

Compendium on Workmen's Compensation

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Chapter 13

Legal Costs and Expenses of Litigation

Any measure of the adequacy of workmen's compensation benefits must take into account the laws and regulations dealing with the expenses of litigation. From their inception, workmen's compensation laws were intended to provide a simple, speedy remedy, devoid of legalisms. This goal has been realized to the extent that what had been a major issue, the question of liability, is seldom contested. Also other elements of workmen's compensation, such as the dollar amount of benefits, are disputed or litigated less often than other claims for personal injury. Despite this measure of success, the compensation system, with its many complexities, is the source of much unanticipated controversy and litigation.

ATTORNEY FEES

Because of its complexities, the workmen's compensation system could not dispense with the legal profession. Although it is often argued that attorneys take part in too many cases (an argument which cannot be supported or refuted by facts), some percentage of cases of necessity evoke controversy and require the services of attorneys. Once an attorney appears on the claimants' behalf, these questions arise: Who is to pay his fee? How much should be paid? The traditional doctrine that each party pays its own attorney is open to strong attack in the setting of workmen's compensation, since a justifiable need for an attorney on the part of a particular claimant often means that, in his case, the system has not performed as it should. To require the worker to bear the costs of an attorney forces him to pay for the failures of the system. In any event, workmen's compensation

benefits are at a level which provides at best a minimal standard of living. Each dollar removed from the weekly benefit to pay for an attorney is a serious deprivation.

Industrial Commission Services

Many States have tried to eliminate or at least minimize the amount of benefit dollars spent on attorneys' fees. Virtually every jurisdiction provides some degree of free advice on workmen's compensation matters, so that workers need not engage an attorney simply to file and pursue a claim for benefits. In Michigan, certain officials have the duty not only to advise injured employees but also to work with them on their case short of litigating their claim. In Minnesota,¹ the Commission employs attorneys to advise both employees and employers of their legal rights, to attempt to settle a controversy if possible, and to conduct the handling of the case should it go to hearing. These attorneys handle cases from the filing of the original claim up through the State supreme court.

It has been estimated that approximately 300 cases per year, or about 10 percent of all contested cases in Minnesota, are handled by Commission attorneys.² No opposition from the State bar association has been voiced, probably because it is the policy of the commission to accept, as far as possible, only cases which involve no significant expenditure of time or which would not be important or remunerative enough to interest a private attorney.

In Wyoming,³ a claimant may request that someone from the office of the State or county attorney

represent him, free of charge, in his compensation claim.

Employer Payment of Fees

A more common method of relieving the employee of the burden of attorney fees, used at the hearing level in 16 jurisdictions,⁴ is to require the employer to pay the fees incurred. (In this chapter, employer refers also to the insurer.) In Connecticut, employers are seldom required to pay the fees, in contrast to New Jersey where a substantial portion of cases have the employee's legal fees paid by the employer. In Florida, by a combination of statute and custom, virtually all attorneys' fees are paid by the employer. These 16 jurisdictions require some degree of employer fault before requiring him to pay the attorney's fee. The most common fault is some form of unreasonable contests. The Florida statute⁵ holds the employer liable for attorneys' fees if he contests a claim in which the employee is eventually successful or if he fails to pay proper benefits within 21 days after they are due in response to a formal claim. In actual practice, attorneys in Florida seldom receive, or seek, attorneys' fees unless they are paid by the employer.

In the remaining 40 jurisdictions, the claimant is solely responsible for his attorneys' fees. At the appellate level, nine of these allow the claimant to recover his attorneys' fees in addition to the award of benefits but only when the employer is unsuccessful in his appeal or when the claimant obtains a reversal of a denial of compensation.

Amount of Attorney's Fees

Almost all jurisdictions now in some way regulate⁶ the amount of the worker's attorney's fee, regardless of who pays. A statute or administrative regulation may prescribe the maximum dollar or percentage amount which can be charged, may fix the amount of the fee on a case by case basis; may require approval of all fee arrangements; or may regulate the fee only when a controversy arises over the amount or when the claimant or his attorney specifically requests determination of the fee. In order to assure compliance with these provisions, the statute may provide that no claim or charge for legal services is enforceable or valid unless it has been set in accordance with the prescribed sta-

