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Basic Concepts & Objectives of Workmen's Compensation

THE ROLE OF WORKMEN'S COMPENSATION

The purpose of this paper is to identify and raise for discussion fundamental questions as to what workmen's compensation is supposed to do, where it fits within the scheme of American social insurance, and how it can best serve and preserve what we have come to think of as distinctive American values.

This is intended to be a special kind of analysis with a special purpose. It is not the sort of philosophical speculation one would present in a symposium on jurisprudence nor is it a general introduction to the philosophy of workmen's compensation such as one might present to a law school class. Rather, it is intended to help in laying a firm bedrock of principle on which those interested in improving and reforming the American workmen's compensation system can proceed to build proposals for specific changes. With this in mind, there will be an attempt to identify specific practical choices and measures whose merits will be seen to depend on the underlying principles discussed.

For the sake of brevity, the discussion will be largely confined to points on which there is some important controversy that is still affecting decisions today. In other words, there will not be rehearsed some of the early basic disputes that have now largely been put behind us, important though they may have been in their time.

WORKMEN'S COMPENSATION AS INCOME INSURANCE

Perhaps the most important single principle affecting decisions on workmen's compensation issues is the proposition that workmen's compensation is one branch of income insurance, in the same sense as unemployment insurance, social security, and temporary disability insurance.

Income insurance is a term devised by the writer over 20 years ago to describe an essentially simple concept: small and regular contributions are made by the employer, the employee, or both, as a result of which the employee, on the happening of a specified contingency interrupting

or terminating his earnings, has a right to be paid to him a portion of his lost income. There are several contingencies that may cause this interruption or termination of earnings: economic unemployment; physical disability, which may be occupational or non-occupational; death, which may be occupational or non-occupational; and old age retirement.¹ When the matter is put this way, it is perfectly obvious that workmen's compensation is one segment of the total scheme of income protection, the principal variant being the nature of the contingency insured against. To be sure, there are other differences—in the identity of the person contributing the “premiums,” in the level of administration, whether State or Federal, and in the character of financing, whether private insurance or public. However, the similarities overwhelmingly outweigh the technical differences.

There is first of all the central insurance principle just described. Moreover, there is the common principle that the benefits are for the most part payable without regard to fault, except the kind of fault that might affect any insurance. That is to say, workmen's compensation may not be payable for deliberate self-injury, and unemployment compensation will not be payable for deliberate refusal to work on a suitable job. Another common characteristic is that benefits are generally limited, both as to maximum and minimum, but within such limits are related to the worker's actual earnings in some way. It is also typical of all these systems that what the worker owns when the contingency happens is not some large single sum of money, as might happen with some forms of private insurance, but the right to be paid weekly or monthly income benefits, which will stop when he dies² or when his situation no longer meets the terms of the contingency. Finally, these systems have in common their ultimate purpose, which is to provide an adequate source of support during periods of wage interruption so as to prevent the worker or his family from being thrown on private charity or public relief.

It is equally important to stress what workmen's compensation is *not*. It is not a branch of strict liability tort and it is not private insurance.

Throughout most of the earlier history of workmen's compensation, the tort fallacy was the most prolific breeder of miscarriages of the compensation idea. It is now largely being put behind us, but its traces are still to be seen in some surviving statutory provisions and judicial decisions. The point is discussed at great length in the opening chapters of my treatise on workmen's compensation,³ and there is no purpose to be served in retracing that argument here. However, there will be noted along the way several items still being affected by this lingering fallacy, and they will be dealt with specifically.

The other principal fallacy that crops up in certain connections is the analogizing of workmen's compensation with private insurance. It is heard most often these days in connection with the Social Security offset of workmen's compensation benefits.⁴ Perhaps the most common complaint one hears about this offset runs like this: “I bought these benefits and I paid for them and I'm entitled to have both of them.” This argument has a little more substance when applied to Social Security, where the worker ordinarily does contribute half of the contribution. But the argument also necessarily assumes that the worker has an equal proprietary right in workmen's compensation, to which he has not contributed at all, or at least not directly. At this point the argument will be encountered that the worker has indirectly contributed even to his workmen's compensation, on the theory that if he had not obtained this value in the form of the fringe benefit of workmen's compensation, it might well have been paid to him in the form of wages. This argument is difficult to accept. The employer has assumed the expense of workmen's compensation premiums because he is absolutely forced to do so by law. The same is true of every other competitive employer. The idea that individual employers here and there could be compelled by collective bargaining to add an equivalent amount to the hourly wage of workers, in place of workmen's compensation premiums, when their competitors are not doing so, simply does not correspond to the facts of industrial life. Workmen's compensation premiums, then, are not being paid by the employee, nor are they being paid in the long run by the employer. They are being paid by the consuming public in the price of the product, which presumably is adjusted by all competing employers to meet this added cost because they have under law no choice.

