Part Two

Evaluations & Recommendations

Evaluations of present workmen's compensation programs,
with Commission recommendations for coverage,
income benefits, medical care and rehabilitation;
safety, and delivery system

Chapter 2

The Appropriate Scope of Workmen's Compensation

A basic objective of workmen's compensation is to provide broad coverage of employees and of work-related injuries and diseases. Section A in this chapter considers which employees should be covered; Section B discusses which injuries and diseases should be compensable; and Section C takes up the relationship between workmen's compensation and other possible remedies for work-related impairments and deaths.

A. WHICH EMPLOYEES SHOULD BE COVERED

Most employees in the United States are covered by workmen's compensation, but coverage is not universal. In 1970, the latest year for which coverage data are available, 83 percent of employed wage and salary workers in the 50 States and the District of Columbia were covered by workmen's compensation. (Table 2.1) At the same time, variations among the States were pronounced in the proportion of workers covered. (Table 2.2) Of the 50 States, 13 covered more than 85 percent of their workers, but 15 covered less than 70 percent. Typically, the States with more extensive coverage also on the average had larger work forces, so that 51 percent of all employees in the United States (excluding Federal and railroad workers) lived in the District of Columbia or the 13 States which covered more than 85 percent of their workers. Statutory extensions of coverage as a result of 1971-72 amendments have probably increased total coverage to about 85 percent of all employees.

Three general factors account for the deficiencies in coverage. First, some laws exclude certain classes of employment, such as farming, small business, or non-hazardous occupations. Second, a number of State laws are not

TABLE 2.1. Estimated number and percentage of workers covered by workmen's compensation in the 50 States and the District of Columbia, 1940-70

Year	Employed wage and salary workers (millions)[a]	Covered by workmen's compensation (millions)[b]	Percentage employees covered
1940	34.8	24.2-25.0	70.8
1946	42.6	32.3-33.2	76.8
1956	53.6	42.8-43.1	80.2
1966	64.6	53.5-53.8	83.1
1970	70.6	58.8-59.0	83.4

a Includes workers in private industry and civilians in Federal, State, and local government.

b Includes coverage required by law and by voluntary election by employer.

Sources. Covered Workers: *Social Security Bulletin,* October 1970 and January 1972, Social Security Administration, U.S. Department of Health, Education, and Welfare. Employed wage and salary workers: *Employment and Earnings,* various issues, Bureau of Labor Statistics, U.S. Department of Labor.

TABLE 2.2. Actual workmen's compensation coverage as a percentage of potential coverage in various jurisdictions, 1970

Jurisdictions	Less than 70%	70 to 84.9	85% or more
States (50)	15	22	13
Other "States" (6)	NA	NA	1[b]
Federal	0	1[a]	0

a Number of workers under Federal workmen's compensation programs (FECA and LHWCA) as a percent of workers under these laws plus those under Federal employer liability acts which apply to railroad employees and merchant seamen (FELA and Jones Act). This way of accounting for workers under Federal law demonstrates that some workers over whom the Federal government has taken jurisdiction are not protected by workmen's compensation.

b District of Columbia.

See Table 2.3 for other explanatory notes.

compulsory, and some employers or employees do not elect to be covered. Finally, but probably of limited significance, some employers fail to meet their legal obligation to provide coverage.

Mandatory Universal Coverage

Our conclusion in Chapter 1, based on a consideration of all the arguments for and against universal mandatory coverage, was that such coverage is warranted, subject to possible minor limits for administrative reasons. There has been a definite trend towards increased coverage in the period since World War II, as coverage of workers has risen from about 77 percent to about 85 percent. But coverage still is not adequate, and if the trend of the past 25 years is projected into the future, universal coverage will not be achieved for almost 50 years.

The inequities of wide variations among the States in the proportion of labor force covered are compounded by the nature of the exclusions. The occupations typically excluded from coverage, such as household workers and farm help, are disproportionately low-income, less educated, non-white, and female—those least able financially of carrying the burden of disability by themselves.

Our goal of universal and mandatory coverage can be achieved if our specific recommendations are adopted.

Compulsory laws. That workmen's compensation laws should be compulsory, not elective, has been recommended by a number of sources. (Here and elsewhere in this report, we refer to two sources of recommendations: the recommended standards of several organizations, as compiled and published by the U. S. Department of Labor, and the "Workmen's Compensation and Rehabilitation Law" of the Council of State Governments [the Model Act]. Several of our recommendations differ from theirs, but these sources provide a convenient reference to standards which reflect earlier deliberations and which are widely accepted as desirable.)

The Model Act and the standards published by the Department of Labor recommend compulsory coverage. The considerable progress since 1946 still leaves more than one-third of the States in 1972 with elective laws. (Table 2.3) As noted in the opening chapter, the elective approach originally was based on contemporary interpretations of the Constitution. These constitutional mandates now are largely irrelevant. Even though most eligible employers in States

TABLE 2.3. Jurisdictions with compulsory coverage, 1946-72

Year[d]	States[a] (50)	Other "States" (6)[b]	Federal (2)[c]
1946	21	2	2
1956	25	4	2
1966	27	4	2
1972	31	5	2

a Alaska and Hawaii are counted among the States in 1946. Mississippi had no workmen's compensation law in effect until 1949.

b District of Columbia, Puerto Rico, Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands: designated as "States" by the Occupational Health and Safety Act of 1970. The Trust Territory of the Pacific Islands has no workmen's compensation law applicable in general to private employment. The law in Guam was enacted in 1952; that in the Virgin Islands in 1954; that in American Samoa in 1968.

c Federal Employees' Compensation Act (FECA) and Longshoremen's and Harbor Worker's Compensation Act (LHWCA).

d Evaluations of 1946-66 are as of December 31; for 1972, as of January 1.

with elective laws choose to be covered, others, who do not, deny their employees protection and shift to others their share of the burden of impairments. Employees excluded from coverage are forced to fall back on liability suits, a drawn-out, costly, and uncertain process that was dismissed long-ago as a means of dealing with occupational injuries and diseases.

R2.1

We recommend that coverage by workmen's compensation laws be compulsory and that no waivers be permitted.

Pursuant to this recommendation, coverage could not be avoided by action of an employee or his employer, or by agreement between them, or by other types of waiver.

Numerical exemptions. Coverage of all employers without regard to the number of employees has been recommended by the several prestigious bodies. The Model Act provides coverage of all employers with one or more employees, except for a few types of employers such as farmers and charitable organizations. The standard published by the Department of Labor recommends no exemptions based on the number of employees. Even disregarding special exceptions for certain classes of employers, barely half of the States cover all employers without numerical exemptions. (Table 2.4)

TABLE 2.4. Jurisdictions providing workmen's compensation coverage without exemptions based on the number of employees, 1946-72

Year	States (50)	Other "States" (6)	Federal (2)
1946	19	1	2
1956	21	2	2
1966	23	3	2
1972	27	4	2

See Table 2.3 for explanatory notes.

There is no current justification for the exclusion of small firms from the coverage of workmen's compensation. That one-half of the States have been able successfully to cover firms with one or more employees suggests that there are no administrative factors which make such coverage infeasible.

R2.2

We recommend that employers not be exempted from workmen's compensation coverage because of the number of their employees.

As indicated below, there are a few occupations such as household workers which require special coverage rules, but there should be no numerical exemptions to coverage that are generally applicable to all employers.

Exclusion of hazardous or nonhazardous occupations. The argument for excluding hazardous occupations because of the high costs to employers is unacceptable: this exclusion transfers the costs of work-related injuries and diseases to employees and society in general. Neither are limitations of coverage to hazardous occupations justifiable, as the original constitutional requirements no longer pertain.

R2.3

We recommend that workmen's compensation coverage be extended to all occupations and industries, without regard to the degree of hazard of the occupation or industry.

Farmworkers. Proposed standards of coverage for farm employment differ. The Model Act exempts agricultural employers who have fewer than three employees. The recommended standards published by the Department of Labor would cover farmworkers on essentially the same basis as other employees. Only about one-third of the 50 States now meet that standard (Table 2.5), although the number has increased steadily since the mid-1960's.

TABLE 2.5. Jurisdictions covering agricultural workers on the same basis as other workers, 1946-72

Year	States (50)	Other "States" (6)	Federal (2)
1946	6	1	2
1956	6	2	2
1966	10	2	2
1972	17	3	2

See Table 2.3 for explanatory notes.

The plight of the injured farmworker is no less serious than that of a worker in a manufacturing plant or a retail store. Indeed, the farmworker is the least likely to have personal insurance or savings. Administrative problems, however, make universal coverage for farmworkers more difficult to achieve than coverage for most other employees. The predominance of part-time help on farms, their geographical dispersion, and the fact that migrant farmworkers may work for many different employers during the course of a year present difficulties in reporting, rating, medical care, rehabilitation, and auditing.

New York has dealt with some of these administrative problems by requiring coverage of all farm laborers for the 12-month period beginning April 1, if the farmer's total cash payments to all employees during the preceding calendar year amount to $1,200 or more. Several States, including California, Massachusetts, New Jersey, Ohio, and Oregon, have found it administratively feasible to cover farmworkers on the same basis as all other employees. The use of group insurance covering several farms has eased the administrative burdens in some States.

Recognizing the desirability of as broad a coverage as possible and bearing in mind the transitional problems which may occur as a State moves towards full coverage,

R2.4

We recommend a two-stage approach to the coverage of farmworkers.

First, we recommend that as of July 1, 1973, each agriculture employer who has an annual payroll that in total exceeds $1,000 be required to provide workmen's compensation coverage to all of his employees.

The coverage requirement could be based on the payroll in the preceding year.

As a second stage, we recommend that, as of July 1, 1975, farmworkers be covered on the same basis as all other employees.

Casual and domestic workers. It is sometimes argued that since a household produces no goods or services which are sold to the public, then one of the original rationales for workmen's compensation—that the price of the product should bear the injury costs associated with the production of that product—is not applicable to household employees. This argument is unacceptable. In the first place, it is obvious that the household is both employer and consumer of the household worker's services and in the latter capacity should bear the cost of the worker's injuries. Second, the objectives of workmen's compensation, such as income replacement and rehabilitation, are as valid for a domestic worker as for any other kind of employee. Arguments concerning the proper allocation of the costs should not be permitted to thwart the achievement of these primary objectives.

Administrative burdens offer a more valid argument to be considered in determining coverage of household employees. By their numbers alone, employers of household workers create a formidable task of record-keeping and corre-

spondence. A single household may employ a bevy of transient, part-time workers, such as gardeners or babysitters, during a year. The number of new households and the constantly shifting location of households add to the difficulties of notification and auditing.

The Model Act gave careful attention to these considerations in determining coverage of domestic workers and casual employees of the household. Essentially, domestic workers are covered by the Model Act only if they work in a private home where there are two or more domestic workers regularly employed 40 or more hours a week. Casual workers are covered only if they work at least 10 consecutive work days at a private home or at the premises of an employer who has no other employees covered by workmen's compensation. In effect, these provisions materially reduce the numbers of employees and households to be covered.

Several States have mandated coverage which is more inclusive than the Model Act provisions. No State, however, covers domestic workers on the same basis as all other workers. New Jersey goes furthest by making households liable for compensation for domestic workers, but does not require households to carry insurance.

While administrative difficulties appear to make it impractical to extend complete coverage to domestic workers and casual workers around the home, nonetheless it is possible to go far beyond the coverage provided in most States at present.

R2.5

We recommend that as of July 1, 1975, household workers and all casual workers be covered under workmen's compensation at least to the extent they are covered by Social Security.

Basically, Social Security coverage is extended to any worker who earns $50 or more in cash in any calendar quarter from a single household. The coincidence between workmen's compensation and Social Security coverage for household workers will reduce the administrative burden on such coverage.

Many households could conveniently meet our recommendation if workmen's compensation protection were made a provision in every homeowner's insurance policy. Premiums could be based on an estimate of the payroll for household workers in the policy year, subject to a premium revision on the basis of actual payroll.

