THE WAGE-LOSS PRINCIPLE IN WORKERS’ COMPENSATION

by Arthur Larson†

The law of workers’ compensation has grown steadily more complex in recent years. Accordingly, many states are now faced with increasing costs of administration, increasing insurance rates to employers, excessive litigation and delay, and maldistribution of compensation resources. In an attempt to reverse this alarming trend, Florida enacted a “wage-loss” statute in 1979. A number of other states are considering this type of legislation. In light of these developments, this Article focuses on the concept of “wage-loss” compensation systems. After tracing the “wage-loss” origins of early workers’ compensation systems, Doctor Larson examines both the Minnesota and Florida systems. Doctor Larson then examines the potential impact of a “wage-loss” compensation system and concludes that it has the potential to ease the current administrative and financial burdens while providing increased benefits to workers who need them most.

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The most far-reaching controversy in the area of workers' compensation concerns the current movement to restore the centrality of the wage-loss principle. Workers' compensation in its origins had a well-understood function: it was to provide support for industrially-disabled workers during periods of actual disability, and for their dependents in the event of occupationally-related death, together with hospital, medical, and funeral expenses. Over the years, in a number of jurisdictions, this function has imperceptibly given way to a process of paying cash for physical impairment as such, regardless of either actual or presumed loss of earning capacity, and often in a lump sum, until in some states this cash-for-injury operation has come to predominate both as to the costs entailed and as to the administrative and legal time consumed. This in turn has recently generated a strong reaction among those who view this trend as an unfortunate and expensive distortion of the real mission of workers' compensation. The most dramatic expression of this reaction was Florida's adoption in 1979 of a statute that virtually eliminated cash payments for "permanent partial" impairments as such, and concentrated on paying benefits during weeks of actual wage loss, with a minimum of administrative and legal involvement.\(^2\)

By contrast, Minnesota in 1974 amended its statute to carry the opposite trend—that of paying for physical impairment as such—
to what is probably the furthest extreme of any state so far.\(^3\) The amendment declared in no uncertain terms that permanent partial benefits were payable for impairment of function, distinct from and in addition to any other payment.\(^4\) Minnesota's "schedule," to which this rule applies,\(^5\) also may well be the most inclusive on record, extending as it does, not only to the usual losses of members\(^6\) and disfigurements,\(^7\) but also to head injuries,\(^8\) injuries to internal organs,\(^9\) back injuries,\(^10\) burns,\(^11\) loss of the voice mechanism,\(^12\) and, in case anything has been overlooked, to any other permanent partial disability not enumerated.\(^13\)

The Minnesota and Florida amendments thus supply a strikingly clear-cut contrast between two widely-divergent concepts of the nature and purpose of workers' compensation. It will be interesting and instructive to observe over a period of years how each fares, as to cost, efficiency, and above all, accomplishment of the social purpose of the system.

II. HISTORIC CENTRALITY OF THE WAGE-LOSS PRINCIPLE

The brief summary of the origin and gradual distortion of workers' compensation at the beginning of this Article states flatly that the system had, in its beginnings, a purely wage-loss-replacement function. This generalization may not be accepted as self-evident by some people, particularly those who have become so accustomed to the physical-impairment approach that they believe it to be the normal and indeed classical form of the system. The writer recently received a private communication from an experienced administrator referring to a state that had a "wage-loss statute rather than the more traditional type of statute." Indeed, many people, including some compensation specialists, appear to think

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4. See id.
6. See id., subd. 3(1)-(37).
7. See id., subd. 3(41).
8. See id., subd. 3(39).
9. See id., subd. 3(40).
10. See id., subd. 3(42).
11. See id., subd. 3(48).
12. See id., subd. 3(38).
13. See id., subd. 3(49).
of the Florida amendments as a radical innovation, when in fact they are a return to the original compensation approach.

With this kind of controversy at the very threshold, it is well worth while to document once and for all the proposition that compensation was in origin a wage-loss system. This is by no means to suggest that such a demonstration, by itself, proves that all states should, out of deference to history, immediately rush out and emulate Florida. Realistically, the choice between the Florida approach and the Minnesota approach will be made, not on historic grounds, but on pragmatic considerations of efficiency in doing the job the state wants done.

Still, the reference to history is something more than a debating point. When a system, all of whose features are keyed to a wage-loss function, is changed, whether absent-mindedly or deliberately, into a physical impairment system, with no corresponding adjustment of these wage-loss-related features, there is bound to be trouble. To take only the most obvious illustration, discussed more fully later: because compensation was originally concerned with wage loss, the amounts paid were tied to prior wage; but if what is being compensated for is physical impairment, it makes no sense at all to pay the high-salaried worker more than the low-wage earner.

Workmen's compensation originated in Prussia in the 1880's. It always comes as something of a shock to those who still think compensation is little more than disguised socialism to discover that the father of modern social insurance was the Iron Chancellor himself, Prince Otto von Bismarck. During the years following the war of 1870-71, Bismarck became concerned about the increasing strength shown in elections by the Marxian socialists, as against the practical socialists of the school of Lassalle. Resorting to one of the oldest of political maneuvers—"taking the wind out of their sails"—he lay before the Reichstag his far-reaching plan of compulsory insurance, including workmen's compensation and most of the other components of a modern comprehensive social insurance system. It was enacted in various measures between 1883 and 1887.

Following the Prussian legislation, and before the first American

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14. *See* note 64 *infra* and accompanying text.

