understanding of the system, certain other aspects of the law should be mentioned, at least in passing, although space does not permit proper appreciation of their importance or implications.

Coverage

As noted elsewhere, workmen's compensation laws do not, for a number of reasons, cover all workers. Consequently, many cases are litigated either to bring individuals within the statutory definition of a covered employment or to avoid such coverage. In States which limit coverage to hazardous or extra-hazardous employment, the question is whether a particular job comes within the statutory definition of hazardous employment or falls within the meaning of a specifically listed job. Where there are numerical exemptions, it must be determined whether a particular employer qualifies for coverage. The legal question may be, who is to be counted as his employees? As certain occupations often are specifically excluded from coverage, courts may be asked to decide if a particular worker is or is not, for example, "agricultural" or "domestic" worker. A large body of case law has developed concerning the question of whether particular individuals are "employees" within the meaning of the workmen's compensation law or whether they are "independent contractors", which are almost universally excluded from coverage. The same holds true for so-called "casual" workers, who also are often excluded.

Benefits

The term "average wage", used quite frequently in this document, provides a source of controversy despite its apparent precision. Many different formulas are used to determine the average wage. Employee and employer often disagree as to the actual average wage or what it should include. As items such as tips, free meals, uniforms, and other fringe benefits generally are included, the calculation of all these factors can lead to disputes. In addition, most laws provide that the usual statutory formula for determining the average wage may be modified or ignored where it is difficult to apply or would result in manifest injustice. Such circumstances also foster litigation.

In death cases, claimants must meet several tests. At least, they must show that they fall within the meaning of a statutory term, such as a "wife living with the decedent at the time of his death", a "child", a "parent", or some other degree of relationship. Many of these categories come with a conclusive presumption of dependency so that, once it is shown that the individual claimant falls within one of these categories, benefits are payable without further proof of dependency. However, as many laws require a showing of either total or partial dependency, thousands of cases have been litigated in an attempt to determine what total or partial dependency is.

Notice and Claim Periods

The requirement that an injured worker give notice to his employer after he has sustained a compensable injury and file a claim for benefits, is discussed in chapter 14. Although chapter 14 does not specifically deal with litigation, it readily shows that the rules can be a major source of controversy on such questions as when the notice and

claim period begin to run, whether notice was actually given, whether it was in proper form and to the proper person, whether a failure to give notice is excusable, whether a particular document is sufficient to constitute a claim, or whether it was necessary to file.

Procedure

Litigation itself in the compensation system fosters additional litigation. The usual questions of evidence, the use of presumptions, and the proper procedure to be followed in establishing or denying a claim all have been the subject of controversy. Similarily, appellate procedures are subject to dispute. Numerous appeals have been taken merely for the purpose of disputing appellate procedures. Other procedural aspects of workmen's compensation, such as the circumstances permitting reopening of a claim which has had a determination of disability, or settling a claim and perhaps closing it once and for all, also play a significant part in the litigation of workmen's compensation.