Table 13.1.—SUMMARY OF STATES' WORKMEN'S COMPENSATION LAWS GOVERNING ATTORNEYS' FEES

I. In the following jurisdictions, the fee is basically a matter of agreement between attorney and client. No approval of the fee is required unless a party contests the fee or makes an application to the State agency requesting such approval:

Connecticut
Iowa
Montana
Nebraska
New Hampshire
Ohio
Pennsylvania
Washington

II. In the following jurisdictions, fees are subject to approval or fixed by the State agency on a case-by-case basis or on a percentage schedule established by statute, policy, or rule:

Alabama.....	By law, the maximum fee is 15 percent of compensation awarded. The maximum is always fixed. Medical benefits are not counted in determining the fee. Payment is usually lump sum.
Alaska.....	By law, there is a minimum fee of 25 percent on the first \$1,000 or part; 10 percent on amount above \$1,000. Board rarely fixes fee above the minimum. Medical benefits are not counted in determining the fee. Payment is usually lump sum.
Arizona.....	By law, the maximum fee is 25 percent of benefits awarded, subject to certain time limitations. Since no approval required at hearing level, the maximum is always charged. Medical benefits are not counted. Payment is usually in installments, with the attorney receiving 25 percent of each installment up to the maximum.
Arkansas.....	By law, the maximum fee is 30 percent on the first \$1,000 or part; 20 percent on amount between \$1,000-\$2,000; 10 percent on amount above \$2,000. In contested cases, the maximum is always approved. Medical benefits are counted in determining the fee. Payment is usually lump sum.
California.....	By policy, the maximum fee is 10 percent of the amount recovered. Medical benefits are generally not counted. Payment is usually lump sum.
Colorado.....	Approval is on a case-by-case basis, but fee may not be based on the amount of the award; only on the amount of work involved. Medical benefits are not counted. The fee is usually paid as benefits accrue; not always in a lump sum.
Delaware.....	By law, the maximum fee is 30 percent of the award or \$2,500 whichever is smaller. The maximum is always approved. Medical benefits are not counted. Manner of payment is on a case-by-case basis.
District of Columbia.....	Approval is on a case-by-case basis. Medical benefits are generally not counted. Payment is usually lump sum.
Florida.....	By policy, the maximum fee is 30 percent of amount recovered. Medical benefits are counted. Payment is always lump sum.
Georgia.....	By policy, a fee of 1/4 of the award is approved in contested cases; 25 percent in settlements. Medical benefits are not counted. Manner of payment is on a case-by-case basis, but parties may apply for a lump sum.
Hawaii.....	Approval is on a case-by-case basis. Medical benefits are not counted in determining the fee. Payment is always lump sum.
Idaho.....	By policy, the board follows the fee schedule of the State bar association. If the case is settled prior to hearing a fee of 25 percent of recovery is approved; if settle, on the day of hearing or an award by the board is made a fee of 33 1/3 percent is approved; if an offer is made prior to settlement, a fee of 33 1/3 percent on amount recovered exceeding the offer is approved; if an offer is made prior to an award, a fee of 33 1/3 percent of the amount exceeding the offer or 25 percent of the entire award, whichever is smaller, is approved. Medical benefits are not included in determining the fee. Manner of payment is on a case-by-case basis.