Probably the reason there is so much misunderstanding about the essential nature of workmen's compensation is that there were two quite different lines of development in the background dealing with compensation for industrial injury. The development having its roots in Anglo-American law was the evolution of the Employers' Liability Act, which was ultimately based on employer fault and which modified the common law principally in eliminating or modifying the three common law defenses of contributory negligence, fellow servant, and assumption of risk. The other line of development had its origins in Germany. This was the principle of social insurance, with its beginnings in the German guilds and its culmination in the almost comprehensive series of social insurance plans laid before the Reichstag by Bismarck during the 1880's.⁵ This latter development, with its complete departure from the fault principle, was quite alien to Anglo-American methods of legal thought.

For a number of years in the late 19th century, American efforts in this problem area followed the Employers' Liability Act line,⁶ but beginning about 1913, there was an extremely abrupt change in the story. The Employers' Liability Act approach was largely abandoned and a fresh start was taken that had its somewhat unfamiliar and uncomfortable roots in Bismarck's Prussia.⁷ It is true that the German social experience example arrived, not directly, but by way of the first workmen's compensation acts adopted in England.⁸ In the process, workmen's compensation had already begun to take on some traits influenced by the British tradition.

By far the most conspicuous impact of the common law tradition, however, was visible not in the language of the statutes themselves but in the way the courts interpreted them. Some judges simply could not believe that the statute really meant to hold the employer liable absolutely without fault, even when the employee himself through his own negligence might have been the cause of the harm. Common law concepts of causation were engrafted upon the "arising out of" provision;⁹ common law concepts of scope of employment were superimposed upon compensation "course of employment"; common law ideas of definition of a "servant" were pressed into service to define who is an "employee" under a compensation act. The history of compensation law interpretation has for the most part been one of getting away from these common law glosses and interpreting these modern statutes in line with their own meaning and purpose. The process is by no means completed, however, and no analysis of the inadequacies of workmen's compensation can ignore the impact of those restrictive judicial interpretations that still remain.

WORKMEN'S COMPENSATION AS INSURANCE AGAINST LOSS OF INCOME

The basic principle here is that, as the name "income insurance" implies, the thing insured against is loss of earnings, actual or presumed, and not physical loss of a member or a bodily function.

This is self-evident from most features of any standard workmen's compensation statute. It is most dramatically, if unhappily, brought out in the denials of workmen's compensation for physical losses, however dreadful, that are not accompanied by significant loss of earnings. Such physical losses would include impotence,¹⁰ loss of child-bearing capacity,¹¹ loss of taste and smell,¹² pain and suffering,¹³ and the like. Conversely, a man may be something less than totally disabled in the physical sense, but the combination of his particular physical disability with his previous education and training¹⁴ (or lack of it), or with other economic factors affecting his actual ability

to get work in the disabled condition, will often be held to equal total permanent disability.¹⁵

In recent years, this classical principle of workmen's compensation has been subjected to some challenge and it is important to inquire how this has come about.

The sequence leading to the present controversy on this point begins with the near-universal provision for schedule benefits. Schedule benefits are typically a fixed number of weeks of benefits for the loss, or loss of use, of a specified member, without regard to actual wage loss. This may cut in two directions. A claimant who has had no actual wage loss may continue to draw schedule benefits after returning to work at full or increased wages.¹⁶ Conversely, if the statute expressly makes schedule benefits exclusive, a man who remains disabled in fact after the schedule period has expired may frequently receive no further benefits.¹⁷

The schedule principle, however, is not a departure from the wage-loss principle. There are dozens of statements to this effect in reported cases, and only a handful of statements taking the opposite view. The only difference is that the wage loss in the schedule case is conclusively presumed. This is justifiable because the full extent of the wage loss from a permanent partial disability will typically never be known at the time of the hearing. It stretches out over a lifetime, but the award must be paid now.

The illusion that this is a payment for a lost member is heightened by the practice of lump summing, which is all too prevalent in some jurisdictions. When a man receives a schedule award commuted to a lump sum and goes away with several hundred dollars for loss of a portion of a finger, it begins to look on the surface very much like the man has simply been paid a fixed sum of money for the loss of a fixed portion of the body. But the added practice of lump summing does not itself change the underlying principle of liability; it is just a different way of paying for it.