15. The principal omission was unemployment insurance, which was introduced in England in 1911. To add to the paradox of the paternity of social insurance, we may note that unemployment compensation was strongly urged by the British Board of Trade, and opposed by Sidney and Beatrice Webb and the Fabian Socialists.
act appeared, compensation statutes were enacted in twenty additional countries or provinces: Austria (1887); Norway (1894); Finland (1895); Great Britain (1897); Denmark (1898); France (1898); Italy (1898); Spain (1900); South Australia (1900); New Zealand (1900); Greece (1901); Netherlands (1901); Sweden (1901); British Columbia (1902); Luxembourg (1902); Belgium (1903); Russia (1903); Queensland (1905); Cape of Good Hope (1905); and Hungary (1907).  

In view of the present controversy, the writer reexamined each of these acts, and can confirm that, without exception, they were pure wage-loss statutes. "Schedules" for permanent partial disability, independent of actual wage loss, did not exist.

The mechanism of the early German acts, including a more elaborate 1911 version, was simply the payment of monthly benefits equal to a percentage of wages actually lost, with no distinction between temporary and permanent disability. Similarly, the early British acts of 1897 and 1906, which were the model for most

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16. The dates given are those of enactment.

17. See A. Geerts, B. Kornblith & J. Urmson, Compensation for Bodily Harm: A Comparative Study 110 (1977) ("Everywhere the law on industrial injuries came into force without any applicable schedule existing.").

18. See, e.g., Law of Aug. 1, 1911 (1911) Reichsgesetzblatt [RGBI] XIX 509, reprinted in 2 J. Boyd, Workmen's Compensation and Industrial Insurance 1319, 1326 (1913). Boyd's translation of the most significant sections is as follows:

**ARTICLE 559.**

The amount of the pension is as follows, as long as the injured person as a result of the accident is—

1. Totally disabled . . . (% of earnings)

2. Partially disabled . . . (in proportion to total).

**ARTICLE 562.**

As long as the injured person as a result of the accident is unemployed through no fault of his own, the accident association may for a time raise the partial pension to not more than a full pension.

**ARTICLE 608.**

If an important change takes place in the conditions which were of importance in the determination of the compensation, then a new determination may be made.

**ARTICLE 609.**

During the first two years after the accident a new determination on account of a change in the condition of the injured person may be undertaken or demanded at any time. If, however, within this time limit a permanent pension has been legally determined, or if this time limit has expired, then a new determination may be undertaken or demanded only in periods of at least one year. These periods are not affected by the inauguration of a new course of treatment. The periods may be shortened by mutual agreement.

_Id._ (emphasis added).
American acts, paid fifty percent of average weekly earnings "during the incapacity," again with no distinction between temporary and permanent incapacity.19

When we turn to the origins of workers' compensation in the United States, we again find that almost all of the earliest acts were wage-loss acts with no schedules. The first important act passed in the United States was the 1910 New York statute20—a very short wage-loss act modeled on the 1897 British act. Although it was held unconstitutional,21 it is significant for present purposes, both in its own right and in its influence on other state legislation.

In 1911, in a single year, nine statutes were enacted and all survived. Of these, eight were of the wage-loss type. The ninth, that of New Jersey,22 appears to have been the first example of a state statute that contained a schedule from the beginning. The eight wage-loss acts were those of Wisconsin,23 Ohio,24 Kansas,25 California,26 Nevada,27 New Hampshire,28 Massachusetts,29 and Illinois.30

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19. See, e.g., Workmen's Compensation Act, 1906, 6 Edw., c. 58. The Act stated in part as follows:

[In the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident . . . .]

Id., schedule 1(3). The Act went on to state that "any workman receiving payments under this Act shall, if so required by the employer, from time to time submit himself for examination . . . ." Id., schedule 1(14). In addition, the following provision of the Act is of interest: "[A]ny weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased . . . ."

Id., schedule 1(16).


The statute was reenacted in a more elaborate form in 1914. See Act of Mar. 16, 1914, ch. 41, 1914 N.Y. Laws 216. This version contained a limited schedule. See id. Art. 2, § 15, 1914 N.Y. Laws at 223.

22. Act of Apr. 4, 1911, ch. 95, 1911 N.J. Laws 134. The Washington statute, enacted in 1911, see Act of Mar. 14, 1911, ch. 74, 1911 Wash. Laws 345, is difficult to classify. It had no schedule in the conventional sense, but stipulated a maximum payment of $1500 for major amputations, with lesser losses in proportion. See id. § 5(6), 1911 Wash. Laws at 360.


In summary, by the end of 1911, of the twenty-one statutes enacted in foreign countries and provinces, and the ten enacted in the United States, all but one were of the pure wage-loss type, and only one had a "schedule."

III. MEANING AND ORIGIN OF THE "SCHEDULE PRINCIPLE"

The story from this point on takes the form of the gradual erosion of the wage-loss principle in many jurisdictions by the schedule principle. It becomes important, therefore, to pause at this point and define precisely what the term "the schedule principle" means in a workers' compensation context.

The concept ordinarily contains two components. The first has to do with the way the amount of disability (and therefore compensation) is reckoned. In a typical American schedule, this takes the form of a list describing various members of the body and prescribing a fixed number of weeks of compensation for their loss or loss of use.

The second component has to do with the fundamental rule of liability. Normally, the fixed amount of compensation for a schedule loss is paid regardless of actual wage loss. This can cut both ways. A worker who has lost an eye, but has returned to work at his regular wages, is nevertheless entitled to the scheduled amount. Conversely, if his fixed benefits expire, and he remains unemployed because of his disability, the benefits stop. This latter "exclusiveness" rule was never universal and has been giving way to both judicial and legislative assaults in more recent times.31

It has often been observed that the origins of the "schedule" seem to have been lost in the mists of history.32 The search for origins is eased somewhat by considering separately the two components just identified.