Government employees. The Model Act suggests coverage of "every person in the service of the state or of any political subdivision or agency thereof." The laws in 44 States are compulsory for covered State employees, and are compulsory for local government employees in 36 States. All of the remaining States but one have elective coverage for public employees.

Because State and local government employment is increasing rapidly, the lack of full coverage is particularly disturbing. There is no reason to exclude government employees from coverage. Indeed, a State has a special obligation to set a good example for private employers.

R2.6

We recommend that workmen's compensation coverage be mandatory for all government employees.

Other classes of workers. Other classes of workers, including professional athletes and employees of charitable organizations, have a history of special treatment under some workmen's compensation laws. The Model Act excludes employees of religious or charitable organizations having fewer than four employees.

Various reasons can be offered for such exclusions. Indeed, a cynic might say that a goal of some professional athletes is to injure one another and it seems illogical to compensate their injuries. We find such an argument unconvincing.

R2.7

We recommend that there be no exemptions for any class of employees, such as professional athletes or employees of charitable organizations.

Employers, partners, and self-employed workers. Workmen's compensation coverage traditionally has been extended only to employees, not to employers, partners, or the self-employed. There is some justification for this limitation, since workmen's compensation was developed as a substitute for suits by employees

against their employers. Since an employer or self-employed person never had the right to sue himself for a work-related injury, the "substitution" of workmen's compensation for a non-existent right seems anomalous.

However, most of the objectives we have suggested for a modern workmen's compensation program are as relevant for an employer or the self-employed as for an employee. Therefore we are not convinced that the tradition of confining workmen's compensation to employees remains valid. A broad definition, such as the Model Act provides, would resolve the issue of who is an employee, so that no one need be denied benefits because he has some of the attributes of the self-employed.

Our recommendations are two:

R2.8

We recommend that the term "employee" be defined as broadly as possible.

Doubts as to whether a worker is an employee or a non-employee, such as an independent contractor, should be resolved so as to favor workmen's compensation coverage.

R2.9

We recommend that workmen's compensation be made available on an optional basis for employers, partners, and self-employed persons.

Eligibility. Workmen's compensation statutes traditionally have made a worker eligible for benefits from the first moment he is at work. This "instant" eligibility contrasts with the Social Security and unemployment insurance programs, which require workers to be employed for prescribed periods before they become eligible for benefits. We believe that a continued distinction in eligibility requirements between workmen's compensation and other programs is warranted. One reason is that under the common law a worker was eligible to seek redress for work-related injury from the first moment of employment. Also, new employees typically have a poor safety record and need the immediate protection of workmen's compensation.

R2.10

We recommend that workers be eligible for workmen's compensation benefits from the first moment of their employment.

Employees with multi-state contacts. Witnesses at our hearings provided several examples of the legal complications which result from injury to an employee who travels among the States. An airline pilot, for example, hired in State A by an airline with its corporate headquarters in State B, may have his regular base of operation in State C, and be scheduled on a flight that terminated in State D, but be injured on an intermediate stop in State E. While a case this extreme may appear to be an exercise in the hypothetical for the benefit of a law school class, we were impressed by the number of compensation cases with such complicated multi-state contacts. These present serious practical obstacles to American workers in their efforts to obtain workmen's compensation benefits.

One suggested remedy is that workers, such as airline stewardesses, with substantial multi-state travel should be placed under a separate Federal statute which would cover them wherever they were located. We do not believe this approach is desirable or equitable. Many employees, such as salesmen, truck drivers, corporate executives, union organizers, lawyers, and academic consultants, travel regularly among the States. We do not believe it is practical to decide which of these occupations are mobile enough to warrant the creation of a special act for their benefit, nor is it necessary as a feasible procedure is available which would substantially reduce the complications of claims with multi-state aspects.

R2.11

We recommend that an employee or his survivor be given the choice of filing a workmen's compensation claim in the State where the injury or death occurred, or where the employment was principally localized, or where the employee was hired.

States may wish to add additional bases for coverage, but if every State act were to include these three points of contact, there

would be an expeditious solution to problems arising from the multi-state aspects of workmen's compensation.

B. WHICH INJURIES AND DISEASES SHOULD BE COMPENSABLE

Designers of a program which covers work-related injuries and diseases must decide where and how to draw the line between those which are and those which are not work-related. Common issues are: At what point does the employee, on his way to work, come so close to the employer's premises that an injury falls within the scope of the act? At what hours are such trips work-related? Especially perplexing are the issues deciding which diseases are work-related: for example, when should a heart attack or cancer be compensable?

In a discussion of these issues, it is important to distinguish carefully the several tests for compensability and to recognize the differences between the medical and legal aspects of the tests. Workmen's compensation benefits will be provided only when (1) there is an impairment (either temporary or permanent and either partial or total), or death, (2) caused by an injury or disease, (3) that is work-related. If these three tests are met, the system will provide medical and rehabilitation benefits (Chapter 4). In addition, cash benefits (Chapter 3) may be paid if additional tests for compensability are met. For example, eligibility for wage-loss benefits is conditional on a sufficient degree of "disability," i.e., actual wage loss or reduction in the ability to engage in gainful activity.

Impairment and Disability

The distinction between the legal term "disability" and the medical term "impairment" is important. While interpretations of both concepts ultimately are decided in each case by the administrative agency or, upon appeal, by the courts, it is helpful to recognize the distinction between medical and legal issues and to structure the decision-making process to utilize, insofar as possible, medical expertise in resolving the medical issues.

The American Medical Association's recent publication, *Guides to the Evaluation of Permanent Impairment,* properly recognizes the difference between impairment and disability. Impairment is a purely medical condition; it is any anatomic or functional abnormality or loss. Disability is not a purely medical condition. A worker is disabled when his actual or presumed ability to engage in gainful activity is reduced because of an impairment. The extent of disability may depend on an interaction between the impairment and non-medical factors such as the worker's age and education.

Covered Injuries and Diseases

The legal and medical professions may assign different meanings to the terms "injury" and "disease." We use these terms in their medical sense, which means they are separate categories. (See Glossary) In many, if not all, States, "injury" has been interpreted in a legal sense to include some or all diseases. We have no quarrel with this use of legal terminology: our recommendations concerning injuries and diseases can easily be translated into a program which uses a broad definition of "injury."

Injuries. The first question which must be resolved is which injuries should be compensable. The traditional test for compensation has been "a personal injury" caused by an "accident." An "accident" has frequently been defined as a sudden unexpected event, determinate as to time and place. The "accident" requirement has been a bar to compensability, especially in the past, because of failure in a particular case to meet one or more requirements in this definition. Compensation, for example, has been denied when nothing unexpected or unusual occurred. If a man strained his back while doing regular work in the usual fashion, it was to be expected.

This narrow interpretation of "accident" has to a large extent been discarded. Where it persists, it is undesirable as it serves to bar compensation for injuries that are clearly work-related.

There should be no legal impediments to full coverage of all injuries which are work-related.

R2.12

We recommend that the "accident" requirement be dropped as a test for compensability.

Diseases. The accident requirement has also served to bar compensation for work-connected diseases. Although many diseases contracted as a result of sudden unexpected exposure have been held compensable, e.g., pneumonia contracted while working in a sudden storm, compensation sometimes has been denied for diseases associated with chronic exposure to adverse agents in the work-setting.

States have remedied this situation in part by providing coverage for specific occupational diseases. Initially, this coverage was usually provided by listing compensable diseases in a schedule.

With advances in medical epidemiology and increased exposures to a growing number and variety of combinations of stresses, it became impractical to define work-related diseases by specific enumeration. Most States have therefore amended their statutes to provide full coverage of occupational diseases, in conformance with the recommended standard published by the Department of Labor. Table 2.6 indicates the considerable progress of the States in meeting this standard.

TABLE 2.6. Jurisdictions with full coverage of occupational diseases, 1946-72

Year	States (50)	Other "States" (6)	Federal (2)
1946	18	1	2
1956	30	3	2
1966	30	4	2
1972	41	5	2

See Table 2.3 for explanatory notes.

R2.13

We recommend that all States provide full coverage for work-related diseases.

Work-Relationship of Injuries and Diseases

Basic work-relationship test. All States use the phrase "arising out of and in the course of employment" or a variant, as the test to determine when an injury or disease is work-related. This test covers questions of the scope of employment, such as injuries at the physical edge of the employer's premises, or accidents during lunch breaks or other periods when the employee is not under the supervision of the employer, or injuries to salesmen while traveling. The test is used also to decide whether the injury was the result of the work: for example, injuries suffered as a result of horseplay, street risks, or criminal assault by third parties.

There is a substantial body of precedents interpreting the phrase "arising out of and in the course of." These interpretations are not uniform among or even within States, but we believe it is impossible to devise a tidy rule which will end the controversies. The drafters of the Model Act, after considering the "arising out of and in the course of employment" test concluded that, "Arguments could be made for various alterations, but the value of retaining the guidance afforded by hundreds of precedents was not found to be outweighed by any value that would be gained by adopting an unfamiliar and new formula."

R2.14

We recommend that the "arising out of and in the course of the employment" test be used to determine coverage of injuries and diseases.

A State may, of course, wish to use a more "generous" test for compensability. An example is Utah, where the test is "arising out of or in the course of employment."

Application of the work-relationship test. It is evident that an impairment or death which has as its sole cause a congenital or degenerative source is not compensable. Thus, an impairment due wholly to a birth defect is not compensable.

A serious problem for workmen's compensation occurs when the impairment or death is associated with several contributing factors, and the factors are both work-related and non-work-related, or when there is doubt about the etiology. A classic example is heart damage, which may result from an interaction of congenital, degenerative, and work-related factors. Diabetes is another example, because the etiology of diabetes includes hereditary and degenerative processes, but the symptoms may be aggravated by an incident or condition at work. Respiratory diseases may or may not be work-related. The determination of the etiology or

"cause" of a disease in a medical sense is often difficult or even impossible.

The question of when work-related factors, such as physical exertion or emotional strain, can trigger a heart attack is a subject of some controversy among scientists. It is beyond the competence of this Commission to decide when certain impairments, such as heart disease, are work-related in a medical sense. Workmen's compensation nevertheless must make some legal rules which can be superimposed upon the medical issues of causation for those impairments or deaths which arguably are work-related. The question is how to construct a practical application of the phrase "arising out of and in the course of employment" in a test for compensability of injuries or disease.

Several considerations govern our recommendations for evaluating the relationship of employment to impairment. As the basic purpose of workmen's compensation is to protect the employee, we believe in the traditional practice of resolving doubts in favor of the employee. At the same time, we do not believe that workmen's compensation should be converted into a general insurance scheme: its function is not to protect against all sources of impairment or death for workers. One of its objectives is to provide incentives for employers to improve their safety record. Impairments to his workers from non-work-related sources are largely beyond an employer's control. Moreover, there are many private and public benefits which are available to workers and their families regardless of the source of disability or death. Therefore, despite our sympathy for resolving doubts in favor of employees, we would not extend workmen's compensation to cover impairments and deaths that are not work-related.

Another consideration is that one objective of a modern workmen's compensation program is an effective delivery system, which requires accurate and prompt resolution of issues. Procedures or rules that help to promptly resolve issues of causation of disease or injury facilitate effective delivery and reduce administrative costs.

R2.15

We recommend that the etiology of a disease, being a medical question, be determined by a disability evaluation unit under the control and supervision of the workmen's compensation agency.

R2.16

We further recommend that for deaths and impairments apparently caused by a combination of work-related and non-work-related sources, issues of causation be determined by the disability evaluation unit.

The decisions of the disability evaluation unit should be accepted as conclusions of fact and should be reviewed by the workmen's compensation agency or State court only under the normal rules governing appellate courts in their review of fact determinations. (A general discussion of the composition and role of the disability evaluation unit is contained in Chapter 6.)