However, when this sort of thing has gone on long enough, it is not surprising if a great many people get the idea that what is really going on is cash compensation for physical losses. When this point has been reached, it is also perhaps not surprising if some respected authorities in the field invent a theory or "school of thought" to dignify what has come about as a result of a combination of mistaken notions about the nature of schedule benefits. Thus one can find debates on the subject of the "whole man theory,"¹⁸ and other names given to the idea that a workman is entitled to be compensated for any physical loss to the extent that it impairs the physical effectiveness of the whole man. The writer has, in this instance also, devoted a long section of the treatise to an examination of

the cases advanced to support this theory, and they prove on examination to be far too insignificant to be dignified with the title "school of thought."¹⁹ South Carolina, which has been cited as supporting the unorthodox view, has come out with a resounding reaffirmation of the wage-loss principle.²⁰ In New Jersey, it is true that there can be found dicta questioning the pure wage-loss theory,²¹ but there can also be found an equal number of statements firmly supporting it.²² The vast majority of American jurisdictions still adhere to the wage-loss principle and account for schedule and disfigurement awards on the basis of conclusively presumed impairment of earning capacity.

This controversy is of prime importance in analyzing what is wrong with workmen's compensation today. The trend toward indiscriminate awards of small lump sums for small permanent partial injuries, the "give-the-poor-guy-something" attitude, and the perversion of lump-sum commutations from their original purpose to a facile way of getting a quick short-term disposition of a case satisfying to the immediate parties and their attorneys, adds up to a significant reason why the system is under criticism and in some instances is not doing the job it was intended to do.

Once it is firmly understood that the purpose of workmen's compensation is to provide a steady weekly income to replace lost wages, it is clearly apparent that lump summing, except in rare cases, poses a serious danger of sacrificing the long-term purpose of the system for a short-term satisfaction. Under most acts, commutation of an award to a lump sum, at least an award of any size, and certainly a total permanent disability award, can be justified only if there is some special use to which the money will be put that will serve the purposes of the system even better than the periodic payments. There may be some kind of small business that the recipient could use for his future source of income, provided only he had a capital sum with which to get started.²³ But note carefully that the ultimate objective should still be sustained income. More often than not, the lump sum is frittered away, and society is left with a penniless disabled man on its hands, as if there had never been a workmen's compensation system at all.

There is another angle of attack employed by those who want to break down the orthodox loss-of-earnings principle. This is an argument based on fairness. It is quite inequitable, so the argument runs, that a man who has suffered a physical impairment should be deprived of any recompense whatsoever, in view of the fact that a compensation act will simultaneously stand as a bar to any common law recovery for the same loss. What this approach overlooks is that any argument based on genuine

unfairness would have to assume that the injury was attributable to the fault of the employer, using fault in a genuine moral sense, rather than in some constructive legal sense. The proportion of industrial accidents due to this kind of employer fault is very small—much smaller than the number of injuries due to the fault of the employee himself.²⁴ The argument could therefore be turned around. It would be certainly morally unfair to force the employer to pay the employee for a purely physical loss that the employee has brought upon himself by his own negligence or other misconduct. The only way one can justify employer liability for this kind of loss, in the absence of fault, is on the theory that the loss involved presents a social problem that must be systematically taken care of by something like a social insurance system. This cannot be said of a physical loss not involving income loss.

The situation is further confused by what has happened to the Federal Employers' Liability Act and the Jones Act,²⁵ both of which are theoretically based on employer fault, and accordingly allow full compensatory damages for physical loss, but both of which have been virtually converted by judicial decisions into non-fault statutes.²⁶ With railway workers and seamen thus "getting the best of both worlds", it becomes increasingly difficult to insist on retention of the central wage-loss principle of workmen's compensation.

The practical consequence of all this for compensation improvement and reform is that it highlights the importance of keeping one's eye on the central purpose of income maintenance. It has to be assumed that the resources available for distribution under compensation acts are not infinite. Both in theory, then, and in what one has observed of practice, there is a serious danger that the dissipation of the compensation dollar on floods of minor claims involving physical losses that are not disabling in any meaningful sense will undermine the compensation system itself and prevent the allocation of an adequate proportion of the compensation dollar to the really serious cases of disability that are really what the system is all about.