In the sense of a tabulation of fixed amounts of compensation for particular physical losses, the schedule is by no means a monopoly of workers' compensation. Indeed, the first schedules were probably those in individual insurance policies, which began to appear in the second half of the nineteenth century.33 Belgium's
industrial accident schedule was closely associated with comparable compensation for war wounds, as was also France's original schedule.\textsuperscript{34}

These historical fragments, while helpful in understanding where the first component came from, are of no use at all in explaining the origin of the second component: the complete independence from actual wage loss, within an overall wage-loss system, of one particular group of injuries. The historical evidence is quite clear that the schedule was never intended to be a departure from nor an exception to the wage-loss principle. The typical schedule, limited to obvious and easily-provable losses of members, was justified on two grounds: the gravity of the impairment justified a conclusive presumption that actual wage loss would sooner or later result; and the conspicuousness of the loss guaranteed that awards could be made with no controversy whatever.

When the Pennsylvania Act was under study by the Pennsylvania Industrial Accident Commission, they had the benefit of the talents of Professor Francis H. Bohlen, of the University of Pennsylvania Law School, who was probably the most brilliant workers' compensation analyst of his time. In an address to the Law Association of Philadelphia, on November 15, 1912, he summed up in one sentence the dual justification for including in the Commission's proposed draft a very limited schedule covering only loss of a hand, an arm, a foot, a leg, or an eye, or two or more of these: "The determining consideration was that by rendering the amount definite litigation would be prevented and certainty attained, since whenever a mutilation of this sort occurred there could be no question as to the extent of disability of the sufferer or the amount payable to him."\textsuperscript{35}

Note the absoluteness of the terms chosen. In adducing administrative convenience as a justification, Professor Bohlen did not say that litigation would be reduced, or simplified, or discouraged. He said that it would be "prevented." On the disability issue, there would be "certainty," and "no question of the extent," and hence no room for litigation at all.

As to the other component, the presumption of wage loss, his argument took the form of explaining why the schedule was con-

\textsuperscript{34} Id. at 112.

\textsuperscript{35} F. Bohlen, Workmen's Compensation: An Address Before the Law Association of Philadelphia, Nov. 15, 1912, at 23 (emphasis added).
fined to major members, and why the New Jersey example of including minor members had been rejected:

The Commission rejected the idea of similarly valuing the lesser injuries which are valued in both the Federal and New Jersey Acts. While certainty would thus be attained, it would be a certainty of injustice. In the case of serious mutilations, while the effect of disability in a few cases may be greater or less than that provided in the act, yet the Commission believes that a fair average has been struck which will cover with approximate justice the great bulk of such cases. On the other hand, the effect of minor injuries varies so enormously with the trade of the individual, that no average can be struck that will give a fair general result. The average would not fairly represent the usual or average case, but would be a mere mean between widely divergent extremes. A typesetter or engraver who loses one joint of the index finger of his right hand become[s] thereby incapable of practicing his trade and must learn late in life, a new vocation; in such a case the payment of one-half wages for 25 or 40 weeks would be manifestly inadequate. On the other hand, a teamster or drayman, or any workman doing unskilled labor, would, in a great majority of cases, suffer no loss of earning power except during the period when he is actually being treated for his injury, such period not usually exceeding two weeks to a month. In such case the compensation would be manifestly excessive.37

The idea that the schedule in any way represented compensation for physical impairment as such was emphatically disavowed—so much so that Professor Bohlen regarded any such provision as a downright curiosity:

In Illinois, a curious provision occurs, whereby a servant who suffers any serious disfigurement to his hands and face, though not actually incapacitating him, is entitled to a “reasonable” amount of compensation, not exceeding one-quarter the amount payable in the event of death. Such sums are awarded by way of damages for the sentimental loss entailed, and, having no relation to the earning power of the sufferer, and being given in addition to compensation for the loss thereof, have no place, in the opinion of the Commission, in a compensation act,

36. It may be noted here that any federal acts at this period were not true workers' compensation acts and accordingly are omitted from the present discussion. Since the federal plans were merely provisions by the government for its own employees, they were more comparable to private plans voluntarily adopted by private employers.

the sole object of which is to protect, in part at least, the injured workmen and those dependent upon them from the economic sufferings entailed by the total or partial destruction of their earning power.\textsuperscript{38}

The tying-in of the schedule with the wage-loss principle by the conclusive presumption of wage loss from major impairments was realistic—even more so in earlier times. It must be recalled that, in 1912, none of the developments had occurred that would later soften the impact of such handicaps on employment prospects. There were no second injury funds.\textsuperscript{39} There were no hire-the-handicapped programs comparable to those existing today. There were no mandatory laws prohibiting employment discrimination based on handicap, such as sections 503 and 504 of the Rehabilitation Act of 1973.\textsuperscript{40} Rehabilitation techniques, benefits, and programs were, by modern standards, primitive or nonexistent. The presumption that a one-armed, or one-legged worker would suffer eventual actual wage loss, then, was no fiction, nor was it a facade behind which to distribute payments for physical impairment.

IV. GRADUAL EROSION OF THE WAGE-LOSS PRINCIPLE THROUGH EXPANSION OF THE SCHEDULE PRINCIPLE

It was noted earlier that, up to the end of 1911, of the thirty-one statutes enacted throughout the world, including ten in the United States, only one, New Jersey, had a schedule. The rest were wage-loss statutes.\textsuperscript{41} For some reason, perhaps in part because of the New Jersey example, schedules began to proliferate at about this time. In 1912, three states, Michigan,\textsuperscript{42} Rhode Island,\textsuperscript{43} and

\begin{footnotesize}
\textsuperscript{38} Id. at 24.