References to Chapter 12

1. Texas Workmen's Compensation Law, art. 8309, sec. 1.
2. *Tracy* v. *Americana Hotel*, 234 So. 2d, 641 (Fla. 1970) ; *Seymour* v. *Sokolnek*, 34 A.D. 2d 1073, 312 N.Y.S. 2d 323 (1970) ; *Jarka Corporation* v. *Hughes*, 196 F. Supp. 442 (E.D.N.Y. 1961) ; *Burton Transportation Center* v. *Willoughby*, 205 A. 2d 22, (Del. 1970).
3. See, e.g., *Kinney* v. *State Industrial Accident Commission*, 423, P. 2d 186 (Ore. 1967). See generally, Larson, Arthur, *Workmen's Compensation Law*, vol. 1A, sec. 42.23 (New York, Matthew Bender Co.) 1967 ed.
4. *Bussone* v. *Sinclair Refining Co.*, 210 Pa. Super, 442, 234 A. 2d 195 (1967).
5. California, Iowa, Massachusetts, Minnesota, Rhode Island, Texas.
6. Alaska, Arkansas, Connecticut, Illinois, Maryland, Mississippi, New York, Oklahoma, Oregon.
7. Larson, *supra*, note 3, vol. 1A, sec. 38.20.
8. *Id.* at sec. 38.30.
9. See, e.g.. *Lakey* v. *Duso Auto Parts, Inc.*, 29 A.D. 2d 1035, 289 N.Y.S. 2d 434 (N.Y. 1968) ; *Robinette* v. *Kayo Oil Company*, 171 S.E. 2d 172 (Va. 1969).
10. This group includes, among others, Arizona, Georgia, Indiana, Maryland, Missouri, New York, Pennsylvania, South Carolina, Texas, Utah, and Virginia.
11. *E.g.*, Nebraska, Oregon, Washington, Montana, Illinois, and Louisiana.
12. *E.g.*, Pennsylvania and Maryland.
13. See, e.g., *Andreason* v. *Industrial Commission*, 102 P. 2d 894 (Utah 1940).
14. Larson, *supra.*, note 3, vol. 1, sec. 6.20.
15. *Id.* at sec. 6.30.
16. Id. at sec. 6.40.
17. See, e.g., *Whetro* v. *Awkerman*, 174 N.W. 2d 783 (Mich. 1970).
18. See, e.g., *J. I. Case Company* v. *Industrial Commission*, 223 N.E. 2d 847 (Ill. 1967).
19. See, e.g., *Aetna Life Insurance Company* v. *Industrial Commission*, 254 P. 996 (Colo. 1927).
20. See, e.g., *Korchinski* v. *S.S.S. Bar and Grill, Inc.*, 315 N.Y.S. 2d 268 (1970) ; *Fiorelli* v. *Anastasi Bros. Company*, 28 A.D. 2d 775, 280 N.Y.S. 2d 884 (1967).
21. See, e.g., *Corken* v. *Corken Steel Products, Inc.*, 385 S.W. 2d 949 (Ky. App. 1965).
22. See, e.g., *Turner* v. *Campbell Soup Company*, 166 S.E. 2d 817 (S.C. 1969) ; *Williams* v. *City of Gallup*, 421 P. 2d 804 (N.M. 1966).
23. See, e.g., *Borden Foods Company* v. *Dorsey*, 146 S.E. 2d 532 (Ga. App. 1965) ; *Williams* v. *Industrial Commission*, 232 N.E. 2d 744 (Ill. 1968).
24. See, e.g., *Tonn & Blank, Inc.* v. *Curtis*, 226 N.E. 2d 551 (Ind. App. 1967).
25. See, e.g., *Marsigli's Estate* v. *Granite City Auto Sales, Inc.*, 197 A. 2d 799 (Vt. 1964).
26. California, Kentucky, North Dakota, Florida Mississippi.
27. Larson, *supra*, note 3, vol. 1, sec. 13.00.
28. See, e.g., *Andras* v. *Donovan*, 414 F. 2d 241 (5th Cir. 1969) ; *Bedwell* v. *Industrial Commission*, 542 P. 2d 131 (Arizona App. 1969).
29. See, e.g., *Carabetta* v. *Industrial Commission*, 469 P. 2d (Ariz. App. 1970) ; *Lawson* v. *Lawson*, 415 S.W. 2d 313 (Mo. App. 1967).
30. Larson, *supra*, note 3, vol. 1, sec. 13.11.
31. See, e.g., *Yount* v. *United Fire and Casualty Company*, 129 N.W. 2d 75 (Iowa 1964).
32. See, e.g., *Hefley* v. *E. I. du Pont de Nemours & Company*, 424 S.W. 2d 396 (Ky. App. 1968).
33. See, e.g., *Rauma* v. *Paper Calmenson & Company*, 174 N.W. 2d 244 (Minn. 1970).
34. See, e.g., *Saala* v. *McFarland*, 45 Cal. Rptr. 144, 403 P. 2d 400 (1965) ; *Faust* v. *Birds Eye Division*, 422 P. 2d 616 (Idaho 1967).
35. See, e.g., *Askren* v. *Industrial Commission*, 391 P. 2d 302 (Utah 1964) ; *Reading and Bates Inc.* v. *Whittington*, 208 So. 2d 437 (Miss. 1968).
36. See, e.g., *Greisman* v. *New York State Department of Transportation*, 307 N.Y.S. 2d 733 (1970) ; *Ruiz* v. *Deldan Design, Inc.*, 27 A.D. 2d 774, 277 N.Y.S. 2d 90 (1967).
37. See, e.g., *Diffendaffan* v. *Clifford*, 430 P. 2d 497 (Idaho 1967) ; *Frisbie* v. *Four Wheel Drive Corporation*, 172 N.W. 2d 346 (Wisc. 1969).
38. See, e.g., *Griffin* v. *Doss*, 411 S.W. 2d 649 (Mo. App. 1967) ; *Whaley* v. *Steuben County Rural Elec. Membership Corporation*, 221 N.E. 2d 445 (Ind. App. 1966).
39. See, generally, Larson, supra, note 3, vol. 1, sec. 24.20.