The crucial question in the application of the work-relationship tests is: What is the extent of the employer's liability when the impairment or death is determined to be a result of both non-work and work-related sources? In general, an employee has been eligible for full workmen's compensation benefits if any non-trivial portion of his disability was due to a work-related source.

R2.17

We recommend that full workmen's compensation benefits be paid for an impairment or death resulting from both work-related and non-work-related causes if the work-related factor was a significant cause of the impairment or death.

This recommendation concerns only the amount of the workmen's compensation benefit, not the source of financing the benefits within the program. As discussed in Chapter 4, benefits for impairments resulting from work-related and non-work-related factors may be partially financed by the employer and partially by a second-injury fund.

C. THE RELATIONSHIP BETWEEN WORKMEN'S COMPENSATION AND OTHER POSSIBLE REMEDIES FOR WORK-RELATED IMPAIRMENTS AND DEATHS

If the previous recommendations in this chapter are adopted by the States, almost all

workers will be protected from the consequences of work-related injuries and diseases. For some workers, remedies other than workmen's compensation are available if they are disabled because of a work-related injury or disease. The proper relationship between workmen's compensation and programs such as Social Security and retirement programs, which are available to eligible workers without regard to whether or not their impairment was work-related is discussed in Chapter 3. Here we consider the relationship between workmen's compensation and other potential remedies confined to work-related injuries and diseases.

Workmen's Compensation and Damage Suits

Damage suits against employers by workers injured on the job are a possible substitute or supplement for workmen's compensation benefits. For reasons detailed in Chapter 7, we believe these suits are inappropriate.

R2.18

We recommend that workmen's compensation benefits be the exclusive liability of an employer when an employee is impaired or dies because of a work-related injury or disease.

Employees may be injured on the job because of the negligence of a third party, such as a supplier of defective machinery. In most States, an employee has the right to sue a negligent third party and, if successful, generally is obligated to repay his employer for some or all of his workmen's compensation benefits. The most troublesome aspect of these suits occurs when the third party is performing a role normally performed by the employer, such as safety inspection. It seems anomalous in such cases to permit an employee to sue a third party, such as a carrier, for the negligence in safety inspections when the employee could not sue his employer for similar negligence.

R2.19

We recommend that suits by employees against negligent third parties generally be permitted. Immunity from negligence actions should be extended to any third party performing the normal functions of the employer.

Programs for Previously Uncovered Workers

Our recommendations would extend workmen's compensation coverage to virtually all employees and provide protection against the consequences of all work-related injuries and diseases. What should be done about workers now disabled because of past work-related injuries or diseases, but who are not receiving workmen's compensation benefits because at the time of initial impairment they were working in uncovered employment or their injuries or diseases were not then deemed compensable? This question has become particularly important because of the 1969 enactment of the Federal Coal Mine Health and Safety Act which provides cash benefits to workers suffering from pneumoconiosis or to the dependents of workers who died from the disease. This "Black Lung" legislation partially reflects the historically inadequate coverage of occupational diseases in some State laws. Presently, payments under the 1969 Act are running about $35 million per month and are paid from general revenues of the Federal government. Some estimate that, as a result of the 1972 amendments to the Act, payments will increase to as much as $1 billion per year. Since the benefits paid by the 50 State workmen's compensation programs total about $3 billion per year, it is apparent that the Federal government is making a substantial effort to rectify the inadequate occupational disease coverage in prior workmen's compensation statutes.

The Black Lung legislation returns full responsibility to the States and private employers for all cases originating after January 1, 1974. We believe it is essential in a modern workmen's compensation program for employers to bear the cost of work-related injuries and diseases. We endorse the timetable adopted by Congress in 1972 for shifting financial responsibility to employers.

REFERENCES FOR CHAPTER 2

Section A, See *Compendium,* Chapters 4, 7, and 10
Section B, See *Compendium,* Chapters 4, 12, and 20
Section C, See *Compendium,* Chapters 5, 12, 19, and 20

The *Compendium on Workmen's Compensation* was prepared for the National Commission on State Workmen's Compensation Laws. References for data cited in this *Report* are included in the *Compendium,* but the Commission does not endorse all ideas expressed in the *Compendium.*

Chapter 3

The Income Maintenance Objective

A basic objective of a modern workmen's compensation program is to provide protection to workers against loss of income from work-related injuries and diseases. To achieve this goal, the program must carefully weigh the worker's interest in substantial income benefits against factors such as the loss of incentive for rehabilitation, which some believe may occur if income benefits are too high.

A perfect balance of these contending interests can not be reached by a scientific formula or any other means. It is possible, however, to develop general guidelines for income benefits, and much of this chapter is devoted to that task. These guidelines are used, together with recommendations advanced earlier by other organizations, to evaluate the cash benefits in current workmen's compensation programs.

We are asked by the Occupational Safety and Health Act of 1970 to evaluate several aspects of State workmen's compensation laws, including the amount and duration of permanent and temporary disability benefits, with respect to their adequacy and equity. Although workmen's compensation has many strengths, as this report will elaborate, surely the current level of benefits is not among them. Except in a few States, workmen's compensation benefits are not adequate. Moreover, the adequacy of cash benefits in only a few States emphasizes the inequities when comparisons are made among States. Inequities also occur within States. In some, workers with minor impairments receive relatively more generous benefits than workers with serious impairments.

Progress in recent years in raising benefit levels provides encouraging evidence of increased interest by the States in improving workmen's compensation. Nonetheless, even the recent

improvements leave many States with inadequate benefits, as this chapter will demonstrate.

A. GENERAL ISSUES CONCERNING INCOME BENEFITS

Several general issues must be discussed before the specific categories of benefits—temporary total, permanent total, permanent partial, and death—can be evaluated.

Two Types of Benefits

As indicated in Chapter 2, a worker must meet three tests before he is potentially eligible for income benefits. The worker must (1) experience an impairment (2) caused by an injury or disease (3) that is work-related. If these tests are met, then two types of workmen's compensation cash benefits are possible:

i. ***Impairment benefits*** **are paid to a worker with an impairment caused by a work-related injury or disease, and**

ii. ***Disability benefits*** **are paid when an employee has impairment *and* wage loss, both due to a work-related injury or disease.**

Impairment benefits are paid whether or not the worker experiences a wage loss. Disability benefits are paid only if the worker has an actual or potential wage loss due to a work-related impairment.

The exact circumstances governing payment of impairment benefits and disability benefits in the present workmen's compensation program are described in later sections. In general, temporary total, permanent total, and death benefits require disability. Impairment benefits are presently of importance only as a basis for permanent partial benefits although, even for this class of benefits, disability is the primary basis for awards.

Our recommendations for temporary total, permanent total, and death benefits assume disability, and we believe that disability should be the primary basis for permanent partial benefits.

The Proper Approach for Determining Disability Benefits

A number of issues must be resolved in the design of a workmen's compensation disability benefit schedule. What is the proper measure of the worker's economic loss resulting from a work-related impairment? Shall only wages be considered, or should fringe benefits be added? Should consideration be given to the impact of income taxes? And what proportion of economic loss should be compensated?

Remuneration or earnings? The value of a job to a worker cannot be measured simply by his wage or salary. Table 3.1 documents the growing importance of supplements relative to earnings in the employee's total remuneration. Earnings are defined in this table to include basic wages and salaries plus irregular wage payments (e.g., payments for overtime) plus pay for leave time. Even with this inclusive definition of earnings, remuneration as a percentage of earnings has increased from 104.2 percent in 1946 to 111.4 percent in 1970.

The status of supplements subsequent to a worker's injury or disease varies with circumstances. Some employers continue payments on behalf of their injured workers for such programs as health insurance, life insurance, and pensions. Moreover, some workers injured on the job may be eligible for benefits under supplementary programs, such as the disability retirement option in a pension plan. However, a disabled worker may lose some supplements, particularly if he is out of the job for an extended period. Because workmen's compensation benefits usually are tied solely to earnings, the program is increasingly deficient in the protection provided to the remuneration of American workers.

Total or net remuneration? While workmen's compensation should protect remuneration (earnings plus supplements), it is net remuneration, not total remuneration that is the relevant basis for workmen's compensation benefits. Net remuneration takes account of payroll taxes and job-related expenses incurred by a worker.

Table 3.2 indicates how taxes take an increasing share of earnings. In 1946, gross average weekly earnings were $46.69, and almost 98 percent of this income was spendable.

TABLE 3.1. Relationship of average annual total remuneration to average annual earnings in all private industries, 1940-70

	1940	1946	1956	1966	1970
Remuneration per full-time employee	$1352	2460	4365	6615	8315
Earnings per full-time employee	$1291	2360	4089	5974	7462
Remuneration as a percentage of earnings	104.7	104.2	106.7	110.7	111.4

Source. Calculated from data in Tables 6.1, 6.4, and 6.5 of U.S. Department of Commerce, *The National Income and Product Accounts of the United States, 1929-1965 Statistical Tables; Survey of Current Business,* July 1970 and July 1971.

In this Report, "remuneration" is used in place of "compensation," as that term is defined in the above publications. "Earnings" and "Wages and Salaries" are equivalent. The definitions in the Department of Commerce publication are:

Compensation of employees is the income accruing to persons in an employee status as remuneration for their work. It is the sum of wages and salaries and supplements to wages and salaries.

Wages and salaries consists of the monetary remuneration of employees, inclusive of executives' compensation, commissions, tips, and bonuses, and of payments in kind which represent income to the recipients.

Supplements to wages and salaries consists of employer contributions for social insurance and of other labor income. Employer contributions for social insurance comprises employer payments under the social security, Federal and State unemployment insurance, railroad retirement and unemployment insurance, government retirement and a few other minor social insurance programs. Other labor income comprises employer contributions to private pension, health, unemployment, and welfare funds; compensation for injuries; directors' fees; pay of the military reserve; and a few other minor items.

TABLE 3.2. Relation between gross and spendable weekly earnings, 1940-70

Year	(1) Gross average[a]	(2) Spendable average[b]	(3) Spendable as pct of gross
1940	$ 27.02	$ 26.76	99.0%
1946	46.69	45.55	97.6
1956	81.15	74.16	91.4
1966	114.51	101.17	88.4
1970	141.09	121.70	86.3

a Gross average weekly wages for all workers covered by the unemployment insurance program, U.S. average, from Handbook of Unemployment Insurance Financial Data, 1938-1970.

b Spendable average weekly earnings for a married worker and three dependents. Spendable earnings reflect deductions for Federal income and social security taxes. Formulas are presented in U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings* February 1972, pp. 13-17.

In 1970, gross weekly earnings were $141.09, but only 86 percent was spendable: the balance went for Federal income taxes and Social Security deductions. Because workmen's compensation benefits are tied to basic wages and salaries, and because the benefits are tax-free, workmen's compensation benefits have tended to become more attractive relative to a worker's spendable earnings. If weekly benefits were tied to pre-tax wages, and if the limits on maximum weekly benefits were raised to the point where most workers would have all of their pre-tax wages used in calculating disability benefits, high wage workers would receive so much that their incentive for rehabilitation might be weakened. Because the income tax is progressive, tax-free benefits set as a percentage of pre-tax earnings would tend to approach or even surpass post-tax earnings for high wage workers.

Dependents' allowance? Still another factor must be considered in the design of workmen's compensation benefits. Many States pay a dependents' allowance in addition to the basic benefit for the disabled worker. From the employer's standpoint, the dependents' allowance may seem illogical because he pays the same wage to a worker whether or not that worker has dependents. On the other hand, from the employee's standpoint, the dependents' allowance may seem entirely rational. Because of the income tax, two workers with the same pre-tax wages may have different post-tax wages: the family with more dependents will have the larger income after taxes. It can be argued that workmen's compensation benefits should reflect differences in net remuneration among workers with different numbers of dependents.

A new basis for disability benefits. Conceptually, the ideal workmen's compensation program would measure a disabled worker's loss by the difference between his net remuneration before the injury or disease with his net remuneration thereafter. Obvious administrative difficulties make this ideal solution impractical, but the difficulties do not compel a modern workmen's compensation program to continue the tradition of comparing gross weekly wages before the injury with gross weekly wages after the injury and of calculating benefits by replacing the traditional proportion of lost wages.