Table 13.1—SUMMARY OF STATES' WORKMEN'S COMPENSATION LAWS GOVERNING ATTORNEYS' FEES—Continued

Illinois.....	By commission rule, there is a maximum fee of 20 percent of the award, which is usually approved in contested cases. Medical benefits, if disputed or included in a settlement, are included in determining the fee. Payment is usually made in a lump sum, but determined on a case-by-case basis.
Indiana.....	Board rule provides a maximum fee of 20 percent on first \$1,000 or part; 15 percent on amounts between \$1,000 and \$3,000; 10 percent on amounts above \$3,000. The maximum is generally fixed. Medical benefits are not included in determining the fee. Manner of payment is on a case-by-case basis.
Kansas.....	By law, the maximum fee is 25 percent of compensation recovered by agreement, award or judgment. The maximum is always approved. Medical benefits are not included in determining the fee. Manner of payment is on a case-by-case basis.
Kentucky.....	By law, the maximum fee is 20 percent of the amount recovered. The maximum is always fixed. Medical benefits are not included in determining the fee. Payment is always made in a lump sum.
Louisiana.....	By law, the maximum fee is 20 percent on the first \$5,000; 10 percent of amounts above \$5,000. The maximum is always approved. Medical benefits are not included in determining the fee. Payment is usually made in a lump sum.
Maryland.....	By policy, the maximum fee is 20 percent on the first \$7,000; 15 percent on amounts between \$7,000 and \$25,000; 10 percent on amounts above \$25,000. The maximum is generally approved. Medical benefits are not included in determining the fee. Payment is always made in a lump sum.
Massachusetts.....	By policy, the maximum fee is 20 percent of the award, but approval is on a case-by-case basis. Medical benefits are generally not included in determining the fee. Payment is always made in a lump sum.
Michigan.....	By rule, the maximum fee is 30 percent of the award, which is always approved in contested cases. Medical benefits are included in determining the fee. Payment is usually made in a lump sum.
Minnesota.....	By policy, the maximum fee is 25 percent of the award. The maximum is always approved in contested cases. Medical benefits are not included in determining the fee. Payment is usually in installments, the attorney receiving 25 percent of each payment.
Mississippi.....	By law, the maximum fee is 25 percent of the award. The maximum is always approved in contested cases. Payment is always made in a lump sum.
Missouri.....	Approval of the fee is on a case-by-case basis, but generally no more than 25 percent of the award will be allowed. Medical benefits are not included in determining the fee. Manner of payment is on a case-by-case basis.
New Jersey.....	By law, the maximum fee is 20 percent of the judgement. If compensation is offered, tendered in good faith or paid prior to hearing, the fee will be allowed only that part of the judgement or award in excess of the amount offered, tendered or paid. If the amount of judgement (or excess beyond good faith offer) is less than \$200, a fee of not more than \$50 may be allowed. The maximum is rarely allowed; fee is usually 16 $\frac{2}{3}$ –17 $\frac{1}{2}$ percent of the award. Medical benefits are generally not included in determining the fee. Payment is always made in a lump sum.
New Mexico.....	Where no court proceedings are required, the maximum fee is 10 percent of the whole amount recovered. There is no approval required in such cases so the maximum is always charged. Where proceedings are necessary, the fee is fixed on a case-by-case basis. Medical benefits are included in determining the fee. Payment is always made in a lump sum.

Table 13.1—SUMMARY OF STATES' WORKMEN'S COMPENSATION LAWS GOVERNING ATTORNEYS' FEES—Continued

New York.....	Fee is approved on a case-by-case basis, but in no case may fee be based on the amount of the award; only on services performed. Medical benefits are not included in determining the fee. Payment is always made in a lump sum.
North Carolina.....	Commission follows guidelines of State Bar Association; a minimum fee of 15 percent of recovery but not to exceed 25 percent of recovery. Approval is on a case-by-case basis. Medical benefits are generally not included in determining the fee. Payment is always made in a lump sum.
North Dakota.....	By rule, the fee is \$20 an hour; never based on the award. The fee is paid by a State fund whether or not the claimant prevails. Medical benefits are not included in determining the fee. Payment is always made in a lump sum.
Oklahoma.....	By rule, the maximum fee is 20 percent of the award in contested cases; quantum meruit in uncontested cases. The maximum is always approved. Medical benefits are not included in determining the fee. Manner of payment is determined on a case-by-case basis. If the award is in installments, the attorney receives every fifth check up to 20 percent of the total award.
Oregon.....	Board follows the fee schedule of the State Bar Association; maximum fee of 25 percent of the award or \$1,500, whichever is less. The maximum is usually approved. Medical benefits are not included in determining the fee. Manner of payment is on a case-by-case basis.
Puerto Rico.....	By policy, the maximum fee is 15 percent of the award in contested cases; 5 percent of amount recovered by settlement, but in no case may fee exceed \$1,000. The maximum is usually fixed. Medical benefits are not included in determining the fee. Payment is always made in a lump sum.
Rhode Island.....	By policy, the maximum fee is 15 percent of the award. The maximum is usually approved. Medical benefits are not included in determining the fee. Payment is always made in a lump sum.
South Carolina.....	Fee is approved on a case-by-case basis, but 33 $\frac{1}{3}$ percent is usually allowed in contested cases. Medical benefits are not included in determining the fee. Payment is generally made in a lump sum.
South Dakota.....	Department follows guidelines of State Bar Association: maximum fee not to exceed 33 $\frac{1}{3}$ percent of award on case going to hearing, 25 percent of award if case does not go to hearing. Medical payments may be included in determining the fee. Payment is sometimes in a lump sum.
Tennessee.....	By law, the maximum fee is 20 percent of the amount recovered. The maximum is always approved. Medical benefits are not included in determining the fee. Payment is always made in a lump sum.
Texas.....	By law, the maximum fee is 25 percent of the total recovery. In contested cases the maximum is always approved. Medical benefits are included in determining the fee. Payment is generally made in a lump sum.
Utah.....	By rule, the maximum fee is \$25 an hour or 15 percent of the award, whichever is less. A fee in excess of \$150–\$200 is rarely fixed by the Commission. Medical benefits are not included in determining the fee. Payment is always made in a lump sum.
Vermont.....	Approval is on a case-by-case basis; average fee allowed is 15 percent of the award. Medical benefits are not included in determining the fee. Payment is usually made in a lump sum.
Virginia.....	Approval is on a case-by-case basis. Medical benefits are not included in determining the fee. Payment is usually made in a lump sum.

