Compendium on Workmen's Compensation

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Chapter 19

Integration of Workmen's Compensation and Other Programs

In the eyes of some observers, the deficiencies of workmen's compensation can at best be corrected only partially through reforms in the present separate system. They prefer to integrate workmen's compensation and other forms of social insurance into one or more comprehensive programs that would cover both occupational and nonoccupational injuries and diseases. Arguments for and against this integration require a study of specific proposals described below.

THE CASE FOR INTEGRATION

A cogent case for integration appeared in the 1942 report by Sir William Beveridge on Social Insurance and Allied Services and the 1967 Report of the Royal Commission of Inquiry on Compensation for Personal Injury in New Zealand.[1] The arguments in sum were:

(a) There is no reason to treat occupational injuries, diseases, or deaths differently from corresponding nonoccupational incidents or even general unemployment. First, the economic losses caused by these perils stem from the nature of the injury, not the cause. A worker who loses an arm or is killed in an automobile accident on a Sunday afternoon drive with his family suffers as much an economic loss as if he had been the victim of a work accident on Monday morning.

Second, because work-related disabilities are less likely than other disabilities, for most employees, it is inappropriate to award them separate treatment. The chance that an employee will be injured off the job has increased as employees spend a larger and often more dangerous part of their lives away from work than at it.[2] Indeed, because of greater longevity, "the great disablers are no longer traumatic injury and diseases accounted with hazardous processes but have become the degenerative conditions, of circulatory and skeletal systems, that accompany aging."[3]

Third, there is no sound ethical or economic reason why employees injured on the job should receive separate treatment from those injured off the job.

(b) Separate treatment of occupational impairments requires procedures to determine that the cause of each impairment is work-related. Doctors and lawyers differ considerably among themselves on how some significant medical and legal issues affecting this determination should be resolved. In some instances, the demarcation between occupational and nonoccupational injuries and diseases seems impossible. Such issues produce undesirable delays, acrimonious disputes, and heavy administrative, medical, and legal charges. They also retard or discourage restoration of the disabled.

(c) Workmen's compensation is no longer the only social insurance program covering death and injury or illness. Indeed it has become a relatively small part of the total United States social insurance system. Private employee benefit plans have also expanded to the point where their benefits dwarf those provided under workmen's compensa-

tion. "Although in an earlier day the employer's responsibility was the touchstone of liability, more recently insurance against the common hazards of modern life, on and off the job, has become a convenient form in which to pay part of employee compensation, and social insurance plans are justified more on the need for particular protection than on special justifications for a particular mode of providing it." [4] With the growth of these other public and private plans, it becomes essential to coordinate all death and disability plans so as to avoid gaps and overlaps.

(d) The safety incentives claimed for workmen's compensation are overrated. The New Zealand Royal Commission of Inquiry argued first that "large numbers of accidents occur by chance or because of some lapse on the part of an employee or in circumstances over which the employer has no control." [5] Second, the New Zealanders doubted that the incentives provided by workmen's compensation experience rating were sufficient to stimulate much accident prevention. Third, they noted the absence of empirical studies indicating that experience rating has in fact reduced accident frequency and severity.[6] Instead, they argued, experience rating gives employers an incentive to fight claims.

(e) Administration costs are unduly high for workmen's compensation compared to other social insurance programs. In part, these high costs are attributable to the effort that is required to determine whether the injury or disease is work-related. A separate program also entails some duplicate overhead expense and lacks the economies of scale that may be achieved through an integrated program. Finally, although the involvement of private insurers is not a necessary feature of workmen's compensation, private insurers, which have higher expense ratios than exclusive government insurers, do in fact administer most workmen's compensation operations in the United States.

THE CASE AGAINST INTEGRATION

To date, the argument for integrating workmen's compensation and other social insurance programs has not been persuasive. The responses that have been made to the case for integration have been partly philosophical, partly practical. Two principal spokesmen for making special provisions for industrial accidents have been Sir William Beveridge, whose arguments for integration have already been cited, and Arthur Larson, former Undersecretary of Labor in the Eisenhower administration.