40. *Mahoney* v. *Michaels Stern and Company*, 9 A.D. 2d 843, 193 N.Y.S. 2d 106 (1959), *rev'd.*, 9 N.Y. 2d 931, 176 N.E. 2d 104, 217 N.Y.S. 2d 97 (1961).
41. See, e.g., *Mark's Dependents* v. *Gray*, 251 N.Y. 90, 167 N.E. 181 (1929).
42. E.g., Kentucky, Arizona. Arizona's statute carries this requirement to the ultimate, requiring that a specific number of shifts be worked within the State.
43. An excellent, detailed discussion is presented in Knight, "Compensation for Black Lung at the Federal Level: A Precedent for Nationalized Workmen's Compensation," 57 Va. L. Rev. 97 (1971).
44. W. Va. Code Ann., secs. 23–4–1 to 23–4–21 (supp. 1970).
45. Federal Coal Mine Health and Safety Act of 1969, Pub. L., No. 91–173, sec. 509, 83 stat. 803.
46. Pub. L. No. 91–173, 83 stat. 742 (codified at 30 U.S.C. secs. 801–960 (supp. V. 1970)).
47. 30 U.S.C. sec. 91 (Supp. V, 30 U.S.C., sec. 901).
48. Id. sec. 923(a).
49. Id. sec. 922(b).
50. id. sec. 931(a).
51. id. sec. 932(a).
52. id. secs. 931(a) (1), (2)(A)–(E).
53. 57 Va. L. rev. 97, 125 (1971).
54. P.L. No. 92–303, 86 stat. 150.
55. A good example of this is *Daniels* v. *Trailer Transport Co.*, 42 N.W. 2d 828 (Mich. 1950). Claimant, a resident of Illinois, made a contract of employment in Texas with a Michigan employer, and suffered a compensable accident in Tennessee.
56. *Green* v. *J. A. Jones Construction Company*, 161 F. 2d 359 (5th cir. 1947).
57. Larson, supra, note 3, vol. 3, sec. 84.20.
58. See, e.g., *Pacific Employers Insurance Company* v. *Industrial Accident Commission*, 306 U.S. 493, 59 S. Ct. 629, 83 L. Ed. 940 (1939); *Carroll* v. *Lanza*, 349, U.S. 408, 75 S. Ct. 804, 99 L. Ed. 1183 (1955).
59. e.g., Connecticut, District of Columbia, Indiana, Massachusetts, Ohio, and South Dakota.
60. See, e.g., *Boyle* v. *G & K Trucking Co.*, 179 A. 2d 514 (N.J. 1962).
61. See, e.g., *Arnold* v. *Industrial Commission*, 171 N.E. 2d 26 (Ill. 1961).
62. Alabama, Hawaii, Illinois, Kansas, Kentucky, Maine, Missouri, Oklahoma, Tennessee, Texas, and Vermont.
63. Arizona, Colorado, Idaho, Mississippi, Nevada, New Mexico, and Utah.
64. Maryland, North Dakota, and Oregon.
65. Among the States in the group are Alaska, Arkansas, Connecticut, Indiana, Iowa, Louisiana, Massachusetts, Nebraska, New Jersey, New York, Ohio, and Rhode Island.
66. *Nashko* v. *Standard Water Proofing Company*, 4 N.Y. 2d 199, 149 N.E. 2d 859, 173 N.Y.S. 2d 565 (1958).
67. Such a situation actually occurred in *House* v. *Industrial Commission*, 117 P. 2d 611 (Ore. 1941). Oregon has since amended its statute so that this result could not occur. But see, *Bank* v. *Meyers*, 35 A. 2d 110 (Md. 1943).