An administratively feasible procedure can simultaneously take into account the difference between gross and spendable earnings, the virtues of dependents' allowances, the impact of the progressive income tax, and the increasing importance of supplements. This procedure first determines the worker's gross average weekly wage prior to disability (which must be determined now in virtually every State workmen's compensation program) and the number of his dependents (which must now be determined in many States). The gross weekly wage and dependency data are then inserted into a formula prepared and published by the U.S. Department of Labor to determine the worker's spendable earnings. (See *Compendium* for the 1972 formulas.) Once spendable earnings are calculated, workmen's compensation benefits for all sizes of families can be calculated as a fixed proportion of spendable weekly earnings. No further allowances for dependents or tax considerations are necessary or appropriate.

The method used to determine spendable weekly earnings is neither complicated nor impractical. A similar, though more complex, method is already in use in the Federal Wage Garnishment Law.

What is the appropriate proportion of spendable earnings to pay as benefits? Unfortunately, there is no easy answer to that question. The traditional approach has been to replace two-thirds of lost wages. This proportion represented a rough judgment about the adjustments needed to reflect the reduction in the disabled worker's work-related expenses, and to provide him an incentive to return to work. As the proportion of wages replaced is increased, the worker is assumed to have less incentive to return to work. Of course, if the proportion is too low, a worker may be in such dire circumstances that he may be forced to return to work before he is properly recovered or he may become so demoralized as to be indefinitely disabled.

There may be ingenious ways to retain effective incentives to rehabilitation while increasing the proportion of benefits to lost wages. For example, it may be possible to replace a substantial, though incomplete, portion of lost wages during the period of disability, and then pay the worker a part of the remaining loss as a bonus if he returns to work successfully. We encourage States to consider such inducements to rehabilitation which could increase the proportion of benefits to wage loss above the level of our recommendations.

Because our preference is for benefits to be based on spendable earnings, which represent only a portion of gross earnings, and because total remuneration is increasingly greater than gross earnings because of the growing importance of supplements, we believe the traditional proportion (two-thirds of lost wages) is too low.

R3.1

We recommend that, subject to the State's maximum weekly benefit, a worker's weekly benefit be at least 80 percent of his spendable weekly earnings.

In Table 3.3, the benefits provided by our recommendation are contrasted with those paid by the traditional 66 2/3 percent of pre-tax wages. The average 1972 weekly wage for all workers is approximately $150.00. The average family size is about four. For a worker with three dependents, earning $150.00, spendable weekly earnings would be $131.91. A benefit allowing 80 percent of this amount would be $105.53. In contrast, a benefit of 66 2/3 percent of the gross weekly wage ($150) would be $100.00. We believe the extra $5.53 is an appropriate adjustment reflecting the increasing importance of supplements since the 66 2/3 percent allowance was first endorsed.

There are several advantages in our recommendation. As Table 3.3 indicates, this procedure automatically mirrors the difference in spendable weekly earnings between a worker

TABLE 3.3. Workmen's compensation benefits as a percentage of spendable earnings compared with benefits as a percentage of wages

Gross average weekly wage		Spendable average weekly earnings*		Workmen's compensation benefits		
Pct of U.S. av. ($150)	$ Amount	Dependents		66.7% of gross av. wkly wage	80% of average spendable weekly earnings Dependents	
		None	Three		None	Three
(1)	(2)	(3)	(4)	(5)	(6)	(7)
50	$ 75	$ 65.63	$ 71.10	$ 50.00	$ 52.50	$ 56.88
66.67	100	84.64	92.38	66.67	67.71	73.90
100	150	121.86	131.91	100	97.49	105.53
133.33	200	159.99	172.36	133.33	127.99	137.89
166.67	250	199.26	214.25	166.67	159.41	171.40
200	300	235.68	253.46	200	188.54	202.77

* Calculated by 1972 formula cited in Table 3.2. Table assumes U.S. average weekly wage for 1972 is $150, which is an estimate by the staff of the National Commission on State Workmen's Compensation Laws.

with dependents and a worker with no dependents. For example, the worker earning $150.00 a week would receive $97.49 a week as a workmen's compensation benefit if he had no dependents, but would receive $105.53 if he had three dependents.

The system shown in Table 3.3 also has the virtue of assuring that high-wage workers have an economic incentive to return to work. For example, the worker without dependents who earns twice as much ($300.00 per week) as the U.S. average weekly wage would receive $200.00 if allowed 66 2/3 percent of gross earnings, which is equivalent to 85 percent of his spendable earnings.

A transitional formula. While our recommendation is not particularly complex, compared to other aspects of workmen's compensation, States will require a transitional period to revise their laws. A somewhat simpler, though generally inferior, formula can be used in the interim.

R3.2

We recommend that, subject to the State's maximum weekly benefit, a worker's weekly benefit be at least 66 2/3 percent of his gross weekly wage.

This formula should be used until the maximum weekly benefit in a State exceeds 100 percent of the State's average weekly wage.

The General Relationship Between Workmen's Compensation and Other Insurance Programs Providing Income Benefits

The relationship between workmen's compensation and other private and public insurance programs providing income benefits for disabled workers has not been a particularly important issue because workmen's compensation benefits generally have been so low. In the event that our recommendations for benefits are adopted, the total benefits received from a combination of workmen's compensation and other programs could become substantial. For this reason, we believe the overlap of benefits from several sources needs examination. If a disabled worker's combined benefits are too high relative to what he might earn, he may see no reason to return to work. Even more serious is the issue of equity. The availability and extent of insurance benefits vary among occupations, industries, and States. Two workers with similar earnings records and similar disabilities may receive markedly dissimilar benefits unless workmen's com-

pensation and these insurance programs are coordinated.

Typically, coordination involves reducing the benefits paid by one program when benefits are also paid by the other program. The issue is, which program should reduce payments in event of overlap? There are advantages to not reducing workmen's compensation benefits such as the stimulus to safety inherent in having employers bear the full cost of work-related injuries and diseases.

R3.3

We recommend that, if our recommended benefit increases for workmen's compensation are adopted, the benefits of other public insurance programs should be coordinated with workmen's compensation benefits. In general, workmen's compensation should be the primary source of benefits for work-related injuries and diseases.

(Circumstances justifying exceptions to this general rule are discussed later in the chapter.)

Coordination between workmen's compensation and some private insurance programs financed by employers is also generally appropriate. These programs include, for example, sick leave plans and disability retirement provisions of pension plans, but would not include employer-financed life insurance.

Workmen's compensation will have to be coordinated with other insurance programs in order to resolve problems such as the plight of workers at the dividing line between two programs who may be denied benefits by both.

The General Relationship Between Workmen's Compensation and Programs Based on Need

Several programs provide benefits to persons in need, including disabled workers, without any requirement that the individual or his employer contribute to an insurance fund. These programs include the General Assistance program, Aid to the Blind, and Aid to the Permanently and Totally Disabled. The proposed Family Assistance Plan, and other versions of an income maintenance program that have been given serious attention in recent years, would provide a basic level of income for all Americans.

Workmen's compensation has a different role than these programs. Their task is to protect families from poverty. Workmen's compensation is an insurance program designed to protect workers and their families against wage loss due to work-related injuries or diseases. For most employees, workmen's compensation should protect income well above the poverty level.

The difference in these roles explains why, for most workers, there can be no adequate substitute for a modern workmen's compensation program. To be sure, there are many full-time workers whose earnings do not take them out of poverty. Nonetheless, the basic insurance purpose of workmen's compensation suggests that the program should not be expected to remove low-wage workers from poverty if they are so unfortuante as to suffer a work-related injury or disease. One reason why our recommendations for benefit levels will not place considerable stress on high minimum weekly benefits is that we assume a family assistance program or other form of income maintenance program soon will assure all families a sufficient income.

R3.4

We recommend that workmen's compensation benefits not be reduced by the amount of any payments from a welfare program or other program based on need.

If a family assistance program or other generally available income support program is adopted with benefit levels that insure all families an income above the poverty level, then this income support program should consider reducing its allowances in the presence of workmen's compensation payments.

B. TEMPORARY TOTAL DISABILITY BENEFITS

A temporary total wage loss benefit, usually called a temporary total disability benefit, is paid because a work-related injury or disease causes a temporary and total loss of earnings. Our evaluation of this type of benefit is based on comparisons involving a worker with three dependents, a family of average size.

Waiting Period

After a worker is temporarily and totally disabled, he normally does not receive benefits the first few days. Virtually every workmen's compensation statute has a waiting period expressed in calendar days, for which no benefits are paid. If the worker is disabled for an extended period, however, benefits for the initial waiting period are paid retroactively.

The recommended standard published by the Department of Labor provides a three day waiting period, with the benefits for the three days paid if the total period of disability exceeds 14 days. The Model Act specifies a seven day waiting period, with benefits paid retroactively for the first seven days if the total period of disability exceeds 28 days.

Table 3.4 indicates the record of compliance with these recommendations in the various States during the period 1966-1972. Most States now meet the Model Act standard, but a substantial majority do not meet the Department of Labor recommendation. The shorter the waiting period, the more workers with work-related injuries and diseases are eligible for benefits. As the period to qualify for retroactive benefits shrinks, the average number of weeks of benefits per case increases.

TABLE 3.4. Jurisdictions in compliance with recommended standards published by the U.S. Dept. of Labor and the Model Act for waiting period and period of disability qualifying for retroactive pay, 1966-72

Year	States (50)		Other "States" (6)		Federal (2)	
	USDL	Model Act	USDL	Model Act	USDL	Model Act
1966	7	44	2	3	0	2
1972	10	45	3	4	0	2

The recommended standards published by the U.S. Department of Labor (USDL) specify 3 days waiting period before benefits begin, and 14 days of disability to qualify for retroactive payments for time lost in the original waiting period. The Model Act specifies 7 days waiting and 28 to qualify for retroactive benefits. Both standards refer to calendar days, not working days.

See Table 2.3 for explanatory notes.

The advantage of reducing both the waiting and the qualifying period is that workers will have a higher proportion of their lost remuneration replaced by benefits. At the same time, the cost of the program increases, both in benefits paid and in administrative expenses. Proponents of the waiting period argue also that a waiting period is necessary to discourage malingering.

TABLE 3.5. Percentage of disability days compensable with various combinations of waiting and retroactive periods

Calendar days of disability to qualify for retroactive benefits	Calendar days to wait before benefits begin			
	0	3	5	7
0	100%	–	–	–
3	–	98%	–	–
7	–	95%	94%	93%
14	–	93%	90%	88%
21	–	92%	88%	84%
28	–	91%	86%	83%

Calculated by actuarial techniques of the National Council on Compensation Insurance.

Table 3.5 indicates the approximate relationship in cost among various combinations of waiting periods and retroactive periods. The table is constructed so that the cost of paying benefits for *all* days of lost time is equal to 100 percent. Thus, the Model Act standard (7 days wait/retroactive after 28 days) would pay benefits for approximately 83 percent of all lost time, and the Department of Labor standard would pay for approximately 93 percent of all lost time.

R3.5

We recommend that the waiting period for benefits be no more than three days and that a period of no more than 14 days be required to qualify for retroactive benefits for days lost.

We believe this recommendation represents a reasonable compromise between the interests of reducing the number of payments for truly minor disabilities and of insuring that even moderately serious injuries will have benefits restored retroactively for the first days lost.

Proportion of Lost Remuneration to be Replaced

The Model Act suggests that temporarily and totally disabled workers should receive 55 percent of their average weekly wage in benefits, with an additional 2 1/2 percent paid for each dependent up to a maximum of five dependents. As an alternative formula, the Model Act uses the more traditional standard of benefits equal to 66 2/3 percent of the worker's weekly wage. (The worker's benefit is subject to minimum and maximum weekly benefits.)