One of the things that makes the problem difficult is that the practice of lump summing carries an immediate appeal to literally every person concerned with a compensation case. The employee naturally has his head turned by the prospect of an enormous sum of money in one chunk. His wife and children, relatives and friends, and particularly creditors will all line up on the same side. His lawyer may be the most enthusiastic of all about the lump-sum principle since it means that he can get a respectable fee all in one payment instead of having it dribbled out over a long period. The insurance carrier and

employer are glad to have the case closed and written off their books. The administrator similarly is glad to mark the case closed and remove it from his overcrowded docket. Who then is to stand up and say, "Wait a minute; you are all defeating the basic purpose of workmen's compensation?" The only way this can be done is to write the restrictions on lump summing into a statute in such cast-iron terms that they cannot be circumvented.²⁷ Better still, since some of the toughest statutes have indeed been circumvented, the statute might abolish the practice of lump summing altogether. It could then get down to the serious business of dealing with the specific problem of how to arrange suitable compensation for an attorney in cases of this kind,²⁸ how to deal with the problem of reopened cases, and so on.

WORKMEN'S COMPENSATION MUST DO A COMPLETE JOB IN ITS SEGMENT OF INCOME INSURANCE

Once it is accepted that workmen's compensation has been given a particular sector of the total income-maintenance job to handle, just as unemployment insurance and Social Security have, then it is readily seen that there can be no possible excuse for not doing the job completely.

Workmen's compensation grew up at a time when it was the only social insurance system in existence in the United States. Accordingly, it did not have to face the question here addressed. Anything it did in the way of improving the lot of the injured worker was something of a gain since, before workmen's compensation acts, injured workers, for all practical purposes, got virtually nothing. For this reason, the gaps in coverage, both as to persons and as to injuries and diseases, did not look so conspicuous. However, now that a large part of the total income-insurance field has been blanketed, the continued failure of some workmen's compensation acts to do a complete job within their assigned area stands out as a shocking breach of responsibility. Completeness as to coverage of persons means eliminating small-firm exemptions, exemptions for farmers, employees of charitable institutions, and the like, and other special categories exempted under certain statutes. It also means completeness of coverage of injuries and diseases, which in turn means that failure to have a comprehensive occupational disease statute is insupportable.

Not least, completeness requires that the size of the weekly benefits and the duration of the benefit period be such that the disabled worker or his dependents are not thrown on charity or relief. This obviously means the elimination of all arbitrary top limits, whether by dollars or by weeks, on total cumulative payments for actual dis-

ability, no matter whether it is called temporary or permanent. Nothing could be more preposterous than to label a particular disability permanent, and then cut off payments after 15 years. Suppose a man is totally permanently disabled at the age of 21, and is paid benefits until he is 36. What is he supposed to do then? To answer that he should be picked up by public assistance is to betray the integrity of the workmen's compensation principle and abdicate the responsibility with which the system has been entrusted. The same can be said of weekly maximum benefits that are too low to permit survival under today's cost of living. Here again, if the workmen's compensation beneficiary has to supplement his compensation benefits with public assistance, the system itself has failed.

MEDICAL EXPENSES AS RELATED TO INCOME LOSS

The principles just discussed, particularly the principle that compensation benefits must be sufficiently complete to obviate the necessity for resorting to public assistance, lead to a corollary: if there are incidental expenses that typically accompany the income loss and compensation claim, these incidental expenses must also be paid by the system for the very obvious reason that if these expenses are not paid, the recipient will not in fact get what the system intends him to get.

The clearest expression of this principle in the typical compensation act is the provision that medical and funeral expenses accompanying a compensable injury must be paid. This is mentioned here, although it might seem obvious, principally to show that the availability of medical benefits under compensation law does not really constitute an exception to the principle that workmen's compensation is concerned with income maintenance. Although payment of medical expenses is not in itself restoration of a portion of lost income, in an indirect way it is because if the income-insurance weekly benefits themselves were consumed in the payment of medical expenses, it could hardly be said that the system was achieving its purpose. It is an easy step from here to the conclusion that there must be no top limits on medical payments, since after the top limits had been reached, the claimant's outlays for medical expenses would at that point begin to defeat the income-maintenance objective of workmen's compensation.

ATTORNEYS' FEES SHOULD NOT CUT INTO COMPENSATION AWARDS

Although the principle just discussed has been more or less unquestioned when applied to medical benefits, the

compensation system has from the start suffered from a failure to recognize that forcing the claimant to absorb attorneys' fees out of his award violates the same principle. The old common law idea, drawn from adversary proceedings, that each party must pay his own attorney as a sort of necessary evil, has been imported bodily into this income-insurance mechanism. It should hardly require any argument at all to establish that, since the levels of workmen's compensation benefits are closely tailored to supply the bare minimum needed by the claimant or his family to avoid destitution, the purposes of the system are frustrated in proportion to the amount by which this award is reduced for attorneys' fees. For a considerable period and even now in most jurisdictions, the solution, if it is one, has been at best to try to beat down the attorney's fees to the absolute minimum.²⁹ The trouble with this is that it deprives claimants of proper legal representation and puts them at a disadvantage in competition with employers and insurers who are under less financial compulsion to minimize attorneys' fees.