The Beveridge Report favored including industrial injuries and diseases within the framework of a comprehensive social insurance program, but treating work-related impairments differently in some ways. The program developed as a result of this report was discussed in chapter 6. Three arguments were made for this special treatment of industrial injuries and diseases:

> First, many industries vital to the community are also specially dangerous. It is essential that men should enter them and desirable, therefore, that they should be able to do so with the assurance of special provision against their risks. Those who in taking such risks suffer prolonged or permanent disablement or death, should have a claim to compensation relating to their earnings, not to a subsistence minimum for themselves and their families. Second, a man disabled during the course of his employment has been disabled while working under orders. This is not true generally of other accidents or of sickness. Third, only if special provision is made for the results of industrial accident and disease, irrespective of negligence, would it appear possible—as on grounds of equity and for the avoidance of controversy it is desirable—to limit the employer's liability at Common Law to the results of actions for which he is responsible morally and in fact, not simply by virtue of some principle of legal liability.[7]

Beveridge recognized that the first argument alone would justify special provision only for those in hazardous industries or would suggest higher special benefits for workers in those industries. But, he concluded, the second and third arguments, plus the desire to make as few distinctions as possible, favored no variation in benefits according to the risk in the employment.

The report also argued that part of the risk of industrial accidents should be borne by the employer on the ground that part of the risk is within their control. All accidents, the report stated, are not inevitable; "the number and severity of accidents can be diminished or increased by greater or less care on the part of those who manage industry." [8] Consequently financing part of the cost of industrial disability through levies on employers that varied with the hazard to their employees is

considered desirable because it gives employers a financial incentive to prevent accidents.

Arthur Larson is an even stronger supporter of separate treatment of industrial disabilities. He favors preserving the traditional separateness of workmen's compensation in the American pattern. Among his arguments are the following: [9]

(a) It is unlikely that the array of benefits available under the most advanced workmen's compensation plans can be provided automatically to every person in the United States who has an automobile accident or slips in the bathtub. This, he claims, is the actual reason that the British social insurance system retained higher benefits for occupational injuries. The proposed New Zealand system, he notes, would exclude sickness and disease except "industrial diseases".

(b) The present OASDHI program has rather complicated provisions intended to assure that the beneficiary has achieved some substantial connection with the system before becoming eligible. In contrast, a worker is eligible for workmen's compensation benefits if he is injured the instant he starts the first job of his life. If these two systems are merged, will the OASDHI eligibility requirements for disability benefits be changed to conform with the workmen's compensation situation or vice versa? If industrial injuries are to be treated separately, some of the alleged advantages of integration will be lost.

(c) Permanent partial disability benefits, an important segment of workmen's compensation, will be especially difficult to extend to nonindustrial injuries and diseases. The administrative and litigative task of handling the disability evaluations would be staggering. Although the New Zealand report favors awards based on impairment rather than an occupational evaluation of disability, such a test could result in reduced benefits for a worker who cannot work but who, by strictly physical standards, is not seriously impaired.

(d) Even if the distinction between occupational and nonoccupational disability were abolished, many points of controversy would remain. The evaluation of disability would be the most prolific source of controversy but there also would be questions of wage base, relationship and dependency, procedural matters, third-parties, and relationships with other systems.

(e) Perhaps the most cogent argument against abandoning the identity of workmen's compensation has to do with the allocation of the burden of payment and its relation to the hazards of the industry and of the particular employment. A strong proposition is that there should be some relation between both collective and individual accident experience and the allocation of the financial burden.[10] For example, suppose that two entire categories of building materials are in competition, such as stone and brick. Suppose that practically all the stonecutters had silicosis and that the workmen's compensation premiums accordingly, as happened in the thirties in Wisconsin, went above the cost of the payroll. Which is more equitable: that manufacturers of brick should pay half the cost, so to speak, of the occupational disease inflicted by brick's competitor, or that the kind of building material that was free of occupational disease should for that reason enjoy a competitive advantage? Although the contrasts are rarely so sharp, they may occur between two different chemical, energizing, or manufacturing processes, of which one is perhaps superficially more profitable through indifference to injury or illness associated with its activities.