\textsuperscript{39} Every state except Georgia now has such a fund. Although they vary widely, they share the common purpose of relieving the employer of liability for the amount by which the final disability of an already-impaired worker exceeds the disability that would have been produced by the instant injury alone on an unimpaired worker.


\textsuperscript{41} See notes 16-30 supra and accompanying text.


\textsuperscript{43} Act of Apr. 29, 1912, ch. 831, § 12, 1912 R.I. Pub. Laws 204, 211. The limitation here is even clearer than that in the Michigan Act, see note 42 supra, since it refers to “loss by severance.” See Act of Apr. 29, 1912, ch. 831, § 12, 1912 R.I. Pub. Laws 204, 211. Payments were “in addition to all other compensation.” See id., 1912 R.I. Pub. Laws at 211.
\end{footnotesize}
Maryland, passed original statutes containing very limited schedules. Even more significantly, a number of states whose original statutes had had no schedules added them within a few years; this occurred in Ohio, Wisconsin, Nevada, Massachusetts, Illinois, and, in modified form, California. Most of these schedules, and those that appeared in the next few years, were quite narrow—sometimes limited to major members and often limited to "loss" or even "loss by severance," thus excluding not only partial loss but partial and even total loss of use.

The expansion of the schedule principle from these very restricted beginnings to the present extreme represented by the Minnesota statute can be summarized by identifying categories of extension that occurred, sometimes gradually, sometimes abruptly, and in no particular chronological sequence. One form of expansion was from relatively major members to smaller and smaller members, such as portions of fingers. Complete loss of use was added to loss or loss by severance, on the quite reasonable argument that a person may, if anything, be better off with an amputation (thus permitting use of a prosthesis) than with a dangling arm or leg that not only is useless but gets in the way.

But the next extension, to "partial loss of use," opened the flood-
gates of controversy and litigation. Total loss was ordinarily self-evident, and total loss of use, under the standard definition of "no better off with the member than . . . if the member had been severed," was not much more difficult to observe and prove. But "partial loss of use" set the stage for the innumerable numbers games to be played by doctors, lawyers, administrators, and judges, endlessly quarreling about whether the loss of use of an arm was fifteen percent or twenty-two percent or thirty-nine percent.

The next step was to extend the schedule beyond members, to include the back, the internal organs, the head, the voice mechanism, the body as a whole, and, for good measure, a catch-all clause including anything else that might have been overlooked. It is no wonder that the problems both of disability evaluation and of proof became unmanageable when a nonmember schedule was combined with partial loss of use.

When upon all this is superimposed the practice of lump-summing, all resemblance to a wage-loss system is lost. If a worker is given $20,000 for some internal organ damage that has no conceivable effect, actual or presumptive, on earning capacity, it is no longer possible to pretend that the statute is still somehow only an extrapolation of the wage-loss principle aided by the conclusive presumption of eventual wage loss.

In classical compensation theory, since benefits are designed to forestall destitution by supplying regular periodic income, lump-summing is strongly discouraged. Theory is confirmed by experience, since it is a truism of compensation administrations in all countries that often the lump sum is soon gone and the community is right back where it would have been if there had been no compensation system at all—confronted with a helpless family that has no resources to draw upon.

In spite of both theory and experience, in some jurisdictions the practice of indiscriminate lump-summing has become increasingly common—indeed almost routine. The principal reason for the persistence of this problem is that practically everyone associated with the system has an incentive—at least a highly visible short-

54. See A. GEERTS, B. KORNBLITH & J. URMSON, supra note 17, at 104. The authors state: "Only the United States continue to award capital sums; everywhere else fear of the money being squandered leads to disability benefit for industrial injuries, being paid in the form of a pension (with some exceptions, particularly for minor injuries)." Id.
term incentive—to resort to lump-summing. The employer and carrier are glad to get the case off their books once and for all. The claimant is dazzled by the vision of perhaps the largest sum of money he has ever seen in one piece. The claimant’s lawyer finds it much more convenient to get his full fee promptly out of a lump sum than protractedly out of small weekly payments. The claimant’s doctor, his other creditors, and his wife and family all typically line up on the side of encouraging a lump-sum settlement. Who then is to hold the line against turning the entire income-protection system into a mere mechanism for handing over cash damages as retribution for industrial injury? It should be the administrator, but even he all too often is relieved to get the case removed from his docket. With all these pressures pushing in the direction of lump-summing, it is perhaps surprising that the practice has not become even more prevalent than it already has.

Of course, once a state deliberately severs the earning-capacity connection with a particular category of benefits, as Minnesota did in 1974 in the case of permanent partial awards, the anti-lump-summing rationales no longer apply. Minnesota accordingly has made lump-summing of permanent partial awards not only permissible but mandatory when return to work occurs prior to four weeks from the date of injury; in other permanent partial cases, the award is spread out into four installments at four-week intervals, unless temporary disability ceases or the claimant returns to work sooner, in which case the full amount is payable.

Minnesota’s dramatic statutory legitimation of the physical-impairment principle only serves to highlight the fact that, until very recently, the expansion of the schedule principle just sketched was not accompanied by any corresponding abandonment of the earning-capacity principle as a theoretical or doctrinal matter. Most states insisted throughout the process that the schedule was based on presumed loss of earning capacity.