Table 13.1.—SUMMARY OF STATES' WORKMEN'S COMPENSATION LAWS GOVERNING ATTORNEYS' FEES—Continued

West Virginia.....	By law, the maximum fee is 25 percent of the award, but if the award is to be paid for the remainder of the life of claimant, or any award to a dependent of an employee, the maximum fee is 25 percent of benefits to be paid during a period of 208 weeks. The maximum is always charged since there is no approval required unless requested. Medical benefits are not included in determining the fee. Manner of payment is on a case-by-case basis; left to attorney-client agreement.
Wisconsin.....	By law, the maximum fee is 20 percent of the amount at which the claim is settled, or the amount of award. Where liability is admitted and there is no dispute as to the amount due, fee may not exceed \$100. The maximum is always approved. Medical benefits are not included in determining the fee. Manner of payment is on a case-by-case basis.
Wyoming.....	By law, the maximum fee is 10 percent of the award, but in no case to exceed \$100. The maximum is always approved. Up to \$300 additional may be allowed for services in the Supreme Court, Medical benefits are not included in determining the fee. Payment is always lump sum.

III. In the following jurisdictions, attorneys' fees for services at the hearing level, in certain situations, may be paid by someone other than the claimant:

Alaska.....	If a claim for compensation is controverted, the employer or carrier pays the fee in addition to compensation, but only on the amount of compensation controverted and awarded. If the employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due and claimant has employed an attorney in the successful prosecution of his claim, the board shall reimburse claimant for costs in the proceedings, including a reasonable attorney's fee, in addition to compensation or medical and related benefits.
Arkansas.....	If a claim is controverted, the fee is paid by the employer or carrier in addition to the compensation but only on the amount controverted and awarded.
Connecticut.....	Where claimant prevails and the Commissioner finds that the employer or insurer unreasonably contested liability, claimant is allowed reasonable attorney's fee.
Delaware.....	The attorney's fee is allowed by the Board to any employee awarded compensation; and taxed as costs against a party.
Florida.....	If the employer or carrier files a notice of controversy or fails to pay a claim on or before the 21st day after notice of claim, the employee is entitled to reasonable fees in addition to compensation awarded.
Idaho.....	Where employer or carrier contests liability without reasonable grounds or neglects or refuses within a reasonable time after receipt of claim to pay compensation, employee is entitled to reasonable attorney's fee in addition to compensation.
Indiana.....	Whenever the Board shall determine that the employer has acted in bad faith in adjusting and settling an award, or has not pursued settlement of a claim with diligence, then the board shall, if compensation be awarded, fix the fee of claimant's attorney, and the fee shall not be charged against the award to claimant. The minimum fee is \$150 in such cases.
Louisiana.....	Any employer not covered by insurance who fails to pay the amount of any claim within 60 days after receipt of notice, when such failure is found to be arbitrary, capricious or without probable cause, is subject to a penalty, together with all reasonable attorney's fee for the prosecution and collection of such claim.