It is no secret that high standards of safety often are won at the expense of at least a temporary loss of productivity. Elaborate safety devices often are in the way and are sometimes removed by workers trying to increase their production. The expense of proper ventilating systems and similar safeguards is not necessarily balanced by gains in productivity when the competitive position of the plant is assessed. Should the conscientious producer who makes all the expenditures necessary to achieve plant safety bear equally the cost of industrial accident and illness experienced by a careless or unscrupulous competitor?

(f) The argument in favor of a unified system cannot be separated from the issue of the proper disposition of tort rights. The decision on supplemental tort rights against the employer will bear heavily on the incentive for the employer to improve safety practices. If experience rating is abolished, there will be no direct cost to the employer flowing from his own faulty practices and accident experience. If he remains liable at common law or under special safety statutes, however, the availability of this remedy will to some extent

offset the loss of the incentive from experience rating. Another reason that the possibility of a supplementary tort suit against the employer is important is that, if industrial injuries are treated the same as nonindustrial, it will be difficult to say where is the quid pro quo for the giving up of the workers' common law remedies. If everybody, working or not, is entitled to the same benefits, why should the worker give up his common law rights? In other words, if workmen's compensation is blended into a general system of social insurance, workers will demand restoration of supplementary tort rights against employers. Whether this would be a good idea is a complex question but, despite the common desire to reduce litigation, a unified system with tort rights restored would likely increase the number of suits.

PROPOSALS FOR INTEGRATING WORKMEN'S COMPENSATION WITH OTHER PUBLIC PROGRAMS

The arguments above may be considered in the light of specific proposals to combine workmen's compensation with existing or proposed public programs. Some would make one or more programs responsible for both long-term and short-term disabilities. Others would divide responsibility for present long-term and short-term workmen's compensation benefits among two or more programs.

Combining Long-Term and Short-Term Protection

The first approach is best exemplified by (*a*) the 1967 "unified scheme" proposal of the New Zealand Royal Commission of Inquiry and (*b*) a suggestion that Old Age, Survivors, Disability, and Health Insurance (OASDHI) of the Social Security Administration, be revised and expanded to provide comprehensive protection against these risks: old age, death, injury, illness, and unemployment.

The New Zealand scheme.—As indicated in chapter 6, the 1967 New Zealand proposal would have established a unified and comprehensive scheme of accident prevention, rehabilitation, and compensation.[11] The objective was to provide compensation for all injuries, irrespective of fault and regardless of cause. Illness benefits, other than those payable for occupational disease, would not be covered. All injured persons were to be entitled to an upgraded and expanded public medical facilities system administered and directly financed by the national health service.

Injured persons would be compensated also for time lost from normal work or other activities for the purpose of convalescence, medical treatment, or rehabilitation. Wage earners and the self-employed would receive 80 percent of previous after-tax earnings subject to a maximum of $25 per week for the first 4 weeks and $120 thereafter. If the work disability lasted more than 8 weeks, the differential compensation paid for the first and second 4-week periods would be paid retroactively. There would also be a minimum benefit, $11.75 a week, which would also be the amount paid housewives, retired persons, and the unemployed who were injured. Minors below age 18 who were not working full time or who earned less than $15 per week would not be eligible for lost-time compensation.

Permanent impairments were to be indemnified further. The Commission favored a schedule that would rate various permanent impairments as a percentage of total incapacity. A loss of a foot, for example, might be rated 20 percent. Once the impairment had been rated, a person would be entitled to his impairment rating, say 20 percent times 80 percent of previous earnings. Persons with no earnings or low earnings would be assigned a national 80 percent earnings figure of $20 per week. Minors or full-time students over 18 would have permanent impairments assessed at the time they would enter the labor market.

Rehabilitation services were to be emphasized more than compensation. In the Commission's view, the purpose of rehabilitation was not to save on compensation costs but to improve the productivity of the handicapped.

Death benefits for life or remarriage for widows would be 50 percent of 80 percent of the deceased spouse's previous earnings with other benefits for life for surviving invalid minors and, until majority, for other dependent minors.

All benefits were to be adjusted every 2 years to changes in the consumers price index.