The presence of this blind spot in workmen's compensation is largely to be accounted for by the fact that the original designers of the system, preposterous as it now seems to us, had the idea that the services of lawyers would practically never be necessary in compensation administration. Indeed, this was one of the contrasts with the undersirable common law system that was being replaced. How anyone could have made such an assumption, and particularly how anyone could have postulated that the statute would be largely self-interpreting and self-executing when they contained such words as "employee," "arising out of," "course of employment," and "by accident," is difficult to understand. In any event, the system became saddled with this fiction, and for the most part the results of the fiction have survived to this day in all but a few States.

Once it is accepted that the amounts stated in the statute are the amounts that the State intends should be received by the claimant as the minimum necessary for his support, and that in many cases the services of lawyers are indispensable, there is no conceivable way to escape the conclusion that the only satisfactory disposition of the matter is to add attorneys' fees to the amount of the award in appropriate cases. Several States have adopted this course, notably Florida,³⁰ Maine,³¹ Nebraska,³² and Delaware,³³ and several others in a more limited way.³⁴ The most common practical objection, as might be expected, is the argument that this measure would encourage litigiousness and unnecessary hiring of lawyers. The answer to this argument is that the provision can be so drafted as to deal specifically with this danger, as has been done in the Council of State Governments draft.³⁵

PROMPTNESS AND SIMPLICITY OF ADMINISTRATION

The underlying principle that workmen's compensation is an income-protection device leads naturally to the corollary that income must be provided quickly and with a minimum of administrative complexity. Here again workmen's compensation must be distinguished from tort recoveries. In an ordinary law suit, a person may perhaps be able to wait for years while he vindicates his right to some large amount of damages. In cases of industrial injuries and death, however, the presumption is that the worker or his dependents need weekly income immediately to replace what has been lost. Therefore, at every point that a choice can be made between simplicity and promptness of administration on the one hand, and more complex or time-consuming procedures on the other, even if the latter may perhaps in the end yield a larger recovery, the presumption should be in favor of the former. This point has obvious implications for basic choices on administrative method. Thus, the direct-payment method is clearly more in line with this objective than a method in which a formal claim is always necessary, and perhaps even a court procedure. It also has implications for such diverse features of compensation acts as penalties for delay in payment³⁶ and forbidding of a stay of payments pending appeals.³⁷

Moreover, this principle suggests that, in the drafting of compensation statutes, no effort should be spared to eliminate in advance possible sources of controversy on interpretation, even if this requires a lot of words. Many times the expenditure of 50 more words in a statute can forestall the expenditure of 50,000 words of judicial interpretation. Brevity is not necessarily a virtue in this context. An interesting example of draftsmanship based on this approach is the second-injury fund clause in the Council of State Governments draft.³⁸ In addressing itself to the question of what prior injuries or illnesses are covered, the Council draft begins by setting out a long list of named conditions and diseases, in the process mentioning probably 98 percent of the known conditions that figure in second-injury fund cases. This portion is then followed by a catch-all clause indicating that any other condition would stand as a prior physical impairment if it would support a disability rating of 200 weeks or more. At this point, someone might ask why it would not have been just as well to write in the catch-all clause and omit the list of 26 specific conditions, since the end result would probably be almost exactly the same. The answer is that the result might indeed have been the same, but only after litigation in some cases to establish that the particular prior impairment was covered because it adequately

satisfied the general definition. For example, the specific list includes such items as cardiac disease and psychoneurotic disability, conditions which are not accepted as prior impairments in many second-injury provisions. Administration is greatly simplified and litigation minimized by the fact that if claimant has one of the conditions specifically list, the matter stops right there, whereas under a general definition there might have been an argument about the matter. Innumerable instances could be cited in which even a word or two in the statute would have forestalled literally dozens of cases if the draftsmen could have anticipated the controversy over interpretation that was to ensue. Since we have now had more than a half century of experience with what kinds of provisions stimulate litigation and what kinds of provisions can be used to put the same matters to rest by statutory language, any overhauling of compensation statutes should leave no stone unturned to anticipate and put beyond controversy any cloudy point that can be made clear by precise statutory language.