In general, present workmen's compensation programs do a creditable job of meeting this standard. In 1972, 32 of the 50 States meet this 66 2/3 percent standard, and six others pay 65 percent. No State pays less than 60 percent of the worker's wage.

There is a great virtue in relating a worker's benefits to his previous wages. This approach, in contrast to a system which would pay workers a flat amount if they are disabled, permits workmen's compensation reasonably to accomplish its objective of maintaining income with fair regard for the level of earnings before disability. Also, this means States with high wage levels automatically provide higher benefits for their workers than States with low wages.

We have indicated our preference for a formula which bases a worker's benefit on his spendable earnings before disability.

R3.6

We recommend that, subject to the State's maximum weekly benefit, temporary total disability benefits be at least 80 percent of the worker's spendable weekly earnings. This formula should be used as soon as feasible or, in any case, as soon as the maximum weekly benefit in a State exceeds 100 percent of the State's average weekly wage.

We realize that, on an interim basis, use of a generally inferior formula may be necessary.

R3.7

We recommend that, subject to the State's maximum weekly benefit, temporary total disability benefits be at least 66 2/3 percent of the worker's gross weekly wage.

In addition to this 66 2/3 percent, a State may wish to provide a dependents' allowance. However, a dependents' allowance in addition to the 80 percent of spendable weekly earnings would be inappropriate.

Maximum Weekly Benefit

The recommendation published by the Department of Labor provides that the maximum weekly benefit in a State should be at least 66 2/3 percent of the average weekly wage in the State. Table 3.6 indicates the extent of full compliance with this standard since 1940. The majority of States do not now meet the standard. Maximum benefits were nearer to the average wage in 1940 than they have been since then, although there has been some improvement in recent years.

The data in Table 3.6 need to be interpreted with caution. Part of the apparent increase in full compliance between 1966 and 1972 may be a statistical artifact. The evaluations for the years prior to 1972 are based on the statutes in effect on December 31 of a given year compared to the average weekly wage during that same year. For 1972, the statutes in effect as of January 1 are compared to the average wages in the first half of 1971, the latest data available. If the comparisons were made between the January 1, 1972, statutes and the average weekly wage for the entire calendar year of 1971, it appears likely that three more States would not fully comply with the recommended standard.

The sensitivity of the full compliance results in Table 3.6 to the wage being used demonstrates how some States find it difficult to keep benefits in line with rising wages. If a State conscientiously amends its law to set the maximum weekly benefit equal to two-thirds of the average weekly wage for the latest data available, it usually would find that when the wage data subsequently became available for the date when the law was amended, the maximum would fall short of its target. Recognizing that the rising trend in wages makes it difficult for States to have their maximum benefits equal or exceed the two-thirds standard, Table 3.6 identifies the States which have substantially complied with the traditional 66 2/3 percent standard by creating a category where the maximum weekly

TABLE 3.6. Maximum weekly benefits for temporary total disability as a percentage of average weekly wage: distribution of jurisdictions, 1940-72

	States (50)					Other "States" (6)					Federal (2)				
Year (19)	40	46	56	66	72	40	46	56	66	72	40	46	56	66	72
Full compliance															
75% or more	29	3	2	2	4	1					2		1	1	1
66.7 to 74.9%	9	1	1	1	6		1	1					1		
Substantial compliance															
60 to 66.6%	7	4	1	1	8				2			2		1	
Substandard															
50 to 59.9%	4	17	7	16	12					1					
Less than 50%	0	24	39	30	20					1					1

The maximum benefits for 1940 through 1946 are for December 31 and are compared to the State's average weekly wage for the corresponding year. The 1972 maximums are those in effect on January 1, 1972, and are compared to the State's average weekly wage for the first half of 1971.

Benefits are calculated as payments to a worker with three dependents.

Wage data for 4 other "States" are not available. Mississippi law did not go into effect until January 1, 1949. Wage data for Puerto Rico was not available before 1961.

Source of wage data: Handbook of Unemployment Insurance Financial Data, 1938-1970, and unpublished data from U.S. Department of Labor.

See Table 2.3 for explanatory notes.

benefit is at least 60 percent of the average weekly wage in the jurisdiction. Eighteen States are in "full compliance" or "substantial compliance" with the 66 2/3 percent standard. However, the maximum weekly benefit in 20 States is less than 50 percent of the State's average weekly wage, and in another 12 States, the maximum weekly benefit is between 50 and 60 percent of the State's average weekly wage. The deficiencies in these States are due to more than a temporary lag in legislative enactments.

Judged by traditional standards, a majority of States have maximum weekly benefits which are inadequate. Moreover, the wide variation among the States in the relationship of maximums to average weekly wages indicates that the maximum weekly benefits for temporary total disability are not equitable.

Our judgment that the maximum weekly benefit levels are generally inadequate is reinforced by comparing the maximum weekly benefit in each State as of January 1, 1972, with the 1971 national poverty level for a non-farm family of four persons, which is $79.56 a week. It is distressing that as of January 1, 1972, the *maximum* weekly benefit for temporary total benefits in more than half of the States did not reach this poverty level.

Some temporarily disabled workers have sources of income in addition to workmen's compensation benefits. After the first six months of disability, a worker who continues to be incapacitated may be eligible for disability insurance benefits under the Social Security program. In California, some workers may receive a benefit under the temporary disability insurance law equal to the difference between the TDI benefit and the workmen's compensation benefit. More common but available nationally only to a minority are sick leave or insurance benefits provided by employers to pay for the waiting period or supplement the weekly workmen's compensation benefits. The sick pay plans sometimes replace wages in full, but more often pay some flat amount or an amount proportioned to replace part of earnings.

The extent of such coverage varies by size of firm (the larger firms tend to offer more

protection), by industry (public utilities and manufacturing are more likely to have such plans), and by type of worker (salaried workers are much more likely to enjoy this protection than wage workers.) Moreover, even among progressive firms, fewer than half the workers are covered by sick leave or other plans which supplement workmen's compensation benefits for temporarily disabled workers. These private plans are almost always integrated with payments by public programs so that duplicate payments are rare.

Despite such supplementary income, the conclusion is inescapable that the maximum weekly benefits for most disabled workers are in general inadequate and inequitable.

It seems likely that workmen's compensation beneficiaries prior to injury have on the average weekly wages lower than the State average. It is difficult to confirm this assumption, although it has been observed that the injured are often the young and inexperienced. The only available series on wages of injured workers is published by the National Council on Compensation Insurance. The Council believes the average wages for injured workers are probably understated by its data because some of the sources the Council uses do not report the full wage of high-wage workers.

Weekly benefits for disability often are reduced by attorney's fees. (See Chapter 6) The data on legal expenses are limited, but it is evident that the adequacy of benefits is further undermined by the effect of these fees, which in almost every State are paid by the worker.

While we recognize that not all of the data that would be useful to evaluate the adequacy of benefits are available, nonetheless there are enough data to support a finding that the States are failing to meet in a responsible fashion the traditional standard of a maximum weekly benefit of at least 66 2/3 percent of the average weekly wage in the State. Moreover, that traditional maximum is too low.

A statute which provides that a worker's benefit shall be 66 2/3 percent of his wages subject to the State's maximum weekly benefit, coupled with a maximum weekly benefit which is 66 2/3 percent of the State's average weekly wage, means that in fact approximately half of the workers in a State are going to receive benefits that are less than 66 2/3 percent of their previous wages. It is wrong to restrict the benefits of such a substantial proportion of the work force through the operation of the maximum weekly benefit.

R3.8

We recommend that as of July 1, 1973, the maximum weekly benefit for temporary total disability be at least 66 2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

By 1975, the most expensive phase of our recommendations for maximum benefits will be over, and the States should then proceed to increase the protection for workers with above-average earnings.

R3.9

We recommend that as of July 1, 1977, the maximum weekly benefit for temporary total disability be at least 133 1/3 percent of the State's average weekly wage; as of July 1, 1979, the maximum should be at least 166 2/3 percent of the State's average weekly wage, and on and after July 1, 1981, the maximum should be at least 200 percent of the State's average weekly wage.

R3.10

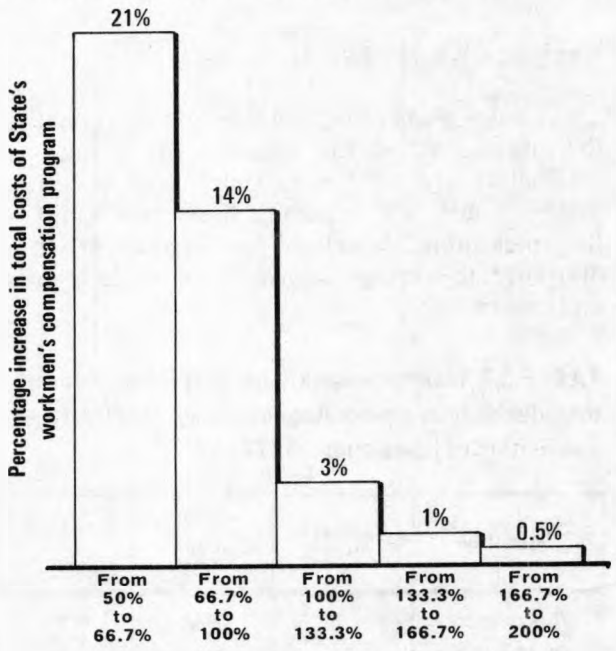
We recommend that, for all maximum weekly benefits, the maximum be linked to the State's average weekly wage for the latest available year as determined by the agency administering the State employment security program.

Increasing the maximums according to our recommendations is not only essential to make benefits equitable and adequate, it is administratively and economically feasible. Thirteen States now have provisions which automatically increase the maximum weekly benefit for temporary total benefits as their average weekly wage increases.

Figure 3.1 indicates the approximate cost of moving to these successive increments of maximum weekly benefits when the maximums are coupled with the Model Act standard of a minimum weekly benefit equal to 20 percent of the State's average weekly wage and a weekly

disability benefit equal to 66 2/3 percent of the worker's weekly wage.

FIGURE 3.1. Additional cost of increasing maximum weekly benefits in workmen's compensation



Calculated by staff of National Commission on State Workmen's Compensation Laws with actuarial techniques of the National Council on Compensation Insurance. Calculations assume that a worker's benefit is 66.67% of his weekly wage, subject to a minimum weekly benefit equal to 20% of the State's average weekly wage and to the maximum weekly benefits shown in the figure.

C. PERMANENT TOTAL DISABILITY BENEFITS

Only about 10 percent of all workmen's compensation claims (including claims paying medical benefits only) involve impairments serious enough to qualify the workers for permanent total disability or permanent partial benefits. Only about 1,000 workers each year receive permanent total disability awards.

Although numerically less important than the claims involving temporary total disability benefits or medical care only, the claims involving workers with permanent impairments present the most difficult challenges. These cases are the most expensive in terms of benefits paid and services provided. In addition, the claimants present the greatest potential for rehabilitation—a potential which too often is unappreciated and unfulfilled.

One reason for the insufficient attention to rehabilitation is the tendency to view workmen's compensation primarily in terms of payment of cash benefits. In some States virtually all that happens is that a worker is injured, inspected, and indemnified. Such a policy is unsatisfactory and inhumane, and in Chapters 4 and 6 we spell out procedures which should insure that workers with serious impairments will receive needed medical and rehabilitation services under the close supervision and careful attention of the State workmen's compensation agency. We stress these restorative aspects of a modern workmen's compensation program because we do not wish our discussion of cash benefits for serious impairments to divert attention from our goal of an integrated and comprehensive set of services for workers with serious impairments.

Legal Definition

Permanent total disability benefits should be paid to a worker who experiences a work-related injury or disease which leads to a permanent impairment that makes it impossible for him to engage in any substantial gainful activity for a prolonged period. If a worker earns income subsequent to his injury, he may be eligible for the permanent partial disability benefits described later in this chapter.