Thus, Wisconsin, when it extended its schedule to injuries other than loss or loss of use of members, nevertheless stuck to this justification:

During the healing period it is possible to establish a wage loss because that is a past event. But since our award for permanent disability is to be made for all time at the end of this pe-

55. See Act of Apr. 12, 1974, ch. 486, § 1, 1974 Minn. Laws 1230, 1231 (current version at MINN. STAT. § 176.021, subd. 3 (1978 & Supp. 1979)).
period it must be based upon some sort of prediction as to impairment of earning capacity. It appears to us that the legislature has specifically chosen in the case of non-schedule permanent partial disabilities the method of comparing the severity of the injuries causing such a disability with those causing permanent total disability.  

Even in New Jersey, which was regarded as an extreme example of elaboration of the schedule and of the "whole-man" theory, the supreme court paid at least lip service to the impairment-of-earning-capacity presumption theory:

The benefits conferred by this particular provision have been classified by this court as in the nature of an indemnity for personal injury sustained, rather than for mere loss of earning power. But however this may be, the compensation is measured by the impairment of earning capacity, immediate or in the future. That is the essence of the statute.  

Minnesota's position, in spite of its expanded schedule, had been the same right up to the time of the 1974 amendment—indeed, this was why the amendment was thought necessary.

In recent years, however, several states have judicially broken ranks. North Dakota was the first, holding in 1974 that both a permanent total and a permanent partial ("22% disability of the whole man") award could be made for the same back injury—a result that can only be explained by assuming it to be based on a theory that the former is for loss of earning capacity and the latter for physical impairment. Several years later, the Kansas Supreme Court came right out and said that the primary purpose of that act was to compensate an injured worker for his physical injuries. The Michigan Supreme Court also appears to accept this new minority view. Thus, in redefining incurable insanity for the purpose of satisfying the statutory presumption of total disability in insanity cases, the court rejected any necessity for relating the

57. Wagner v. Industrial Comm'n, 273 Wis. 553, 567c, 80 N.W.2d 456, 457 (1957) (on rehearing) (emphasis added) (quoting Northern States Power Co. v. Industrial Comm'n, 252 Wis. 70, 76, 30 N.W.2d 217, 220 (1947)).
mental impairment to industrial disability. It was enough that "social or cognitive dysfunction" was shown, severe enough to affect the quality of the worker's personal life in a significant way.

V. THREE PRACTICAL PROBLEMS UNDER "PHYSICAL IMPAIRMENT AWARD" STATUTES

While the statutory and judicial departures illustrated in the preceding section may have the advantage of reconciling theory with actual practice in states where the expansion of the schedule principle has reached an advanced stage, this abrupt attempt to transform long-established underpinnings of the system with no corresponding adjustment of its remaining structure or details is bound to generate serious problems. Three of these problems, selected because they appear to have had almost no attention up until now, will next be examined.

A. Basing the Amount of a Non-Earning-Capacity Award on Prior Earnings

Suppose A's previous average weekly wage was $400 and B's was $150. Suppose each suffers industrial loss of his voice mechanism. In Minnesota, A would get an award at the maximum rate of $197 a week; B's award would be based on 66 2/3% of $150, or $100. For 500 weeks, A would get $98,500. B would get $50,000. Why? If what is being compensated for has nothing to do with loss of earning capacity, of what relevance are prior earnings? Indeed, it takes no vivid imagination to construct possible combinations in which the disparity is not merely senseless but outrageous. A may be in private life a recluse who never talks to anyone anyway. B

63. We are persuaded that the legislative purpose was to provide compensation for severe mental illness or cognitive loss comparable in its impact on the quality of the personal, nonvocation life of the worker to the loss of two members or sight of both eyes, the other permanent and total disability categories in the original formulation of the present total and permanent disability provisions. . . . Such a loss may also affect the worker's wage earning capacity, but that is not determinative.

A worker who suffers such a severe work-related mental illness or cognitive loss is entitled to total and permanent disability benefits. Where there is no such severe impairment of the quality of life, total and permanent disability benefits, separate and apart from general disability benefits may not be awarded even if the mental illness or cognitive loss deprives the worker of wage earning capacity.

Id. at 81-82, 268 N.W.2d 35-36 (footnote omitted).
64. See MINN. STAT. § 176.101, subd. 3(38) (1978 & Supp. 1979).
may be an amateur opera singer. \( A \) still gets almost twice as much as \( B \).

Suppose \( X \) is a seventy-eight-year-old executive making $5,000 a week, and \( Y \) is a young manual worker getting only $60 a week. Suppose both lose their testicles in industrial accidents. There being no minimum on permanent partial in Minnesota, \( X \) would get five times as much for his loss as would \( Y \).

Compounding the preposterousness of results of this kind is the added fact that, under the exclusive remedy clause, each loses any common-law right he might have to sue the employer in tort, if employer negligence was involved. \( Y \)'s tort damages would obviously be much higher than \( X \)'s—certainly at least ten times higher. The injustice to \( Y \) is thus not just five-fold, but at least thrice five-fold.

If a case presenting anything like these hypothetical examples were to arise, it might well be that the magnitude of the injustice, unsupported by any rational state purpose, would raise this discrimination to the level of unconstitutionality.\(^6\)

B. Imposs'ibility of Rationally or Fairly Rating "Disability" When the Tie with Earning Capacity is Severed

The schedule approach, exemplified by the Minnesota statute, presupposes that there is an abstract and uniform measure of "disability" that is valid and fair for all persons, apart from their activities or occupations. What, for example, does "loss of use" of three fingers mean? Loss of use for what purpose? Threading a needle? Lifting a bale of hay? Administering a karate chop? Holding a pencil? These are all "uses," after all.