COORDINATION WITH OTHER SOCIAL INSURANCE

The implications of the concept of workmen's compensation as one branch of overall social insurance have already been touched upon under the first heading, particularly as controversy over the Social Security offset provision for workmen's compensation is affected by an understanding of this principle. Since the Federal Government has now taken upon itself the responsibility of applying the offset, perhaps the controversy over whether the offset should be applied at the Federal or State end can be assumed to be behind us. During the interlude when there was some question whether the offset was to be imposed at the Federal or State end, several States themselves enacted an offset of workmen's compensation benefits for Social Security benefits.³⁹ It takes very little imagination to picture the kind of dizzying cycle one can get into when two statutes offset their benefits by the amount of benefits paid or to be paid by the other.⁴⁰ For this reason, it probably would be in the interests of simplicity and clarity to repeal all of the State offset provisions, leaving the Federal Social Security Act to do any offsetting that is to be done. It would follow that efforts to achieve improvement in this area would best be addressed to studies of how the Federal offset provision is working, and how it can be improved to remove uncertainties and inequities where they have appeared.

WORKMEN'S COMPENSATION AND AMERICAN VALUES

Not the least of the underlying principles that should

be kept in mind in any adjustment of the American workmen's compensation system is the principle that distinctive American traditions and values that have been superimposed upon models drawn from England and the Continent should be respected and preserved as far as possible. These values and traditions can be grouped under two headings.

The first of these two items has to do with the distinction between countries whose approach is essentially socialistic and a country like the United States whose approach is essentially private enterprise and decentralized. In most socialist regimes, there are two presumptions suffusing the handling of public issues: the presumption that governmental action is better than private and the presumption that centralized government is better than decentralized. In the United States the presumptions are exactly the reverse. Consciously or unconsciously, we have always proceeded on the conviction that, other things being equal, it is better to do things through private means than through government means, and that if it is necessary to do things by government means, it is better to do the job by State or local government rather than by Federal government. What appears to be a crazy patchwork of State, Federal, and local activities, not to mention public and private measures, in the American social insurance total coverage, becomes a perfectly logical and consistent pattern when viewed against the two presumptions just stated. Thus, Federal Social Security had to be Federal, not because the American people as a matter of ideology had any preference for a centralized Federal system, but because as a practical matter the job to be done was far too great for private insurance and obviously unmanageable by individual States. Therefore, by default the task had to be done by the Federal Government if it was to be done at all.

There may be those who do not agree with either of the presumptions here stated, but it is a fact of history that these two presumptions have been operative at almost every point. There can, of course, be considerable disagreement on the factual question whether private enterprise and States can indeed do the particular job in question. Thus, some people argue that the States' handling of workmen's compensation has demonstrated that the States cannot really do a satisfactory job and that the cost of private insurance has shown that private insurance is not appropriate for workmen's compensation. The writer disagrees strongly on both points, but the principal submission here is that, at the minimum, there is and should be a presumption in favor of doing a job at the private and State level, as against the public and Federal level, and that any departure from these presumptions would be a marked departure from what we have come to

think of as the American way of doing things.

The other basic American value that must never be lost sight of is the high American regard for individuality and for the dignity of the individual person. The most direct reflection of this emphasis on individuality in the American social insurance system is the practice of basing social insurance benefits in all categories, not just workmen's compensation, on the individual's own wage record. This procedure enormously complicates the task of record keeping and administration, but we have concluded that it is worth the trouble in order to maintain some link between a particular worker's own earnings level and his benefits. In many social insurance systems around the world, this is not so and flat-rate benefits are paid to all beneficiaries regardless of their previous earnings records. Indeed, it can be demonstrated that the American system of basing Social Security benefits on individual wage records would have collapsed long ago due to the sheer weight of record keeping and calculation involved if the invention of the computer had not fortunately intervened. Of course, we surround the individual wage calculation with maximum and minimum limits, and it is in this process that we are in serious danger of violating the individuality principle. As long as there is plenty of elbow room between the maximum and the minimum to cover most workers, it can be said that the system is indeed based on individual earnings history. But when, as has happened in many States, the fixed weekly maximum for workmen's compensation benefits actually falls below even the average wage in the State, the situation can only be described as converting the individualistic American system into a socialistic type of flat-rate benefit structure. And when, as in some States, the majority of benefits are crushed together into one uniform figure under the maximum, anyone who insists on retaining such a low maximum can be told, without facetiousness, that he is in effect advocating the substitution of a socialist benefit system for an individualistic American system.

The concept of the dignity of the individual is, of course, central to the preference for social insurance as against public assistance. In spite of the fact that public assistance in recent years is taking on more and more of the attributes of a benefit claimed of right, still the classical distinction between social insurance and public assistance has always been that insured benefits belong to the insured claimant as of right, while assistance benefits are paid only on the basis of need as determined by administrators. It follows, then, that anyone who insists on keeping compensation benefits so low that a substantial number of compensation recipients are driven to seek public assistance is directly offending the American concept of the dignity of the individual.