Table 13.1.—SUMMARY OF STATES' WORKMEN'S COMPENSATION LAWS GOVERNING ATTORNEYS' FEES—Continued

Maine.....	The employer is assessed the fees of the employee's attorney if, in the Commissioner's judgment, such services of the attorney were necessary to proper and expeditious disposition of the case.
Massachusetts.....	In any proceeding brought by the insurer to discontinue compensation, wherein the insurer is ordered to continue payments, the employee is awarded reasonable counsel fees.
Nebraska.....	Whenever an employer refuses payment or neglects to pay compensation for 30 days after injury, and proceedings are held, the employee shall be allowed a reasonable attorney's fee.
New Jersey.....	It is within the discretion of the Hearing Officer to allow a party in whose favor judgement is entered a reasonable attorney's fee.
New Mexico.....	(a) Where the court is called upon to approve a settlement and the employee is not represented by counsel, the court may appoint counsel and fix his fee to be taxed as costs against the employer. (b) If the employee is represented by counsel, his fee is taxed as costs against the employer. (c) Where the claimant collects compensation through a court proceeding, the fee of his attorney is paid by the employer in addition to compensation.
Oregon.....	If a direct responsibility employer or the State compensation department refuses to pay compensation due under an order, or otherwise unreasonably resists the payment of compensation, the employer or department shall pay a reasonable attorney's fee.
Rhode Island.....	Counsel fees are awarded to employees who successfully prosecute petitions for compensation, for medical expenses and to amend preliminary agreements.
Vermont.....	The Commissioner may allow the claimant to recover reasonable attorney fees when he prevails.

IV. In the following jurisdictions, only attorney's fees for appellate proceedings may be paid by someone other than the claimant:

California.....	If the employer petitions for review of an award and the court finds no reasonable basis for the petition, a supplemental award is made to the employee or his attorney for a reasonable fee for services connected with the petition for review.
Hawaii.....	If the employer appeals and is unsuccessful, he is assessed a reasonable attorney's fee taxed as costs.
Minnesota.....	On appeal to the Commission or court, if the award is affirmed or an order disallowing compensation is reversed, the award may include an amount sufficient to cover a reasonable attorney's fee.
New Hampshire.....	In any dispute over the amount of benefits payable which is appealed, an employee who prevails is entitled to reasonable counsel fees.
North Carolina.....	If the insurance carrier institutes a review hearing and is unsuccessful, the employee is allowed a reasonable attorney's fee, paid by the insurer as part of costs.
North Dakota.....	On appeal, claimant's attorney fee is taxed against the State bureau and paid out of its general funds.
Ohio.....	If claimant prevails on appeal, his attorney's fee is taxed against the employer.
Washington.....	If there is an appeal to the court from the decision of the board and claimant prevails, if the accident fund is affected by the litigation; then the attorney's fee for services before the court shall be payable out of the administrative fund.
West Virginia.....	If the employer is unsuccessful in a petition to review, a reasonable attorney's fee not exceeding \$30 to the claimant's attorney shall be fixed by the court and taxed against the employer.

Source: Survey of statutes and information gathered through telephone conversations with State workmen's compensation agencies.

tutory methods or it may authorize criminal penalties against the attorney for entering into improper fee arrangements.

As shown in table 13.1, the amount of the fee permitted ranges from 10 percent of the award with a \$100 maximum, applied in Wyoming,⁷ to 30 percent of the award with no dollar maximum in Florida. A number of statutes provide a sliding scale which permits 15 percent to 30 percent to be assessed on the first \$500 or \$1,000 and then a smaller percentage on the remaining amount of the award.⁸ Where an exact percentage is not provided, many other factors are considered, such as the amount of the award, the amount of work involved, customary charges for similar services in the community, the complicated or unusual nature of the case, and the ability, skill, and experience of the attorney.

In determining the amount of benefits as a basis for calculating the fee, the majority of jurisdictions do not include medical benefits received. However, if the employer disclaims all liability for medical benefits and the attorney ultimately is successful in proving liability for such benefits, a number of these jurisdictions will include medical services in their calculation. In New Jersey,⁹ the statute provides that when, at a reasonable time prior to any hearing, compensation has been offered and the amount then due has been tendered in good faith or paid, the attorney's fee will be calculated only on that part of the judgment or award which is in excess of the amount of compensation offered, tendered, or paid.

Most States are not able to estimate the proportion of benefits paid which goes to pay claimants' attorneys' fees. From responses to a survey by the National Commission in 1972 and from information in agency reports, it appears that the percentage in New York is less than 5 percent of benefits, whereas in Florida and New Jersey it is between 5 and 10 percent.

How Fees Are Paid

In most jurisdictions, fees are paid in a lump sum. Where the employer is liable for the fee, there is no difficulty. Where the employee is liable and unpaid benefits have accrued, the fee is often awarded in a lump sum payable out of the accrued benefits. If there is no accrual, several jurisdictions provide that the employer pay the fee in a

lump sum to the attorney, and credit this amount against the last weeks for which benefits are due.