Our recommendations for improvements in the level and extent of permanent total disability benefits assume that the improvements will be applied only to those who truly are permanently and totally disabled. A few jurisdictions, however, use definitions of permanent total disability which permit such awards to impaired workers who retain substantial wage earning capacity.

R3.11

We recommend that the definition of permanent total disability used in most States be retained. However, in those few States which permit the payment of permanent total disability benefits to workers who retain substantial earning capacity, we recommend that our benefit proposals be

applicable only to those cases which meet the test of permanent total disability used in most States.

Proportion of Lost Remuneration to be Replaced

The traditional benefit for permanent total disability replaces two-thirds of the worker's wages, subject to minimum and maximum weekly benefits. The Model Act's alternative formula encompasses this traditional view. The Model Act also provides a method for automatically increasing the benefits of a totally disabled worker as the average weekly wage in the State increases. (See Section 21 of the Model Act)

Most States specify an adequate percentage of lost wages to be replaced for a totally disabled worker, although only five now provide for automatic increases in benefits as the State's average weekly wage increases.

R3.12

We recommend that, subject to the State's maximum weekly benefit, permanent total disability benefits be at least 66 2/3 percent of the worker's gross weekly wage.

After a transition period, our preferred formula (R.3.13) should be used.

R3.13

We recommend that, subject to the State's maximum weekly benefit, permanent total disability benefits be at least 80 percent of the worker's spendable weekly earnings. This formula should be used as soon as feasible or, in any case, as soon as the maximum weekly benefit in the State exceeds 100 percent of the State's average weekly wage.

A dependents' allowance may be appropriate in addition to the benefits based on gross weekly wages, but is not appropriate in addition to the benefits based on spendable earnings.

Protection against erosion in the value of the benefits must be provided for claimants with long-term disability cases.

R3.14

We recommend that beneficiaries in permanent total disability cases have their benefits increased through time in the same proportion as increases in the State's average weekly wage.

Maximum Weekly Benefit

Like maximum temporary total benefits, the maximum weekly benefits for permanent total disability are seriously deficient in certain States. Table 3.7 indicates the relationship of the maximum benefits for permanent total disability to average wages in the various jurisdictions in 1972.

TABLE 3.7 Maximum weekly benefits for permanent total disability as a percentage of average weekly wages: distribution of jurisdictions, 1972

Percentage	States (50)	Other "States" (6)*	Federal (2)
75% or more	4	NA	1
66.7/74.9%	6	NA	0
60/66.6%	4	NA	0
50/59.9%	11	NA	0
Less than 50%	25	2	1

* Average wage data not available for four "States."

See Table 2.3 for explanatory notes.

The maximum weekly benefits in most States are inadequate, and the considerable variation among the States in the relationship of the maximums to the State average weekly wage indicates considerable inequity.

R3.15

We recommend that as of July 1, 1973, the maximum weekly benefit for permanent total disability be at least 66 2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

R3.16

We recommend that as of July 1, 1977, the maximum weekly benefit for permanent total disability be at least 133 1/3 percent of the

State's average weekly wage; as of July 1, 1979, the maximum should be at least 166 2/3 percent of the State's average weekly wage; and on and after July 1, 1981, the maximum should be at least 200 percent of the State's average weekly wage.

These maximums should be linked to the State's average weekly wage as defined in recommendation 3.10.

Duration of Permanent Total Benefits

Permanent total benefits should be paid for the entire period of disability or for life, according to the recommendation published by the Department of Labor and the Model Act. There should be no limits of time or total dollar amount on permanent total benefits.

Table 3.8 indicates the extent of compliance with these recommendations. It is distressing to note that 19 States in 1972 did not meet the standard. In 15 States, a totally disabled worker can receive benefits for a maximum period of less than 10 years. In 11 States, often the same States with maximum limits on duration, the most a totally disabled worker can receive in benefits is less than $25,000. This amount is less than the average American worker earns in four years of full-time work.

TABLE 3.8. Jurisdictions with compensation for permanent total disability payable for life or period of disability

Year	States (50)	Other "States" (6)	Federal (2)
1946	16	0	1
1956	26	1	2
1966	30	2	2
1972	31	3	2

See Table 2.3 for explanatory notes.

These limitations on permanent total benefits are inexcusable in a modern workmen's compensation program. The worker with a permanent total disability presents a compelling need for long-term support from workmen's compensation.

R3.17

We recommend that total disability benefits be paid for the duration of the worker's disability, or for life, without any limitations as to dollar amount or time.

This recommendation is primarily relevant for permanent total disability benefits, but also is applicable to temporary total disability benefits, which are of limited duration or amount in some States.

Relationship of Permanent Total Benefits to Other Programs

A permanently and totally disabled worker who is receiving workmen's compensation benefits often is eligible for payments from other programs. The most important additional public benefit is provided under the Social Security program (OASDHI). Although it is not known how many workmen's compensation beneficiaries are eligible for benefits under Social Security, a rough idea can be gleaned from awards data. In recent years there have been about 1,000 permanent total and 35,000 major permanent partial disability awards annually under workmen's compensation. In 1968 about 11,000 workers receiving permanent disability benefits from Social Security had these benefits reduced because they were receiving workmen's compensation benefits. It is estimated that perhaps another 2,000 to 4,000 were receiving both benefits, but were not subject to the offset because their combined workmen's compensation and Social Security benefits were less than 80 percent of their former wage. It thus appears likely that most seriously disabled workers receiving workmen's compensation benefits are not receiving Social Security benefits.

Private supplements also are available to some workers. Perhaps three-fourths of the 30 million American workers in private industry covered by retirement plans may receive benefits if they become disabled. However, vesting limitations and age and service requirements limit the number of these workers who are eligible. This form of protection, like other private

supplements, varies by industrial sector, size of firm, union status, and other factors. Most manufacturing workers, but only about one-third of retail-trade workers, have pension plans with disability benefits.

Another type of benefit available for permanent total disability in private industry is group long-term disability insurance. This plan has few eligibility restrictions but is offered mainly to salaried workers. (A recent survey of leading firms showed more than half of salaried workers but little more than a fourth of hourly workers are covered by long-term-disability plans.)

In the aggregate, supplements to workmen's compensation permanent total disability benefits are probably substantial, but their availability differs greatly among and within firms. Supplements are more prevalent in large than in small firms, and in unionized than in nonunionized firms. Reliance on supplements may only exaggerate the inequity of the treatment of permanently and totally disabled workers.

Because of the numerous possible sources of benefits for permanently and totally disabled workers and the substantial inequities which can occur if the benefits we have recommended for workmen's compensation are duplicated by benefits from other programs, we believe that coordination is necessary. Coordination is essential also because the general availability of programs for totally disabled workers in addition to workmen's compensation may have undercut the sense of urgency concerning the need for increases in workmen's compensation benefits. Unfortunately, many workers have probably suffered as a consequence of the lack of urgency because, for them, workmen's compensation was the sole or primary source of protection when they became totally disabled. Only if workmen's compensation is coordinated with other programs can there be assurance that the substantial workmen's compensation benefits necessary to protect those workers who rely on the program for primary protection will not provide unnecessary support to other workers with multiple sources of protection.

The most obvious need for coordination involves the disability insurance program of Social Security and workmen's compensation.

R3.18

We recommend that, provided our other recommendations for permanently total disability benefits are adopted by the States, the Disability Insurance program of Social Security continue to reduce payments for those workers receiving workmen's compensation benefits.

We believe also that it is appropriate to integrate workmen's compensation benefits with other benefits provided by an employer. As in the past, we believe that employers and other interested parties, such as unions, should be free to develop provisions which either supplement workmen's compensation benefits or reduce retirement or disability benefits paid for by the employer in the presence of workmen's compensation benefits.

D. PERMANENT PARTIAL BENEFITS

A worker who experiences an impairment because of a work-related injury or disease, but who is not totally disabled, may be eligible for permanent partial benefits. Permanent partial cases are the most expensive portion of the workmen's compensation program: cash benefits and medical care in permanent partial cases account for more than 50 percent of all payments.

Permanent partial benefits are also the most controversial and complex aspect of workmen's compensation. We were impressed during our hearings and meetings that for no other class of benefits are there more variations among the States or more divergence between statutes and practices.

One element in the variations is the relative importance of cash benefits for minor permanent partial cases. Such benefits represent less than 10 percent of all payments in four States, but represent more than 30 percent in four others. (Table 3.9)

The imbalance in the importance of permanent partial benefits among the States is accentuated by the apparent paradox that some States with an unusually high proportion of total benefits paid for permanent partial benefits also have unusually low maximum weekly benefits for the category. New Jersey expends over 35 percent of all benefit payments on minor

TABLE 3.9 Distribution of 44 States and the District of Columbia according to cash benefits paid for minor permanent partial impairments as a percentage of their total outlays for workmen's compensation benefits, 1970

Indemnity	Number of States
Less than 10%	5
10/14.9%	9
15/19.9%	11
20/24.9%	10
25/29.9%	6
30% or more	4

permanent partial cases even though its maximum weekly benefit for permanent partial ($40) is far below the maximum for other classes of benefits ($101).

A possible explanation of these imbalances is that the evaluation of the extent of disability in permanent partial cases permits considerable discretion for decision makers, including agency adjudicators and courts. In some States, officials apparently have stretched the rules out of sympathy for claimants with permanent partial injuries. Occasionally, because the statutory benefits were so low, every effort was made to pay those benefits freely by, for example, evaluating the extent of impairment liberally. However, because of the frequency of minor injuries, the cumulative amount of payments was substantial.

For these and possibly other reasons, the total cost and the imbalance of permanent partial benefits tend to undermine the entire workmen's compensation program. Employers, disturbed by what they consider excessive payments for minor injuries, have refused to support general increases in benefits. Labor spokesmen oppose surrender of the substantial awards for minor injuries because they fear that any general benefit increases given in exchange would soon be eroded by the passage of time and the assault of inflation. The result of this stand-off has too often been the permanent impairment of reform efforts other than inconsequential or bizarre statutory amendments, such as New Jersey's differentiation between maximum benefits for permanent partial claims and maximums for other classes of benefits.

We believe the States must break the log-jam barring general reform posed by the imbalances of permanent partial benefits. Workers with truly serious injuries suffer, while employers bear the costs of extravagant awards for minor injuries.

A bold and substantial reform of permanent partial benefits is necessary. Indeed, there is no more pressing and fundamental issue confronting workmen's compensation. Nonetheless, we have concluded that the issue is so intractable that we would do a disservice to make precise recommendations for the restructuring of permanent partial benefits on the basis of the time for analysis that was available to us.

R3.19

We recommend that each State undertake a thorough examination of permanent partial benefits and that the Federal government sponsor a comprehensive review of present and potential approaches to permanent partial benefits.

We offer below some suggestions which should be considered in the State and Federal reviews of the topic. In Chapter 7, we describe the Federal vehicle we believe is appropriate for the review, which we believe will require more time for analysis than was available to this Commission.

Two Bases for Permanent Partial Benefits

There are two possible bases for permanent partial benefits. Benefits can be paid solely because of a work-related *impairment*. Benefits can be paid because the worker has a *disability* which resulted from a work-related impairment. The disability can be measured by actual wage loss or by loss in wage-earning capacity.

Workmen's compensation benefits now are usually justified as payments because of disability. Nonetheless, payments solely because of impairment are of some importance. In practice, there are several approaches to permanent partial benefits which combine the impairment and disability bases in different ways. The same statute may contain more than one of the approaches.

Benefits based solely on extent of impairment. Some statutes incorporate a schedule of benefits for a specific list of impairments, and

the benefits are paid whether or not there is a disability. Moreover, the benefits are the exclusive remedy for workers with these impairments (except, in most States, for the temporary total disability benefits paid during the healing period), even if the worker's wage loss far exceeds the scheduled benefits. The Model Act incorporates this approach for certain impairments, such as the loss of a foot (which, on the assumption that the whole man is rated at 400 weeks, results in 112 weeks of benefits in addition to healing period benefits).