Finally, the emphasis on individual dignity and worth compels the conclusion that every conceivable effort should be made to rehabilitate the injured workers who come within the province of the workmen's compensation system. Dignity of the individual is served best of all when the individual can go back to work, earn his own living, pay his own taxes, and hold his head up as a proud and useful member of the work force. The practical conclusion from this is that American workmen's compensation statutes should be thoroughly examined with a view to strengthening their rehabilitation provisions. There is much more to this than merely a few extra allowances for a rehabilitation period or for travel expenses and the like. The entire administration of workmen's compensation must be suffused from beginning to end with the concept of restoration of the worker rather than merely handing him a sum of money as a pay-off for his injury. Special officers and units concerned with rehabilitation should be built right into the administrative structure; appropriate incentives to become rehabilitated must be included; disincentives in the form of cut-off of benefits must be guarded against; and above all a much greater effort must be made than ever before to provide proper rehabilitation facilities throughout the country and to coordinate all Federal and State rehabilitation activities.

Endnotes

1. See Larson, *The Law of Workmen's Compensation*, § 96, especially the diagram at § 96.20 illustrating how the different segments of the American social insurance system fit together.
2. For an early case holding that unaccrued benefits are not payable to heirs, see *In re Bartoni*, 225 Mass. 349, 114 N.E. 663 (1961). Massachusetts has changed this rule by statute. Mass. Ann. Laws, Ch. 152, § 36A (1965). But it is significant that the compensation to which decedent was entitled goes to dependents, not heirs. For a more recent case supporting the general rule in the text, see *Borquez v. John Barbank Trucking Co.*, 432 P.2d 767 (Colo. 1967).
3. See Larson, *op. cit.*, § 2.
4. The offset was held constitutional in *Richardson v. Belcher*, 92 S. Ct. 254 (1971). For a detailed discussion of the offset, including the question of which kinds of compensation benefits are offset, see Larson, *op. cit.*, §§ 97.31-97.34.
5. Fundamental Law of 1884 (Industry, Transport, Trades, Telegraph, Army and Navy); Agricultural Law, 1886; Building Law, 1887; Marine Law, 1887. This legislation included almost all of the components of what would now be considered a typical comprehensive social insurance program, except unemployment insurance, which was originated in England in 1911.
6. The culmination of this development, and the most advanced of these acts at the time, was the Federal Employers' Liability Act of 1908, which is still in effect. 45 U.S.C. § 51-60.
7. The German example was mainly brought to the attention of