This is a problem that has haunted compensation administrators for years—indeed ever since the schedule strayed beyond loss of major members. It is precisely the problem so presciently foreseen by Professor Bohlen,\(^6\) and indeed to this day accounts for a large proportion of compensation litigation.

In a Texas case,\(^7\) for example, an iron worker had suffered an

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\(^6\) The general constitutionality of the Minnesota amendment basing permanent partial awards on physical impairment was upheld in Tracy v. Streater/Litton Indus., 283 N.W.2d 909 (Minn. 1979), but the specific issue of the irrational disparity between the amounts awarded different claimants within a physical-impairment-compensation scheme was not raised.

\(^66\) See note 37 supra and accompanying text.

injury to his arm. The jury found total and permanent loss of use. The facts showed, however, that since the injury the worker had been using the arm in the same type of employment and at the same rate of pay for as many hours a week as other iron workers. The appellate court reversed the judgment as manifestly contrary to the evidence.\textsuperscript{68}

It would seem to follow that, if a court consults actual use of the member in the claimant's particular occupation to deny loss of use it must also consult actual nonuse of the member in his particular occupation to establish loss of use. Yet there is no lack of authority for the view that loss of use must be judged in purely functional terms. In Georgia, for example, an award based on thirty-five percent disability of the claimant's arm, "considering he was a laboring man on the assembly line," was reversed and remanded on the ground that a schedule award should be based upon physical impairment and not upon claimant's occupation or the impact on his wages.\textsuperscript{69}

This view rests on the idea that the loss-of-use concept is derivative from and equated with the concept of loss, and should therefore similarly be judged by functional loss. The practical fallacy is, of course, that while an amputation is an unambiguous "loss," an impairment of "use" is ambiguous in the extreme.

Michigan began with a hard functional-only interpretation in \textit{Hutsko v. Chrysler Corp.},\textsuperscript{70} refusing to give any weight to the fact that the partial loss of use of the claimant's hand rendered it completely useless for his particular skilled trade. But even since \textit{Hutsko}, Michigan has repeatedly held that "loss of use" means, not loss of all use or any use, but loss of "industrial use."\textsuperscript{71} By going even this far, a court has already ruled out a purely physical measurement as the test. How can it stop short of asking: in what industry or industrial occupation? The varieties of industrial use of a hand or leg are just as multifarious as the varieties of nonindustrial use. In some sedentary occupations, legs may literally not be necessary at all. As to hands, some occupations require a strong gripping ability, some precision in manipulation of small objects,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{68} See \textit{id.} at 929.
\item \textsuperscript{69} General Motors Corp. v. Sligh, 108 Ga. App. 354, 133 S.E.2d 56 (1963).
\item \textsuperscript{70} 381 Mich. 99, 158 N.W.2d 874 (1968).
\end{itemize}
\end{footnotesize}
some versatile handling of a variety of complex tools—while some require only the ability to push or lift rough objects. Which of these is "industrial use"?

The controversy will not die. In 1979, the New York Appellate Division was confronted with a textbook example of the problem. A court reporter had fallen and injured his left ear, and he was left with a 19.2% loss of hearing in that ear. This loss was enough, however, to disqualify him completely as a court reporter. New York had for many years operated under a rule that hearing losses must be treated as schedule losses. But the appellate division, evidently determined to find some way around the gross miscarriage of compensation law purpose that a strict application of this rule would produce, found its solution by holding that the condition was still "unsettled." It is elementary, of course, that schedule awards are not made when the condition has not yet stabilized, or when its effects extend beyond the member to other parts of the body. But here there was no physical instability, or swelling, or radiating pain. The percentage of hearing loss was clearly established by an otologist’s testimony. The only "unsettled" item adduced by the court was the fact that claimant had been inquiring about more effective hearing aids. The court upheld the referee’s decision that the injury was not schedulable and that continuing benefits for total disability should be paid.

The difficulty of evaluating disability in the absence of any standard, such as effect on work performance, is obvious enough when members like fingers, hands, eyes, or ears are involved. When extended to internal organs and the like it passes beyond the bounds of any rational solution.

Until 1979, the Minnesota statute stated that compensation for loss of internal organs was to be in an amount "for that proportion of 500 weeks which is the proportionate amount of disability caused to the entire body by the injury. . . ." The Minnesota

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73. See id. at 760, 419 N.Y.S.2d at 317.
74. The court said:
   Here the record establishes that claimant is totally disabled from performing his duties as a Court Stenographer as a result of his injury, and the record further indicates that claimant is inquiring about more effective hearing aids in order to improve his hearing . . . . In our view the record contains substantial evidence to sustain the board’s finding that under the circumstances of this case, claimant’s partial loss of hearing constitutes total disability.

Id. at 760-61, 419 N.Y.S.2d at 317.
Workers' Compensation Study Commission, whose February 1979 report was the basis for many of the 1979 amendments, called this passage "vague and unclear," and stated that it had "resulted in inconsistent, confusing and subjective compensation awards and an increase in litigation." 76

To take only one actual reported example: what is the proportionate disability to the entire body represented by the loss of a kidney? The claimant argued that 100% loss of a kidney should yield an award for the entire 500 weeks. The compensation court found him fifty percent permanently partially disabled and awarded 250 weeks. The supreme court agreed that a percentage determination could not be made by simply looking to the percentage of the organ lost, and directed the compensation judge to look at the percentage of permanent partial disability the claimant had suffered. 77

But is the "entire body" of a person who has lost one kidney really fifty percent disabled? Indeed, as long as the other kidney is functioning normally, is the person disabled at all? Disabled from doing what?

