LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

This symposium,[1] though centered primarily on the Federal Employers' Liability Act,[2] of necessity undertakes a reevaluation of other systems of compensating employees for work-connected injuries, since any discussion of the alleged merits and defects of the FELA inevitably includes a comparison of it with alternative methods of dealing with work-injury compensation.

The FELA is still based essentially on the doctrines of the common law tort of negligence, although some of those doctrines, especially those peculiar to master and servant, have been modified or even abolished by Congress and the courts. Recovery depends both upon the employer-employee relationship and upon fault or negligence on the part of the employer; fault on the part of the employee is a partial defense, even though not an absolute bar; enforcement is entirely through the adversary system and the courts; damages are given not only for the loss of the injured person's earning capacity through disability, but also for all other harms which the law of torts now deems compensable, such as pain and suffering, disfigurement, and impotency; and the amount of compensation recoverable attempts to restore, so far as money can, all the injured worker has lost in order to make him whole.

The most readily available alternative to the FELA is workmen's compensation, either a unified federal law for all employees now under the FELA, or congressional permission for each state to include such of these employees as are appropriate under the present workmen's compensation system of that state. Workmen's compensation systems vary widely in detail but all are based primarily on one essential fact, namely, liability results not because of any fault, tort, or negligence of the employer but simply from the necessary connection or relationship between the employee's injury and his job; liability is usually enforced through an administrative procedure subject to judicial review; compensation is given only for loss of earning power resulting from disability and only in such a minimum amount as will permit the injured worker to exist without being a burden upon others.

Another possibility would be to substitute for the FELA a system similar to that

[1] Published in two parts, the second of which will appear in July, 1953.

[2] The title of the Act is a misnomer; actually it applies only, in general, to those employees of railroads who are injured while working in interstate commerce.

in Great Britain. This gives to the entire population, in varying degrees, broad social insurance against many of the hazards of life, such as unemployment, old age, and all illness, injury, and even death, whether or not resulting from employment. Such a proposal might be financed by the state alone through general taxes, or by joint contributions from the state and from either or both the employer and the employee, with the contributions being uniform for all employers (workmen's compensation, by contrast, is financed initially solely by the employer as a rule, but ultimately, of course, is paid for by the consumer of the employer's products); the benefits of such a scheme are usually uniform for all recipients regardless of prior earnings or even, to a large extent, actual means or needs.

The three methods, of course, might well be combined in various ways. Recovery for work injuries caused by an employer's negligence might be permitted in lieu of or in addition to, at least in part, workmen's compensation or general social insurance payments. By statute, judicial decision, presumptions, allocation of burden of proof, or jury verdicts, the element of fault may largely be strained out of the so-called negligence required for recovery under the FELA. Federal retirement, or unemployment, or social security benefits may be paid to FELA-covered employees so that even in the absence of any workmen's compensation or specific insurance against work injuries, an employee suffering a work injury, where unable to recover under the FELA for lack of proof of negligence, will still not in effect be denied all compensation. Similarly, employers even where not liable under the FELA because of the absence of negligence, may follow a policy of paying some compensation at least for all work injuries as a result of their relations with either their employees or labor organizations.

One of the most disturbing aspects of this situation certainly is the increasing criticism, much of it well documented, of many aspects of state workmen's compensation laws. In an increasingly large number of states, workmen's compensation suffers from inadequate coverage of employees; from compensation and benefits far too low (even for minimum standards of living, in the present time of inflation); from excessive, costly, and time-consuming litigation before both administrators and courts; from little if any injury-preventive measures; from the absence of suitable, over-all rehabilitation programs; and from excessive costs to employers and employees alike (as compared with those under the FELA), caused by poor methods of disability ratings and inadequate controls over the methods, profits, underwriting expenses, and claims-adjustment allowances of insurers. Such systems obviously are neither quick, automatic, nor adequate in their awards, and so long as such defects exist there seems little chance for substituting workmen's compensation for the FELA—far more likely would be the substitution of a comprehensive, over-all social security insurance program.

These defects in many state workmen's compensation systems, however, should not, I believe, blind us to the possible advantages that a suitable workmen's compensation law, state or federal, might have—advantages over both the FELA and a

broad social security system. Employer and private-insurer liability, with resulting resistance in many cases to payment of compensation claims, may or may not cause increased litigation as compared with a system of state payments for all injuries, but it would certainly seem to be an excellent device to eliminate unfair, fake, or malingering claims for work injuries.

Two points, perhaps, may be overlooked and deserve more emphasis than they sometimes receive. First, prevention is clearly the most desirable objective in coping with work injuries and we know all too little about the possible effects of the various methods of compensation for work injuries on the success of preventive measures by employers, employees, insurers, labor organizations, and government officials. Second, full and speedy rehabilitation and restoration of the injured worker as far as possible, in his home, job, and community, by employer, insurer, or government, seems a more desirable goal than the mere payment of money to the injured person after the occurrence of the injury.

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