It could be argued that the main purpose of such a schedule is to provide benefits for disability, and that impairment is used as the basis for benefits because impairment and disability are closely related. The validity of this argument is questionable because there is no exact relationship between the degree of impairment and the extent of wage loss. Some workers with only minor permanent impairments have substantial wage losses. The concert pianist who loses a part of one finger is the classic example. Other workers may suffer serious impairments and experience only limited disability. A lawyer might, for example, lose an arm without permanent loss of earning capacity.

Despite the doubtful validity of using impairment ratings to predict the extent of disability, there is an obvious advantage to the use of schedules. They provide a convenient method to determine, on the basis of one evaluation, the benefits that are considered appropriate as a cushion for possible future wage loss or, if no wage loss is suffered, for the impairment itself.

Benefits based solely on extent of disability. Some statutes provide that, for permanent impairments which are not specifically named in the statute, the worker's exclusive remedy (again, with the exception in some States of healing period benefits) are benefits paid only if there is disability. The Model Act provides that for those disabilities which result from injuries not listed in the schedule, the weekly benefit is 55 percent of the loss in wage-earning capacity, payable during the period of disability (subject to minimum and maximum weekly benefits and dependents' allowances).

Benefits based on both disability and impairments; predetermined formula used. Another approach is to base permanent partial awards on a formula that considers factors relating to impairment and to disability. For example, California uses an impairment rating as a starting point for its permanent partial awards, but then modifies the rating to take account of the worker's age and previous occupation. The California approach, while recognizing the difference between impairment and disability, still represents only a rough estimate of the effect of a specific permanent impairment on the actual wage loss of a particular worker.

Benefits based on both disability and impairment; flexible formula used. Some statutes use impairment ratings as the basis for determining the initial duration of permanent partial benefits, but also provide additional benefits if the actual disability extends beyond this initial period. The Model Act, for example, specifies the number of weeks of benefits for certain serious impairments, such as 240 weeks for the total loss of an arm. Benefits, however, may be paid beyond the prescribed period provided the disability continues. Michigan and New York have adopted this Model Act approach for certain impairments.

Benefits based on disability or impairment. In Florida, a worker with a nonscheduled permanent impairment receives benefits based on impairment or disability. After evaluating the extent of impairment a disability rating is prepared, based on the impairment rating and other information relevant to the worker's earning capacity. Benefits are based on the more generous of the two ratings.

Dual benefits. Another approach, used in Massachusetts, is to separate benefits for impairment from benefits for disability. A worker may be eligible for both.

Suggestions for Restructuring Permanent Partial Benefits

The considerable differences among the States in the benefits awarded for similar impairments cannot be justified. We offer the following suggestions as a starting point for further investigations of the area. We are not endorsing all of these suggestions, though we believe they warrant serious consideration.

Explicitly separate impairment and disability benefits. As indicated in Chapter 1, we

believe that the primary basis for workmen's compensation benefits should be the worker's loss of wages. We also believe that limited payments for permanent impairments are appropriate. A major difficulty with present permanent partial benefit provisions is that most seem to use one formula which bases benefits on both the impairment and disability bases. Combining both bases into one formula appears unworkable.

Consideration should be given to the use of two types of benefits:

permanent partial impairment benefits, paid to a worker solely because of a work-related impairment

permanent partial disability benefits, paid to a worker because he has both a work-related impairment and a resultant disability.

A worker might be eligible for both types of benefits. The impairment benefits would be based on the worker's impairment relative to the whole man. If, for example, the whole man were defined as 400 weeks, and the disability evaluation unit of the workmen's compensation agency (described in Chapters 4 and 6) determined that a worker was 50 percent impaired, then he would be eligible for 200 weeks of benefits.

Impairment benefits are justified because of losses an impaired worker experiences that are unrelated to lost remuneration. The impairment may, for example, have lifetime effects on the personality and normal activities of the worker. Since impairment benefits have no relationship to wage loss, there would be no necessity to link the value of the weekly benefits to the worker's own weekly wage; the weekly benefit could be the same amount for all workers in the State.

In contrast, the disability benefits could be based on actual wage loss or loss in wage earning capacity. In most States, permanent partial benefit awards are based on estimates of the future loss in wages caused by the impairment. In some States, such as Michigan, the worker can be paid benefits on the basis of actual wage loss as it develops over an extended period. While the Michigan approach has some costs, primarily the added administrative expenses of keeping a case open for a long time, these burdens are not insupportable. The method has the substantial merit of matching benefits to a worker's actual loss of wages, rather than basing benefits on guesses about future wage loss.

Remove schedules from the statutes. Almost every workmen's compensation statute contains a schedule which stipulates the benefits to be paid for the listed impairments. These schedules in some cases may provide a short-cut to the determination of the benefits to be paid, but that is not an adequate justification for their use. Present schedules include only a small proportion of all medically identifiable permanent impairments. Also, some schedules have not been revised for many years, despite considerable progress in the understanding of the relationship between specific injuries and extent of functional impairment. A basis for a rational evaluation of injury or disease is the recently published American Medical Association's *Guides to the Evaluation of Permanent Impairment.* Use of the AMA publication instead of statutory scheduling appears desirable.

It must be stressed, however, that the AMA guides are relevant for evaluation of impairment, not disability; and disability should be the primary basis for awarding permanent partial benefits. Use of the AMA guides to help establish the impairment rating, and then use of the impairment rating in conjunction with other information, such as the worker's age, education, and previous experience, to establish the extent of disability seems most appropriate. It is hard to see how any statutory schedule could substitute effectively for this process.

Modify existing schedules. We are skeptical of the validity of many statutory schedules, partially because of the substantial inconsistencies in benefits paid for identical impairments. A loss of a foot entitles a worker to an award of $6,000 or less in five States; at the other extreme, in five others, the loss of a foot may mean $15,000 or more. (Table 3.10)

If it is believed desirable to retain a schedule for permanent partial benefits, either in a statute or in administrative regulation, then we offer these suggestions. The States should review their schedules on the basis of the AMA guides, recognizing that impairment and disability are distinctive concepts. One way to reflect the distinction would be to follow the California policy of modifying impairment ratings by factors relevant to earning capacity. Another

TABLE 3.10 Specified maximum amounts of benefits provided for loss of arm, foot, and eye in various jurisdictions, 1972

Arm at shoulder	States (50)	Other "States" (6)*	Federal (2)
Over $25,000	6	1	1
20,000-24,999	1	1	1
15,000-19,999	14	1	0
10,000-14,999	22	2	0
Under 10,000	7	0	0
Foot			
Over $20,000	2	1	1
15,000-19,999	3	0	0
10,000-14,999	14	2	1
6,000-9,999	26	2	0
Under 6,000	5	0	0
Eye*			
Over $20,000	1	1	1
15,000-19,999	4	0	0
10,000-14,999	8	2	1
6,000-9,999	27	1	0
Under 6,000	10	0	0

* No set amount in Puerto Rico.

See Table 2.3 for explanatory notes.

way to give additional emphasis to disability as a basis for permanent partial awards would be to adopt the Model Act provision which permits benefits beyond the scheduled period when the disability persists.

Reallocate resources. As indicated, permanent partial benefits in some States appear to take a disproportionate share of total benefits. Moreover, permanent partial benefits for minor impairments in some States seem to be excessive compared to benefits for more serious impairments. In some States, payments are made even though there are no impairments. At the same time, the maximum weekly benefits for permanent partial benefits are so low in many States that seriously disabled workers are penalized.

Drastic reform may be necessary in some States to shift benefits to workers with the most serious impairments. A possible strategy would be to increase the maximum weekly benefits at the rate we have recommended for other classes of benefits, while simultaneously proscribing permanent partial payments unless the worker experiences a permanent impairment of at least 10 percent of the whole body or an actual wage loss of at least 10 percent of the pre-disability wage.

Healing period benefits. Most workers with permanent partial impairments experience a brief initial period of total disability. Temporary total benefits are awarded for this healing period. After wage-earning capacity returns, eligibility for permanent partial benefits is determined. In most States, permanent partial benefits are paid in addition to the healing period benefits, but in a few States, benefits paid for the healing period are subtracted from the permanent partial awards. This practice is questionable since the permanent partial awards generally are designed to estimate future wage loss, whereas healing period benefits are paid because of wages already lost at the time of the evaluation.

Relationship to Other Programs

Many workers with permanent partial disability receive benefits from two or more programs, including workmen's compensation. About 25,000 beneficiaries with retirement or disability awards under Social Security in 1968 also were receiving workmen's compensation benefits. Although it is not known what number were receiving permanent partial benefits, these benefits are the most likely to be involved in the overlap as there are only about 1,000 permanent total disability awards annually.

The most common private supplement to workmen's compensation for certain types of permanent partial disability comes from accidental death and dismemberment insurance. A majority of companies with at least 100 employees offer these benefits, but not all plans pay benefits for work-related disability.

Some with permanent partial disability awards may subsequently become eligible also for veterans' pensions or for aid to the permanently and totally disabled under the public assistance system. The overlap of these programs is probably small: any duplicate payments are hardly excessive.

E. DEATH BENEFITS

Work-related deaths account for less than one percent of all workmen's compensation claims and less than 10 percent of all benefits. As the ultimate tragedy, work-related death deserves full compensation. The infrequency of death claims permits payment of substantial death benefits at a relatively small cost in the total budget of a modern workmen's compensation program.

The Proportion of Lost Remuneration to be Replaced

In most States, but not all, the proportion of the worker's weekly wage replaced by death benefits varies with the number of dependents. Section 18 of the Model Act provides that a surviving spouse will receive 50 percent of the weekly wage of the deceased; a widow or widower with two children under 18 receives 75 percent of the weekly wage; two orphans receive 50 percent of the deceased's weekly wage, and so on.

Determination of the appropriate proportion of lost remuneration to be replaced by death benefits involves several considerations. In contrast to workers with temporary or permanent disabilities, the living expenses of the deceased no longer take a share of the family budget. This reduction in family needs suggests that the proportion of wages to be replaced should be less in death cases than in total disability cases. However, one reason why disability benefits replace less than 100 percent of wage loss is the theory that the injured worker needs an economic incentive to return to work. For the dead, there are no motivation problems, which suggests that replacement of more than the normal 66 2/3 percent of lost wages is appropriate. The considerations that suggest the proportion of lost wages to be replaced in death cases should be greater than, or less than, the proportion in total disability cases seem to be roughly in balance.

As in the total disability cases, wages lost by death cases are not necessarily the same as spendable income lost. A formula which relates death benefits to spendable earnings would take account of the impact of taxes and also would automatically adjust the benefit in response to the number of surviving dependents.

R3.20

We recommend that, subject to the State's maximum weekly benefit, death benefits be at least 80 percent of the worker's spendable weekly earnings. This formula should be used as soon as feasible or, in any case, as soon as the maximum weekly benefit in a State exceeds 100 percent of the State's average weekly wage.

On a transitional basis, a less desirable formula may be used.

R3.21

We recommend that, subject to the State's maximum weekly benefit, death benefits be at least 66 2/3 percent of the worker's gross weekly wage.

States may wish to pay a dependents' allowance in addition to the benefits based on gross weekly wages, but such an allowance would be inappropriate in addition to the benefits based on spendable earnings. For both types of benefits, protection against the value-eroding power of inflation is necessary.

R3.22

We recommend that beneficiaries in death cases have their benefits increased through time in the same proportion as increases in the State's average weekly wage.

Maximum Weekly Benefit

The Model Act provides that the maximum weekly benefit in death cases shall be equal to two-thirds of the State's average weekly wage. We believe that the arguments discussed earlier concerning the maximum weekly benefits for temporary and permanent disabilities are equally applicable for death cases, and therefore:

R3.23

We recommend that as of July 1, 1973, the maximum weekly death benefit be at least 66 2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

R3.24

We recommend that as of July 1, 1977, the maximum weekly death benefit be at least 133 1/3 percent of the State's average weekly wage; as of July 1, 1979, the maximum should be at least 166 2/3 percent of the State's average weekly wage, and on and after July 1, 1981, the maximum should be at least 200 percent of the State's average weekly wage.