The Study Commission accordingly recommended that the Legislature provide a specific schedule for internal organs comparable to that for other members. It is significant that the Legislature responded, not by supplying a schedule, but by "passing the buck" to the Commissioner of Labor and Industry, who is delegated the unenviable task of promulgating such a schedule, completely unaided by any legislative standard. 78 Such a schedule must presume to announce the relative value of all organs, not only by comparison with members already evaluated in the list by the Legislature, and not only in relation to the body as a whole but also in relation to each other. Which is worth more—a kidney or a testicle? A testicle or a uterus? Heart damage or liver damage? At this writing, no schedule has yet appeared.
In several of the earliest compensation statutes, perhaps because of an awareness of the hazards of cutting loose completely from an industrial-use standard of disability, this standard was retained at least in part. California, since it had no list of members, but only a series of percentages, prescribed that occupation and age should be taken into account in determining percentage of disability. Nevada and Kentucky provided schedule lists, but followed them with a catch-all clause that takes into account occupation and age.

In the case of Minnesota, it comes as something of a surprise to discover an occupation-related catch-all also, at the end of its elaborate schedule. Admittedly, by the time one reaches subsection 49, there is little left for the catch-all to catch. But for any such unlisted disability, the test becomes pure earning capacity. This catch-all was evidently overlooked when the Legislature decreed flatly in another section: "Permanent partial disability is payable for functional loss of use or impairment of function, permanent in nature, and payment therefore shall be separate, distinct, and in addition to payment for any other compensation."

Apart from the obvious possibility, created by this passage, of troublesome questions of duplicate benefits both measured by loss of earning capacity, the switch from a physical-impairment to an earning-capacity standard in subsection 49 inevitably precipitates the fundamental question: how can one justify, in the same statute and in the same category, i.e., permanent partial, a physical-impairment standard for some injuries and an earning-capacity standard for others—depending solely on the accident of whether the Legislature has got around to adding a particular item to the list by name?

79. See Act of May 26, 1913, ch. 176, § 15, 1913 Cal. Stats. 279, 284; note 50 supra and accompanying text.
82. In all cases of permanent partial disability not enumerated in this schedule the compensation shall be 66 2/3 percent of the difference between the daily wage of the worker at the time of the injury and the daily wage he is able to earn in his partially disabled condition, subject to a maximum equal to the statewide average weekly wage, and continue during disability, not to exceed 350 weeks; and if the employer does not furnish the worker with work which he can do in his permanently partially disabled condition and he is unable to secure such work with another employer after a reasonably diligent effort, the employee shall be paid at his or her maximum rate of compensation for total disability.

MINN. STAT. § 176.101, subd. 3(49) (1978).
83. MINN. STAT. § 176.021, subd. 3 (1978).
C. Physical-Impairment Awards Carried to Their Logical Conclusion

Sometimes a striking way to test the soundness of a principle is to see what happens when it is carried to its logical conclusion. In Bagge's Case,84 decedent lived seventeen to twenty-four minutes, in a coma, after being struck on the head. His dependents were awarded full death benefits. In addition, they were awarded full permanent partial benefits for loss of both eyes, both ears, both arms, both legs and other bodily functions. The court felt compelled to do this by the statutory provision, present in the Massachusetts Act from its inception, that schedule awards are payable "in addition to all other compensation,"85 and a 1951 amendment making the unpaid balance of such compensation payable to dependents.86

This case was followed a few years later by the appearance in New Hampshire of Corson v. Brown Products, Inc.87 The facts were similar, except that the coma lasted much longer and that the worker had not died at the time of the original award. A similar additional award was made, amounting to over $400,000. New Hampshire promptly took preventive legislative action,88 but Massachusetts so far has not.

There seems to be no reason why a similar result could not occur in Minnesota—with some extras thrown in, such as loss of voice and the like. The act states:

The right to receive temporary total, temporary partial, permanent partial or permanent total disability payments shall vest in the injured employee or his dependents under this chapter or, if none, in his legal heirs at the time the disability can be ascertained and the right shall not be abrogated by the employee’s death prior to the making of the payment.89

Suppose instead of seventeen or twenty-four minutes, the employee lives one minute. Should this random fact of sixty-second survival rather than instantaneous death determine whether relatives get a $400,000 windfall? Or if one minute, why not one sec-

ond? How often, one wonders, is accidental death absolutely instantaneous?

To summarize, the last three sections identify only three of the more practical objections to the physical-impairment approach: It begins by taking one factor, prior wage, which, since what is compensated for is physical loss as such, is utterly unrelated to the purpose of the award. It then multiplies this factor by a second factor, degree of disability, which is utterly unrelated to any activity, industrial or non-industrial. Then, if the worker has been considerate enough of his relatives to survive a few minutes in a coma, they may receive, on top of dependency benefits, a windfall of $400,000, which is utterly unrelated to anything.

VI. MOTIVES BEHIND THE MOVEMENT TO RESTORE THE WAGE-LOSS PRINCIPLE

There are two main motives behind the present movement to restore the wage-loss principle. The first is reducing waste of the compensation dollar on nondisabling losses. The second is reducing waste of administrative, legal, and judicial time and resources.

As to the first, the beginning point is that the fund available for compensation payments is not infinite. If, for example, eighty percent of the compensation dollar is frittered away on small schedule awards for conditions that are in no sense disabling, as has happened in New Jersey, inevitably the ability of the system to do its real job, that of taking adequate care of the really disabled, is damaged. It is not surprising to find that New Jersey continues to have one of the lowest maximum limits on weekly benefits of any major industrial state—only seventy percent of the state average weekly wage, or $185. Its most comparable neighbor, Pennsylvania—an essentially wage-loss state, has a maximum of one hundred percent of the state average weekly wage, or $242.