- American legislators by a full account of the system written by John Graham Brooks and published as the Fourth Special Report of the Commissioner of Labor in 1893.
8. The British Workmen's Compensation Act of 1897 became the model for American legislation in many respects.
 9. See, e.g., the early Massachusetts rule in *Madden's Case*, 222 Mass. 487, 111 N.E. 379, L.R.A. 1916D (1916) 1000: "The rational mind must be able to trace the resultant injury to a proximate cause set in motion by the employment, and not by some other agency."
 10. *Rivers Constr. Co. v. Dubose*, 241 Miss. 527, 130 So. 2d 865 (1961).
 11. *Bergeron v. New Amsterdam Cas. Co.*, 134 So. 2d 416 (La. App. (1961), *aff'd*, 141 So. 2d 832 (La. 1962).
 12. *Arrington v. Stone & Webster Eng'r Corp.*, 264 N.C. 38, 140 S.E.2d 759 (1965).
 13. *Blancett V. Homestake-Sapin Partners*, 73 N.M. 47, 385 P.2d 568 (1963).
 14. *Nichols v. Metropolitan Opera Ass'n*, 13 A.D.2d 568, 211 N.Y.S.2d 872 (1961). An opera singer suffered a hemorrhage into the left vocal cord and continued to be disabled due to polyposis of the vocal cord. Compensation was affirmed.
 15. *Petter v. K.W. McKee, Inc.*, 270 Minn. 362, 133 N.W.2d 638 (1965). The fact that claimant had the physical ability to do light work was held not to affect an award for total permanent disability when he did not have sufficient educational background to obtain this kind of work.
 16. *Alaska Indus. Bd. v. Chugach Elec. Ass'n*, 356 U.S.320, 78 S. Ct. 735, 2 L. Ed. 795 (1958).
 17. See, e.g., *Hawkeye-Security Ins. Co. v. Tupper*, 152 Colo. 112, 380 P.2d 31 (1963), reversing a general disability award for a clean-cut amputation of a leg below the knee.
 18. See, e.g., U.S. Dep't of Labor, Proceedings of the IAIABC, 42nd Annual Convention, 1956, Bureau of Labor Standards Bull. No. 192, p. 72 *et seq.* (1957); Hill, "Actual Wage Loss Theory," p. 72; Kessler, "Whole Man Theory," p. 76; Foster, "Loss of Wage Earning Capacity Theory," p. 79. Note that the only one of the three articles that actually cites cases is the third.
 19. See *Larson, op. cit.*, § 57.10.
 20. *Bowen v. Chiquiloa Mfg. Co.*, 238 S.C. 322, 120 S.E.2d 99 (1961). Medical testimony on percentage of physical disability will not of itself support an award; wage-earning capacity must be considered, and average post-injury earnings are relevant in this connection.
 21. See, e.g., *Stepnowski v. Specific Pharmaceuticals, Inc.*, 18 N.J. Super. 495, 87 A.2d 546, 548 (1952): "... a permanent injury which involves a loss of physical function and detracts from the former efficiency of the body or its member in the ordinary pursuits of life, is compensable even though there be no diminution in earning power or capacity to work."
 22. *Kalson v. Star Elec. Motor Co.*, 15 N.J. Super. 565, 83 A.2d 656, 660 (1951), citing *Everhart v. Newark Cleaning & Dyeing Co.*, 120 N.J.L. 474, 200 A. 795 (1938): "Compensable disability under the act is a loss ensuing from personal injury which detracts from the former efficiency of the workmen's body or its members in the ordinary pursuits of life *in relation to the field of service to which he is suited.*" (Emphasis supplied.)
 23. See, e.g., *Texas Employers' Inc. Ass'n v. Rollins*, 257 S.W.2d 851 (Tex. Civ. App. 1953).
 24. The only available statistics with a suitable breakdown on this point are German. The figures for 1907 show, as to causes of industrial accidents: fault of the employer, 16.81%; fault of the employee, 28.89%; joint fault of employer and employee, 4.66%. Figures taken at other 10-year intervals vary only slightly.
 25. Merchant Marine Act, 41 Stat. 1007 (1020), 46 U.S.C. § 688 (1952)
 26. See, e.g., statement to this effect as to the FELA by Mr. Justice Jackson, dissenting in *Wilkerson v. McCarthy*, 336 U.S.53, 69 S. Ct. 413, 93 L. Ed. 497 (1949).
As to seamen, this is the result of both the availability of the virtual strict-liability remedy of unseaworthiness of a vessel or her tackle and the additional non-fault remedy of maintenance and cure.
 27. The Council of State Governments, Suggested State Legislation, 1963 and 1965, Workmen's Compensation and Rehabilitation Law, allows lump summing only when there has been a specific finding by the director, after a hearing and after a recommendation by the rehabilitation panel, that the lump summing will promote the rehabilitation of the claimant.
 28. See discussion of the various available devices, in *Larson, op. cit.*, §§ 83.11-83.19.
 29. Approximately three-fourths of the States have some kind of commission or court supervision of attorneys' fees. Ten State statutes fix maximum fees, the lowest being 10 percent with a \$100 maximum. (Wyoming Stat. Ann. § 27-120 (1957)). An additional fee not to exceed \$300 is allowed for services in the state supreme court.
 30. Fla. Stat. § 440.34(1) (1967).
 31. 39 MRSA 1964, as amended, § 110.
 32. Neb. Rev. Stat. § 48-125 (1963).
 33. 19 Del. Code Ann. § 2127.
 34. See N.J. Rev. Stat. § 34:15-64 (1959), and N.M. Stat. Ann. § 59-10-23 (1953). These two statutes are more limited chiefly in that a voluntary offer or payment by the employer can block the application of the statute.
 35. Council Draft, Section 42.
 36. See, e.g., La. Rev. Stat. Ann. § 22:658 (1959) authorizing adding a penalty and attorneys' fees for arbitrary refusal of payment.
 37. Generally a stay will not issue in the absence of a showing of probable irreparable damage. *Travelers Ins. Co. v. Belair*, 284 F. Supp. 168 (D. Mass. 1968), applying the Longshoremen's Act. This same case holds that the prospect of not being able to recover the payments back from claimant is not in itself a sufficient showing of irreparable damage.
 38. Council Draft, Section 20(d).
 39. Colo. Rev. Stat. Ann., Ch. 83 § 12-1(4)(1965); Minn. Stat. Ann. § 176.101(4) (1966); Mont. Senate Bill 115, Ch. 174, enacted March 3, 1971, effective July 1, 1971.
 40. See *Larson, op. cit.*, § 97.35.