68. Florida, for example, defines "disability" to mean either physical impairment or diminution of wage earning capacity, whichever is greater.
69. For a detailed discussion of the exclusiveness of schedule benefits, see A. Larson, supra, note 3, vol. 2, sec. 58.20 (1969).
70. *O'Laughlin* v. *Federal Reserve Bank*, 275 App. Div. 876, 88 N.Y.S. 2d 706 (1949).
71. See, e.g., Ohio Rev. Ann Sec. 4123.57 (1965).
72. Louisiana, Texas.
73. *Hebert* v. *South-Louisiana Contractors, Inc.*, 238 So. 2d 756 (La. App. 1970); *Lawless* v. *Steel Erectors, Inc.*, 222 So. 2d 849 (La. 1969). La. Rev. Stat. Sec. 23 1221 (2) (1950).
74. Malone, "Total Disability Evaluation Under the Louisiana Compensation Act," 20 La. L. Rev. 486 (1960); Horovitz, "Injury and Death Under Workmen's Compensation Laws," 275 (1944).
75. See observations of Janvier, J., in *McAlister* v. *Liberty Mutual Insurance Company*, 87 So. 2d 354, 360–361 (La. App. 1956).
76. Mass. Ann. Laws, ch. 152, sec. 66 (1965).
77. See, e.g., *Brewington* v. *Radio Corporation of America*, 210 F. Supp. 204 (S.D. Ind. 1962); *Murphy* v. *American Enka Corporation*, 195 S.E. 536 (N.C. 1938).
78. E.g., Minnesota, New Hampshire, Ohio.
79. See *La Bonte* v. *National Gypsum Company*, 269 A 2d 634 (N.H. 1970).
80. See *Slavinsky* v. *National Bottling Torah Company*, 166 N.E. 821 (Mass. 1929).
81. See, e.g., *Garcia* v. *Gusmack Restaurant*, 150 N.Y.S. 2d 232 (1954).
82. See, e.g., *Carter* v. *Superior Court*, 142 Cal. App. 2d 350, 298 P. 2d 598 (1956).
83. Kentucky, Oregon, Washington, and West Virginia.
84. Arizona Rev. Stat. Ann. Sec. 23–1022 A and B (1956).
85. Texas Workmen's Compensation Law, art. 8306, sec. 5.
86. *Duprey* v. *Shane*, 109 Cal. App. 586, 241 P. 2d 78 (1951), aff'd., 39 Cal. 2d 781, 249 P. 2d 8.
87. An excellent discussion is presented in Larson, "Workmen's Compensation: Third Party's Action Over Against Employer," 65 N.W.L. Rev. 351 (1970).
88. See *Elston* v. *Industrial Lift Truck Company*, 420 Pa. 97, 102, no. 216 A. 2d 318, 320, n. 2 (1966).
89. *Kim* v. *Michigan Ladder Company*, 208 F. Supp. 298 (W.D. Pa. 1962); *Brown* v. *Dickey* 397 Pa. 454, 155 A. 2d 836 (1959); *Maio* v. *Fahs*, 339 Pa. 180, 14 A. 2d 105 (1940).
90. See *Hunsucker* v. *High Point Bending and Chair Company*, 237 N.C. 559, 75 S.E. 2d 768 (1953).
91. See *Tate* v. *Superior Court of Los Angeles*, 213 Cal. App. 2d 238, 28 Cal. Rptr. 548 (1963).
92. 350 U.S. 124 (1956).
93. *Halstead* v. *Norfolk and Western Railway*, 236 F. Supp. 182 (S.D. W. Va. 1964), aff'd 350 F. 2d