The unified scheme was to be handled as a social service by an agency of the government. Private insurers would underwrite at most supplementary accident protection. Administration costs were predicted to be 11 percent of benefits paid,

compared with 30 percent under workmen's compensation.

Consistent with the Commission's belief that merit rating does not promote safety, about half of the cost of the program would be financed by a uniform levy on salaries and wages of employees and self-employers. This levy would be supplemented by payments by owners and drivers of motor vehicles and by general taxation.

Common-law rights in respect of personal injuries, both occupational and nonoccupational, were to be abolished. The present New Zealand workmen's compensation program differs from that in the United States in that a New Zealand worker can elect to sue his employer in a common law action.

As noted in chapter 6, the unified scheme had not been adopted at this writing. The New Zealand Parliament was considering an accident compensation bill submitted by the conservative National Party Government with support from the opposition Labor Party. Like the unified scheme proposal, this bill would repeal the existing workmen's compensation system and the bulk of common-law actions. However, unlike the earlier proposal, housewives and retired persons would not be covered except for road accidents. Lost time compensation would be subject to a 6-day waiting period. Employers would be required to provide salary or wage continuation benefits for the first 6 days. Private insurers might be permitted to participate in the administration of the program. Finally, a merit or experience rating scheme would be established that would be more simplified than current workmen's compensation practices but would be inconsistent with the Royal Commission's recommendations.

A revised and expanded OASDHI.—Whereas the New Zealand scheme deals only with accidental injuries, proposals to revise and expand OASDHI would combine comprehensive accident insurance protection with illness, death, old-age insurance, and perhaps unemployment insurance. These proposals have not been developed as much as the New Zealand unified scheme proposal. Discussions of these proposals have been limited to a few pages in an article or monograph dealing primarily with other matters.[12,13,14,15]

At present, as described in chapter 5, OASDHI includes, in addition to its old age and survivorship benefits, (*a*) a long-term disability income insurance program and (*b*) a medical expense program for aged persons. Under the proposal, the disability income and death benefits of workmen's compensation would be provided by the survivorship insurance and disability insurance portions of OASDHI. The medical care benefits would become part of an expanded medicare program.

To provide injured workers with the same types of cash benefits they receive under workmen's compensation, temporary disability benefits and permanent partial disability benefits would have to be added to OASDHI. Also, the definition of permanent total disability would have to be liberalized. Even with these changes, however, there would remain important differences between the new program and workmen's compensation. For example, compared with present workmen's compensation benefits, the OASDHI formula favors injured workers with relatively low earnings or with dependents. Also, the formula is based on career earnings instead of recent average earnings. Finally, as noted in the argument against integration, whereas employees become eligible for workmen's compensation benefits the first day they work, under OASDHI they must acquire some minimum quarters of coverage.

To match medical care benefits in workmen's compensation, the social security program would have to provide medical care for occupational impairment without maximums or cost sharing to employees of all ages who would qualify for such benefits the first day they worked.

If the new benefits were financed in the same way as present OASDHI benefits, employers and employees would both contribute to their cost whereas only employers pay workmen's compensation premiums. The cost of work injuries could, of course, be assessed only against employers, but this would require an administrative determination of whether the injury was work-related.

Another basic issue is the distribution of costs among employers. Whereas present insurance pricing practices vary premiums by industry, employer experience, and size, the OASDHI system exacts a uniform levy on payrolls. It is possible to exact contributions for work injuries based on current pricing principles if it is considered important to retain the resource allocation and safety incentive advantages claimed for merit rating. Although

such a costing procedure would require actuaries to distinguish between work-related and nonrelated losses, the worker's benefits would not be affected.

General revenues also might be used to fund part or all of the cost of the program. If so, the cost of work injuries would be allocated in a much different fashion than at present.

To supplement the benefits provided injured workers under this comprehensive system, workers could be given the right to sue negligent employers. If they could sue for both their economic and noneconomic losses, social insurance benefits could be deducted from their recoveries. In favor of such a change, it can be argued that (a) workers should have the same rights as other persons injured by someone else's negligence and (b) that excess liability suits have been permitted under all automobile no-fault plans enacted to this date. Including this feature, however, would introduce a new source of dispute and litigation. Also employers might be expected to object to paying for a given level of social insurance benefits if they are not relieved of costly liability suits.