OTHER LEGAL COSTS

Once it is determined that a claim is to be litigated, it becomes virtually certain that money will have to be spent on legal costs other than attorneys' fees. Some items, such as investigative costs, virtually always remain the obligation of the party who incurs them. In the absence of a statute or regulation providing to the contrary, all other costs would receive the same treatment. However, under circumstances prescribed by statute or regulation in many jurisdictions, some expenses more closely related to the actual litigation may be shifted from the party initially incurring them to someone else.

Witness Fees

At the hearing or trial level, where live testimony is used for both parties, the primary expense other than attorney's fees is witness fees. While fees for lay witnesses are usually small, fees for expert witnesses such as physicians can run well above \$100 per witness. A related cost item is the taking of testimony (depositions) outside the hearing or trial in the presence of both attorneys but without a judge or referee. The testimony is transcribed and may be presented as evidence in lieu of live testimony. The cost includes the fees of the reporter who takes the testimony and transcribes it as well as the usual witness fee. In addition to their use in the hearing process, depositions may be used to discover what the testimony of potential witnesses may be. If used solely for investigation, the expense incurred usually is not permitted to be shifted from one party to another.

The manner in which costs can be shifted, and to whom, varies among jurisdictions. Few statutes expressly provide for the shifting of the employer's costs, although many of the statutes which give the agency discretion in the allocation of costs could conceivably permit the employer's costs to be taxed against the employee. In practice, this does not happen.¹⁰ Although claimants' costs are often shifted, such apparently unequal treatment has been held to be constitutional.¹¹

The claimant's costs may be shifted to the employer or to the State. Of the jurisdictions that

permit shifting, only four¹² provide for the State to bear the claimant's costs, usually when it is determined that the testimony of the witness whose fee is sought to be shifted was "material." In Wyoming, an exclusive fund State, costs incurred by an unsuccessful claimant are taxed against the fund, while the employer bears the successful claimant's costs.¹³ Seven jurisdictions¹⁴ expressly provide that costs shall be shifted from the employee to the employer only when the employee's claim is successful. In 13 jurisdictions,¹⁵ each party must be responsible for its own costs; in 18,¹⁶ the workmen's compensation agency has discretion in assessing costs; and in another 12,¹⁷ some or all of the employee's costs are shifted regardless of the success of the claim.

Several jurisdictions determine whether the employee has been successful by comparing what is awarded at the hearing with the offer, if any, made by the employer at some point prior to trial.¹⁸ If the award does not exceed the offer, then the employee has not been successful.

Cost of Medical Testimony

Another source of expense, again in the medical field, is that of obtaining expert medical testimony other than that of the treating physician. If the employee wishes to obtain such testimony (as he may if the treating physicians were selected by the employer), the cost of the independent examination may be prohibitive.

This burden is eased somewhat in a number of jurisdictions by statutory provision permitting the compensation agency to appoint a doctor to provide an impartial medical examination at the expense of the State or the employer. Also, a number of jurisdictions have impartial medical panels which perform the same function.

California not only permits reimbursement for medical expenses reasonably incurred in attempting to prove a claim, even an unsuccessful claim,¹⁹ but also allows reimbursement for travel expenses and loss of wages resulting from the claimant's obtaining such an examination in order to support his claim.²⁰ If the foregoing options are either not available or for some reasons not used, a claimant may attempt to obtain reimbursement for the expense of medical examinations by disguising such examinations as true reimbursable

medical expenses incurred in obtaining a diagnosis and treatment.

Transcript Costs

At the appellate level of litigation, where live testimony is not permitted, the major cost is the preparation of the transcript of the earlier proceedings. Even for a case heard in only a few hours, the transcript can cost several hundred dollars. For an extended and complicated case, it is not unusual to incur transcript costs in excess of \$1,000. If the employer appeals, generally he is required to provide the claimant with a copy of the transcript. If the employee appeals, about ten States furnish him with a transcript without cost. Another five²¹ relieve the employee of part or all of this expense if he can show an inability to pay.

Once the appeal is decided, approximately eight States either expressly require or permit the appellate body to assess costs against a losing employer. The large majority of jurisdictions apply general statutes which permit costs to be assessed against a losing employee or employer. In practice, as the unequal economic position of the parties is taken into account, when an employee loses, both parties are required to bear their own costs or the employee's costs are assessed against the agency.