Duration of Death Benefits

Under the recommendation published by the Department of Labor, a widow receives benefits for life, unless she remarries. Children ordinarily receive benefits until they are 18: if disabled or full-time students, they receive further benefits. The Model Act provides similarly for the surviving spouse and children, although it also provides a dowry if the widow or widower remarries. In essence, both sets of recommendations oppose arbitrary limits on total dollars or duration of benefits to dependents of the deceased.

Table 3.11 indicates the extent of compliance with the Department of Labor standards for death benefits. The failure of more than two-thirds of the States to provide benefits without limit is indefensible. The costs of removing these limits could not possibly exceed five percent of the total costs of workmen's compensation in a State. Nonetheless, 22 States pay death benefits to widows for a maximum period of less than 10 years, and 25 States stipulate that the maximum amount a widow can receive during her widowhood is $25,000 or less. There is no justification for these limitations.

TABLE 3.11. Jurisdictions with death benefits payable to widow until her death or remarriage and to dependent children until 18, 1946-72

Year	States (50)	Other "States" (6)	Federal (2)
1946	7	0	1
1956	9	1	2
1966	11	3	2
1972	15	4	2

See Table 2.3 for explanatory notes.

R3.25

We recommend that death benefits be paid to a widow or widower for life or until remarriage, and in the event of remarriage we recommend that two years' benefits be paid in a lump sum to the widow or widower. We also recommend that benefits for a dependent child be continued at least until the child reaches 18, or beyond such age if actually dependent, or at least until age 25 if enrolled as a full-time student in any accredited educational institution.

Minimum Weekly Benefit

The Model Act provides for no minimum in the case of death, but we believe that a minimum weekly benefit is appropriate. The malingering problem is non-existent, and the family of an employee who dies from a work-related injury or disease has a particularly compelling case for support from the workmen's compensation program.

R3.26

We recommend that the minimum weekly benefit for death cases be at least 50 percent of the State's average weekly wage.

This recommendation means that the surviving family of a low-wage worker may receive more in workmen's compensation benefits than the worker had earned. We believe this distortion of the essentially insurance character of workmen's compensation is appropriate for death benefits. However, the cost consequence of this recommendation would justify linking its adoption with the adoption of our next recommendation (R3.27).

Relationship of Death Benefits to Other Programs

Our recommendation for death benefits would substantially increase payments in many States. Such increased benefits should be coordinated with those of other programs. It is sometimes argued that workmen's compensation death benefits are not more substantial because many families qualify for benefits under the Social Security program. However, there are serious flaws in this reasoning. Families do not

qualify for Social Security benefits unless the worker had sufficient quarters of covered employment. Moreover, Social Security benefits are paid only if the surviving spouse has dependent children in her care or if the spouse is at least 60 years old.

For example, a widow aged 40 in 1972 with two children age 10 and 15 would receive Social Security survivor benefits for herself and children only through 1979. In 1975, the eldest child becomes 18 and becomes ineligible for further benefits unless he is a full-time student. Thus, from 1975 through 1979, the survivor benefit would be reduced. From 1980 through 1993, no Social Security benefits would be paid to the family as both children would be above the age of dependency. In 1994, (at age 62) the widow, if not remarried, would receive a benefit until death. (This benefit is optionally available at a reduced rate at age 60).

R3.27

We recommend that workmen's compensation death benefits be reduced by the amount of any payments received from Social Security by the deceased worker's family.

This offset provision, in conjunction with our other recommendations for death benefits, would provide substantial protection at a lower cost to the employer than if workmen's compensation benefits were to duplicate Social Security benefits. More important, the offset would add equity to the workmen's compensation system because two families would not receive different benefits merely because only one was eligible for the Social Security benefits. Moreover, all surviving families would be assured of a continuing income of the same general magnitude, rather than being subject to wide swings in family income resulting from the in-and-out characteristics of Social Security benefits.

Aside from the survivors' benefits available through workmen's compensation and Social Security, widows may receive cash from privately sponsored plans. Group life insurance, the most common source of such income, in 1970 covered about 52 million workers, 70 percent of all wage and salary workers. The second most common type of privately financed death benefits for employees' families is the accidental death and dismemberment policy. About half of all workers are covered by such plans. A majority, but by no means all, of these insurance plans protect against work-related death.

Some survivors also are eligible for pensions under the deceased worker's retirement plans. A substantial number of pension plans added this feature in the 1960's. These benefits are most commonly limited to families of employees who die within 10 to 15 years of retirement and who had been employed by the same firm long enough to accumulate substantial rights. Other types of protection to survivors include deferred profit-sharing and employee savings plans; these may provide significant sources of income but are available to relatively few families.

Death benefits under workmen's compensation should be integrated with other benefits which a family of a deceased worker may receive. In particular, programs paid for by the employer, such as retirement programs which include survivors' benefits, may properly offset workmen's compensation benefits. We do not believe, however, that life insurance, whether paid for by the employee or the employer, should be offset in any way against workmen's compensation death benefits.

F. ESTIMATED COSTS OF ADOPTING OUR BENEFIT RECOMMENDATIONS

The best possible estimates of the cost of adopting our benefit recommendations have been prepared for each of the 50 States and the District of Columbia. These estimates are presented in detail in Appendix B and are summarized in Tables 3.12 and 3.13. They should enable all parties to appraise realistically the consequences of our recommendations.

Table 3.12 indicates the distribution of the 51 jurisdictions on the basis of the increase in insurance costs for workmen's compensation that can be expected if our recommendations are incorporated into each jurisdiction's law in effect on January 1, 1972. All aspects of current State laws not encompassed in our recommendations are assumed to remain in effect.

The estimates in Table 3.12 assume that, for temporary total, permanent total, and death benefits, the average weekly benefit is 66 2/3 percent of the worker's gross weekly wage, subject to a maximum weekly benefit that in

TABLE 3.12. Distribution of 50 States and the District of Columbia according to estimated increase in workmen's compensation costs resulting from incorporating our recommendations into each jurisdiction's present laws

Percentage increase in costs over costs of present State program	Cost of adopting our recommendations	
	With 1973 maximum weekly benefits Number of States	With 1975 maximum weekly benefits Number of States
Less than 10%	5	2
10/29.9%	19	11
30/49.9%	19	18
50/69.9%	8	15
70/89.9%	0	5
90% or more	0	0

See Appendix B, especially Table B.1, for explanation of Table 3.12.

1973 is 66 2/3 percent of the State's average weekly wage and in 1975 is 100 percent of the State's average weekly wage, and also subject to the minimum weekly benefit included in each State's laws as of January 1, 1972. It is assumed that there are no limits on duration or total amount of benefits and that permanent total and death benefits increase through time in proportion to increases in the State's average weekly wage. The estimates also assume full coverage of occupational diseases, and no limits on duration or total amount of payments for medical care, as discussed in Chapter 4.

The estimates in Table 3.12 were prepared by the National Council on Compensation Insurance, the organization which provides rate-making assistance to the private insurance carriers. The National Council has considerable experience in preparing such estimates because it helps adjust insurance premiums to prospective changes in losses whenever a law is amended.

In order to incorporate our 1973 recommendations into their present statutes, 43 States would have to increase workmen's compensation insurance costs by 50 percent or less. Our 1975 recommendations could be adopted by 31 jurisdictions with an increase in insurance costs of 50 percent or less. In a minority of States, whose laws are particularly inadequate at the present time, adoption of our recommendations would be more expensive, but in only 5 States would incorporation of our entire set of recommendations for 1975 increase workmen's compensation insurance costs by more than 70 percent.

TABLE 3.13. Distribution of 41 States and the District of Columbia according to estimated percentage of payroll devoted to workmen's compensation premiums by employers in a representative sample of insurance classifications

Workmen's compensation premiums as a percentage of payroll	Number of States in which premiums are the indicated percentage of payroll		
	Actual in 1972	If all Commission recommendations were adopted	
		With 1973 maximum weekly benefits	With 1975 maximum weekly benefits
	(1)	(2)	(3)
Less than 0.50%	7	1	0
0.50/0.749%	17	13	11
0.75/0.999%	13	13	13
1.00/1.249%	3	~~8~~ 8	9
1.25/1.499%	2	~~4~~ 5	~~8~~ 5
1.50/1.749%	0	1	~~2~~ 3
1.75/1.999%	0	1	~~1~~ 0
2.00% or more	0	0	~~0~~ 1

See Appendix B, especially Table B.2, for explanation of Table 3.13.

The costs of adopting our recommendations also can be related to the proportion of payroll devoted to workmen's compensation insurance premiums by employers in a representative sample of insurance classifications. The appropriate information is available for 41 States and the District of Columbia. Column 1 of Table 3.13 (prepared by the staff of the National Commission on State Workmen's Compensation Laws) indicates the proportion of payroll devoted to workmen's compensation premiums by the average employer in our sample in each jurisdiction in 1972. Columns 2 and 3 show the estimated proportion of payroll

TABLE 3.14. Expenditures for supplements as a percentage of basic wages and salaries in private industry, 1970

Compensation Practice	
Total, all supplements except pay for overtime, weekend, and holiday work, and premium pay for shift work	22.2
Pay for leave time (except sick leave)	6.8
Vacations and holidays	6.6
Payments to funds	0.1
Payments to workers	6.6
Vacations	4.0
Holidays	2.6
Civic and personal leave	0.1
Health and insurance programs[a]	5.1
Workmen's compensation	1.1
Sick leave	0.9
Life, accident, and health insurance	3.2
Retirement programs	7.9
Social security and railroad retirement	4.2
Private pension and retirement plans	3.7
Unemployment programs	1.0
Legally required programs	0.9
Payments to employees	0.1
Payments to funds	(b)
Nonproduction bonuses (including awards)	1.1
Savings and thrift plans	0.2

a Includes items in addition to those shown separately.

b Less than 0.05 percent.

Note: Because of rounding, sums of individual items may not equal totals.

Source: Bureau of Labor Statistics News Release 71-612, November 23, 1971, as adjusted by Commission staff.

that will be devoted to workmen's compensation premiums if our 1973 and 1975 recommendations are adopted. Adoption of all our 1975 recommendations would mean that the average employer in our sample would pay 1.5 percent or less on workmen's compensation premiums in almost every jurisdiction.

Although adoption of our recommendations on balance will increase the cost of workmen's compensation in all States, workmen's compensation will remain only a small proportion of the wage bill for the average employer. Workmen's compensation will remain small even in relation to other supplements paid by employers. (Table 3.14) Moreover, the data in Table 3.13 overstate the true cost to many employers that would result from adoption of our recommendations. Many employers have programs other than workmen's compensation that provide benefits to workers which are reduced in the presence of payments for workmen's compensation. To the extent workmen's compensation payments increase, employers' payments for these other programs will decline.

Despite these qualifications, the proportionate increase in workmen's compensation insurance costs would be substantial in some States. However, to a large extent the need for these increases reflects years of neglect that permitted these low insurance premiums to persist. The increases in benefits in these States are long overdue and, regardless of cost consequences, are necessary if workmen's compensation benefits are to be adequate and equitable.

REFERENCES FOR CHAPTER 3

Section A, See *Compendium,* Chapters 1, 3, 4, 5, 12, 19, and 20
Section B, See *Compendium,* Chapters 3, 4, 5, 8, 19, and 20
Section C, See *Compendium,* Chapters 3, 4, 5, 8, 12, 19, and 20
Section D, See *Compendium,* Chapters 3, 4, 5, 9, 12, 19, and 20
Section E, See *Compendium,* Chapters 3, 4, 5, 9, 19, and 20
Section F, See *Compendium,* Chapters 16 and 17

The *Compendium on Workmen's Compensation* was prepared for the National Commission on State Workmen's Compensation Laws. References for data cited in this *Report* are included in the *Compendium,* but the Commission does not endorse all ideas expressed in the *Compendium.*