Most proponents of a comprehensive OASDHI system would retain a separate unemployment compensation program, though they would replace the present State programs with a Federal system. Others would treat interruptions of income caused by unemployment for reasons other than impairment the same as those caused by impairment, despite the implications for benefits and financing. Although in practice in many States neither the unemployment or compensation program achieves its objectives, and although, in some States, the maximum unemployment benefit exceeds the maximum workmen's compensation benefit, unemployment compensation theoretically replaces about half of most claimants' earnings and workmen's compensation two-thirds.

A disabled worker is commonly assumed to deserve better treatment than a person unemployed for some other reason. He is also assumed to require less motivation to return to work. As for financing unemployment compensation, all employers with at least 3 years' experience are experience rated. For workmen's compensation, only large companies are eligible for individualized experience rating. Furthermore, the statistical credibility of past experience is considered in modifying workmen's compensation charges but not in setting the unemployment insurance rates.

Separate Programs of Long-Term and Short-Term Benefits

In addition to the proposals discussed below, the Netherlands system might also serve as a model for a movement to assign responsibility for long-term and short-term disability benefits to different programs (ch. 6).

Long-term disability benefits.—Because OASDHI currently provides long-term disability income and death benefits, responsibility for work-related and other permanent disability (after the first 3 or 6 months) and death benefits might be assigned to this system. Except for the absence of temporary disability insurance (TDI) benefits, the comments in the preceding section about integrating workmen's compensation and OASDHI cash benefits apply to this proposal. Permanent partial disability benefits would have to be added to OASDHI, the definition of permanent total disability liberalized, the benefits structure and the eligibility requirements reexamined, and the financing implications carefully assessed if persons injured on the job are to receive as liberal benefits as at present and if the cost-allocation effects are to be preserved.

Medical care benefits would become the responsibility of the Social Security Administration as they would be extended to OASDHI beneficiaries with chronic impairment. To match workmen's compensation benefits, the maximums and cost-sharing provisions of OASDHI would have to be removed or other means would have to be found to cover unlimited medical care.

An alternative proposal forecasts a national health insurance program covering all citizens for medical expenses whether or not work-related. In this program there would be no distinction between short-term and long-term impairments.

Short-term disability benefits.—Under this proposal to split temporary from permanent benefits, responsibility for all short-term impairment or disability would be assigned to State TDI programs similar to those now operative in five States but expanded to cover work-related injuries or diseases. Private insurers could be permitted to underwrite these programs. The benefit structures and eligibility requirements of TDI programs and

the ways in which they are financed would have to be reviewed to determine whether they should be changed to be consistent with current workmen's compensation philosophy and practices.

Instead of establishing State TDI programs to handle these benefits, State unemployment insurance funds could be made responsible for all short-term unemployment, however caused. The implications of such a change have been noted above.

Unless a national medical expense insurance program took care of the needs of injured workers, either the State TDI program or some other program would have to provide care during, say, the first 6 months of disability and for those who were not disabled but required medical care. To match the current workmen's compensation benefits provided by most States, these benefits would have to be unlimited up to the level where the Federal program takes over.

General Comments

In at least one State, Hawaii, a bill was introduced in the 1972 State legislature that would have established a comprehensive compensation plan covering both occupational and nonoccupational sickness and injury. This plan would have provided income, medical care, and rehabilitation benefits, but the measure was not enacted.

Because most persons incur medical expenses without being disabled long, if at all, most injured persons would continue to be served by a State program if short term benefits were split from long term. Because of the need for coordinating the State and Federal programs, the State programs would probably have to meet certain Federal standards.