ATTORNEY CHARACTERISTICS

No discussion of legal expenses and costs can be considered complete without mentioning those who directly influence the operation of this system, the attorneys. Unfortunately, it is quite difficult to specify the quantity, quality, and nature of both claimants' and defendants' attorneys. No studies have attempted to evaluate these factors or the effect of various kinds of legal representation on the workmen's compensation system. The following comments, although general in nature, aim only to explain how attorneys participate in the system.

Defendants' Attorneys

For the defense, employers either have insurance companies handle all their workmen's compensation matters or are self-insured. If covered by an insurer, an employer has little or no responsibility in the event of a contested workmen's com-

pensation claim. Other than his initial report of injury and whatever follow-up information the insurance company may request, the employer has little to do. The insurer's claims office is responsible for handling of each compensation claim. The case remains in the hands of the claims office unless there is a controversy, when it may be assigned to an attorney who generally remains subject to control by the claims office. Many insurance companies do not automatically bring their own lawyers into a case as soon as a controversy arises or when the claimant obtains a lawyer. Trained claims people, who may or may not have formal legal experience, are often capable of handling cases up to the point that the law requires the presence of an attorney. Then, only when a hearing or other formal proceeding appears necessary, will the insurance company look to its attorney.

The lawyers used by insurance companies are of two types. Most large insurance companies have attorneys on salary or retainer and use them full-time, at least in some offices, to handle litigation. Others utilize independent legal firms which, with a continuing relationship with one or more insurance companies, handle all or a portion of the insurer's work in a geographic area. These firms typically specialize in defending law suits. Some deal solely in workmen's compensation claims. Others take workmen's compensation cases as well as other types of litigation. These independent firms tend to handle defense cases only. They seldom deal in a significant volume of cases as counsel for injured workers.

If the employer is self-insured, he can handle workmen's compensation claims in one of two ways. If the company is large enough, it may have a workmen's compensation department to administer the processing of claims and the defense of contested claims. In some instances, the staff will have an attorney on salary for litigation. As in the practice of insurance companies, the self-insured may engage private attorneys instead of staff counsel, particularly if there is not a large volume of litigation. If the employer's experience does not justify operating his own workmen's compensation department, he may pay a "servicing agency" to provide all the administrative functions of an insurance company, often including safety services. Like the employer or insurer, when the time for using the services of an attorney arises,

the agency may use its own house counsel or an outside firm, predominantly the latter.

Claimants' Attorneys

As to claimants' attorneys, generalizations are far less reliable. While the defense feels considerable economic pressure to concentrate the handling of compensation claims within a relatively small number of experienced and competent firms, no such pressure is manifest on the claimants' side.

Most claimants have but one compensation claim and do not need a continuing relationship with an attorney for this purpose. Also, claimants usually have little basis for judging an attorney's ability to handle a compensation case, although workmen's compensation is a legal specialty that requires a thorough knowledge of the system. As a result, many attorneys with little or no background in the field may handle an occasional claim. Not until after the case is over may the worker realize or suspect that he may not have had the best possible representation.

Some law offices specialize in claimants' workmen's compensation cases. No highly populated area is without at least one such firm. Although some of these firms do nothing but compensation work, most deal in other aspects of the law, such as plaintiffs' negligence cases. With a wide spectrum of legal representation available, there is little assurance that the average worker with a workmen's compensation problem will be represented by an experienced and competent attorney.

Where labor is well organized, union members often are in a better position to obtain satisfactory representation. As the result of such factors as union policy, information from fellow members, sources of free legal advice, and sometimes even the use of the equivalent of runners, most compensation claims in a particular union's local jurisdiction go to one attorney or firm. While it is possible that these firms could present the shortcomings already noted, the union holds them responsible for competent and economical representation. If a number of workers feel that they have not been represented properly, the loss of the union's claims cases may follow. The economic loss will be accentuated if the firm also handles the union's other legal work. For this reason, it is not uncommon for much of the individual worker's legal matters, including compensation claims,

to be handled at less than the prevailing fee schedule. Some unions have staff attorneys to handle the legal work of their individual members. Such staff counsel may be augmented or replaced by officials with experience in the compensation field but who can provide assistance to workers to the extent that the law permits.