917 (4th Cir. 1965) ; *Hill Lines, Inc.* v. *Pittsburgh Plate Glass Company*, 222 F. 2d 854 (10th Cir. 1955).

94. *Weyerhaeuser S.S. Company* v. *Nacirema Operating Company*, 355 U.S. 563 (1958).
95. See N. 87, supra, at 389–395.
96. *Nelson* v. *Union Wire Rope Corporation*, 31 Ill. 2d 69, 199 N.E. 2d 769 (1964), Rev'g. 39 Ill. App. 2d 73, 187 N.E. 2d 425 (1963).
97. This group includes, among others, Alabama, Colorado, Delaware, Georgia, Illinois, Indiana, Iowa, Maine, New Hampshire, Oregon, Pennsylvania, Texas, Vermont, Virginia, and Washington.
98. See e.g., *Ruth* v. *Bituminous Gas Corporation*, 427 F. 2d 290 (6th Cir. 1970).
98. See, e.g., *Ruth* v. *Bituminous Gas Corporation*, 427 F. ware, District of Columbia, Idaho, Illinois, Kentucky, Michigan, New Jersey, New York, Ohio, Oregon, Texas, Virginia, and Washington.
100. E.g., Arizona, Arkansas, District of Columbia, Georgia, Idaho, Kansas, Kentucky, Maryland, Massachusetts, Missouri, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee and Virginia.
101. See, e.g., *Downing* v. *Dondlinger & Sons Construction Company*, 294 F. Supp. 104 (W.D. Mo. 1968) ; *Hart* v. *National Airlines, Inc.*, 217 So. 2d 900 (Fla. App. 1969).
102. *Makarenko* v. *Scott*, 132 W. Va. 430, 55 S.E. 2d 88 (1949).
103. *Markley* v. *White*, 168 Okla. 244, 32 P. 2d 716 (1934).
104. Texas Workmen's Compensation Law, Art. 8306, Sec. 6a.
105. Georgia, Ohio, West Virginia, Wyoming.
106. Fairly typical of these is New York's requirement that the employer notify the employee at least 30 days before the employee's time to sue runs out that an assignment will occur. If timely notice is not given, the employee's time limit is extended to 30 days from such notice.
107. Florida, North Carolina. In North Dakota, the employee's failure to sue gives the fund an exclusive right to sue with a final right in the employer.
108. Colorado, Maryland, Puerto Rico.
109. Alabama, Alaska, District of Columbia, New York.
110. Arkansas, Minnesota, Montana, North Dakota, Oregon, Wisconsin, Wyoming.
111. Fla. Stat. Ann. sec. 440.39(3) (a) 1966). See *Reznick* v. *Schwartz*, 219 So. 2d 713 (Fla. 1969).
112. See *Ruby* v. *Lustig*, 274 App. 2d 954, 83 N.Y.S. 2d 665 (1948). In this case the court held that a painter's placing his ladder so that he had to stretch his arm "all the way out" in order to paint created "extreme exertion", satisfying the unusual exertion requirement.
113. *Id.*
114. See, generally, Larson, "The 'Heart Cases' in Workmen's Compensation: An Analysis and Suggested Solution," 65 Mich. L. Rev. 441, 461–465 (1966–67).
115. An excellent discussion is presented in Larson, "Mental and Nervous Injury in Workmen's Compensation," 23 Vand. L. Rev. 1243 (1970).
116. *Toth* v. *Standard Oil Company*, 113 N.E. 2d 81 (Ohio 1953) ; *Bussone* v. *Sinclair Refining Company*, 234 A. 2d 195 (Pa. 1967) ; *McGaw* v. *Bloomsburg*, 257 A. 2d 622 (Pa. 1969).
117. 279 S.W. 2d 315 (Tex. 1955).
118. N. 115, supra at 1252.
119. Texas Workmen's Compensation Law, art. 8306, sec. 20 (1967).
120. 486 P. 2d 739 (Okl. 1971).
121. For an analysis of reported cases in this area, sec. n. 115, supra, appendix V at 1273.
122. 108 N.E. 466 (Mass. 1915).
123. Id. at 468.
124. 67 N.E. 424 (Mass. 1903).
125. Larson, Workmen's Compensation Law, Vol. 1A, sec. 36–30 (1967 ed.).