As one observer has noted, integration is not so likely to result from design as by having "more and more aspects of the States' workmen's compensation programs * * * brought into the OASDI program on a gradual basis. This war by attrition could eventually result in a virtual duplication of State programs by OASDI with no clear point in time when the Federal program had posed the threat of ultimate takeover." [16]

INTEGRATION WITH PRIVATE PROGRAMS

Private insurers have been urged to take some voluntary steps to alleviate the problems posed by the necessity of distinguishing work-connected injuries from others.[17] First, they have been asked to develop and market nonoccupational group health insurance that would match workmen's compensation benefits. The more nearly private benefits approximated workmen's compensation benefits, the less reason there would be to delay payments to workers covered by this health insurance or workmen's compensation while the source of impairment was in doubt. Private insurers already sell nonoccupational disability and medical expense insurance. About 51 percent of the wage and salary workers were covered in 1970 against short-term disability income losses; 12 percent against long-term disability income losses; 80 percent against hospital expenses; 79 percent against surgical fees; 71 percent against other doctors' bills; and 36 percent against major medical expenses.[18] Although this degree of coverage is encouraging, many under workmen's compensation have at best limited nonoccupational coverage. Even the most comprehensive plans would have to undergo extensive changes to become comparable with workmen's compensation. For example, under most present programs, medical expense benefits from group health plans are subject to maximum limits, deductibles, or cost-sharing provisions. Permanent partial disability benefits provided under group accidental death and dismemberment insurance are payable only if the worker loses a hand, a foot, or an eye through solely external, violent, and accidental means.

Second, private insurers could experiment with a workmen's health insurance contract that would pay at least the equivalent of workmen's compensation benefits to workers who become ill on or off the job and would be accepted by the State as a substitute for workmen's compensation insurance. If it is desirable to retain the cost allocation effects of present workmen's compensation insurance pricing procedures, an insurer writing a policy providing the same types of benefits for all injuries should be able to consider industry effects in their premiums and to develop some rating method that would charge an employer only with these accidents over which he has some control. Insurers' experience with these contracts, it is argued, would be valuable in determining whether State workmen's compensation acts should be replaced by

State workers' health insurance acts or a Federal program.

Several practical considerations make any such policies unlikely in the near future. First, insurers understandably will be reluctant to accept the risks associated with unlimited medical expense coverage and permanent partial disability benefits for workers who become ill on or off the job. Second, the price of this insurance, once developed, might be so high, particularly for high risk populations, that few employers will pay for such comprehensive protection even if their employees pay a share. Third, these plans have serious social implications, such as the negative effect upon the hiring of older workers or the handicapped.

MAJOR RESTRUCTURING PROPOSALS NOT INVOLVING INTEGRATION

In addition to the proposals for integrating workmen's compensation and other public or private programs, two of several other possibilities of a major restructuring of workmen's compensation are described below.

One proposal would return the handling of industrial injuries and diseases to the state that prevailed before enactment of workmen's compensation. It might be argued that (*a*) employees would fare much better today under employers' liability laws than they did at the turn of the century and (*b*) because of the low maximum benefit levels and other inadequacies, workmen's compensation has become less satisfactory than expected. Unions through collective bargaining might be able to strike a better bargain for no-fault benefits. Employees who could prove negligence on the part of the employer could try to collect both their economic and noneconomic losses. Employers would also have a financial incentive not to be negligent. Employees not protected by benefit plans could purchase individual insurance policies that would cover on a no-fault basis their economic losses. Because employees are more insurance conscious today and because health insurance policies have been vastly improved, they would be more likely to buy personal protection.

Critics of this approach are reluctant to give up what they consider the benefits of workmen's compensation. Their arguments are: (*a*) Even if unions could secure no-fault benefits as generous as present workmen's compensation benefits, a questionable prospect, nonunionized workers would receive inferior treatment. (*b*) Safety incentives would diminish. And (*c*) Disputes and litigation would increase. Awards for non-economic losses, they argue, are highly subjective and the determination of negligence in many instances arbitrary and unfair. Why abandon no-fault workmen's compensation, they ask, when the principle is winning support in automobile insurance?

A second possibility is ad hoc Federal legislation treating special problems such as black lung disease or heart disease. The advantage of such legislation is that prompt uniform action can be achieved on issues deemed to require special attention. The disadvantage is that the handling of occupational illness becomes fragmentary, almost haphazard, with some workers in the same State receiving different treatment than others. This approach also necessitates precise demarcation of the cause of the illness, a task that has already created notorious difficulties in administering benefits for impairments accepted as work-related.

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