In recent years, several programs have been established to assist migrants, low-income families, and similar groups with their legal difficulties. As few of these groups provide representation in workmen's compensation and negligence cases, they have not significantly affected the volume of legal assistance available to injured workers. Where it has been their policy to take difficult cases concerned with basic points of law, however, significant questions of compensation law have been raised by some of their suits.

Need for Attorneys

Much has been said, both pro and con, as to the need for attorneys, particular claimants' attorneys, in the workmen's compensation system. As in many or all areas of the law, instances of abuse by claimants' attorneys occur. It is certain that the self-interest of some attorneys may undermine the efficient operation of the system. Still, it is unrealistic to expect that workers will receive prompt, equitable, and adequate benefits, or anything approaching them, if they are left without the opportunity to obtain legal representation. Even if defense attorneys were also eliminated, there would remain the need of inexperienced claimants for assistance in having to contend with professionals on issues arising under a complicated and unfamiliar law. No State administration presently is equipped to provide all claimants with the advice and assistance that they require. Even if such personnel were available, it is doubtful that agency employees could provide the advocacy that often is required, sometimes directed against the agency or the system itself. Attorneys and unions provide almost the only sources of pressure for operating or changing the system on the claimants' behalf. Although they may be acting out of self-interest, attorneys do work for both statutory and case law improvement in the compensation system. Quite often, they are the sole defense of the worker against overreaching by others in the system.

As noted above, attorneys and the claimants who usually have to pay for them are treated differently from State to State. The differences reflect not only the methods by which attorneys' fees are paid but also the amount which an attorney can expect to receive in a given case. While it is easy to say that such fees should be held to a bare minimum, particularly where paid by the claimant, it has been argued that unrealistically low fees can have a harmful effect. If claimants' attorneys are a necessary part of the system, then it follows that good rather than poor legal representation is desirable. If inadequate fees are paid, the consequences may be dire. Good lawyers may leave compensation practice for other, more lucrative areas and leave the field to marginal attorneys of doubtful ability. Also, specialty firms may develop techniques to handle cases on a mass production basis to achieve an acceptable income. Such assembly line methods are unlikely to provide representation that will give the worker an even break in the compensation system.

References to Chapter 13

1. Minnesota Workmen's Compensation Act, chapter 176-261.
2. Report to the National Commission on State Workmen's Compensation Laws by the Minnesota Workmen's Compensation Commission.
3. Wyoming Stat. Ann., § 27-122 (1957).
4. See table 13.1.
5. Florida Stat. Ann., § 27-120 (1966).
6. See table 13.1.
7. Wyoming Stat. Ann., § 27-120 (1957).
8. See, e.g. Louisiana Rev. Stat., § 23: 1143 (1950).
9. New Jersey Rev. Stat., § 34: 15-64 (1959).
10. Although Oklahoma requires a filing fee to be paid by an unsuccessful party, the fee in practice, is not collected against a claimant.
11. See *Honeywell, Inc. v. Holey*, 216 So. 2d, 745 (Fla. 1968); *Gomes v. Bristol Manufacturing Co.*, 184 A. 2d 787 (R.I. 1962).
12. Maryland, Missouri, Nevada, Ohio.
13. Wyoming Stat. Ann., § 27-115 (1957).
14. Arkansas, Florida, Massachusetts, New Hampshire, Rhode Island, Tennessee, Texas.
15. Colorado, Connecticut, District of Columbia, Idaho, Illinois, Indiana, New Mexico, South Carolina, Utah, Vermont, Virginia, West Virginia, Wisconsin.
16. Alabama, California, Delaware, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, Ohio, Pennsylvania, South Dakota.

17. Arizona, Georgia, Illinois, Iowa, Kentucky, Michigan, Mississippi, New Mexico, New York, North Carolina, West Virginia, Wyoming.
18. Massachusetts provides that if the insurer made a specific written offer to the employee prior to a Board review, no costs are to be assessed if the Board orders no more than that offer.
19. See *Subsequent Injuries Fund v. Industrial Accident Commission*, 59 Cal. 2d, 842, 31 Cal. Rptr. 477, 382 p. 2d, 597 (1963).
20. See *Caldwell v. Workmen's Compensation Appeals Board*, 268, Cal. App. 2d 912, 74 Cal. Rptr. 517 (1969).
21. Colorado, Illinois, Minnesota, Montana (on appeals to the Montana Supreme Court), Nebraska.