That the relationship between wage-loss statutes and a higher maximum limit on weekly benefits is no mere theory is demonstrated by what happened in Florida. Before the wage-loss reform, the maximum weekly benefit was $130; with the reform it became one hundred percent of average weekly wage, or $211.

Again, it should not be necessary to belabor the argument that, assuming a given amount of benefit money available, this eighty-

90. This illustrative percentage is based on inquiries made by the author some years ago in New Jersey.
three dollar differential is much better used in preventing destitution among actually-disabled workers for whom it is probably the sole source of income, than in scattering cash awards among workers who in many cases are still employed at full wages.

As to the second motive, reducing litigation, it should be remembered that this was one of the principal reasons for replacing common-law remedies with compensation in the first place. For a time, at least, this objective appears to have been realized, as evidenced by this excerpt from a 1917 text:

The enormous sums which were paid to any army of lawyers and witnesses on both sides of controversies between employers and employés, over personal injury cases, are now being saved. The machinery of the courts is no longer clogged with such controversies. . . . An accidental injury to an employé no longer creates a condition of guerrilla warfare between the injured employé and his employer, with the corollary of sharp practice, perjury and recrimination.

Injured employés, and their dependents, when killed, are receiving, under compensation laws, assistance when they most need it, instead of waiting for years for the final determinations of courts of last resort . . . .

As to the schedule, recall that, according to Professor Bohlen, the purpose was not merely to reduce, but to “prevent,” litigation.92

The paradox is that this very feature, the schedule, as distorted over the years, is now of all issues the largest producer of litigation. In Florida, for example, before the 1979 reform, it was estimated that quarreling about disability evaluations consumed seventy-nine percent of administrative and legal time.

VII. THE FLORIDA “WAGE-LOSS REFORM” AMENDMENTS OF 1979

The trends discussed so far in this Article, coupled with the motives just described, finally in 1979 produced a sharp reaction, in the form of a set of amendments to the Florida compensation act designed to reestablish the centrality of the wage-loss principle.93

The “wage-loss” approach is here used to refer to a system that

91. H. BRADBURY, WORKMEN’S COMPENSATION LAW 2-3 (3d ed. 1917).
92. See note 35 supra and accompanying text.
pays income benefits only for periods during which there has been in fact a reduction or loss of earnings.94

The Florida plan contains only two relatively minor exceptions to the principle. Having abolished the conventional category of "permanent total," it does retain that designation for the very limited category involving loss of two major members, in the absence of conclusive proof of a substantial earning capacity.95 Note that this requires an actual loss, as by amputation. Loss of use is not enough.

In all other cases, total disability is to be "determined in accordance with the facts."96 The burden of proof at this point is placed on the claimant, and it is a stiff one. He must demonstrate that he "is not able uninterruptedly to do even light work due to physical limitation."97

The most significant changes are found in the new subsection on "permanent impairment and wage-loss benefits."98 Gone are "permanent partial," "schedule benefits," and "disability ratings." The subsection begins with the second small concession to the past. In a limited group of losses including only permanent impairment due to amputation, loss of eighty percent or more of vision, after correction, or serious facial or head disfigurement, falling short of the permanent total category, a token "up-front" payment is made of fifty dollars for each percent of permanent impairment of the body as a whole up to fifty percent, and one hundred dollars for

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94. It may be noted here that, for the purposes of contrast with the physical-impairment trend, this Article has referred to "wage-loss" and "impairment of earning capacity" more or less interchangeably. A "pure" wage-loss statute, like many of the earliest ones noted, may literally do no more than compare actual post-injury and pre-injury earnings, and of course would have no schedule. The "loss of earning capacity" concept leaves room for adjustments in both pre- and post-injury earnings, to arrive at an accurate representation of true impact attributable to the injury. For example, allowances may be made for economic increases in wage levels, for changes in the claimant's age, training, or hours, for distortion of wage by employer sympathy, or for the impermanence of particular post-injury earnings. See 2 A. LARSON, supra note 31, §§ 57.32-40. Even a limited schedule is not necessarily inconsistent with the wage-loss approach, provided the two conditions identified by Professor Bohlen are satisfied. See note 36 supra and accompanying text. The impairment must be severe enough so that the conclusive presumption of wage loss is realistic and not fictitious. In addition, the loss must be obvious enough so that the reason for indulging in the presumption—administrative convenience and prevention of litigation—is also realistic.

96. Id.
97. Id.
each percent above fifty—which obviously cannot amount to more than $7,500 in the most severe case. From there on, everything depends on actual wage loss. The calculation is made on a monthly basis. Actual earnings are subtracted from eighty-five percent of the employee's pre-injury average monthly wage. This difference is then multiplied by ninety-five percent, and the remainder becomes the differential that is payable. Thus, if the pre-injury wage was $1,000, and the post-injury earnings $500, one would subtract $500 from $850, then take ninety-five percent of the resulting $350, to produce a benefit of $332.50. In any event, the benefit cannot be more than 66\(\frac{2}{3}\)% of prior wage—which would come into play in cases of very low subsequent earnings. If these subsequent earnings were $100, one would get this calculation: $850 minus $100 times ninety-five percent which equals $712.50. This figure would have to be reduced to $666.67.

There follows a passage of unusual importance, both as to practical equity and as to the real theoretical foundations of the "wage-loss" principle. After stating that the post-injury earnings figure can never be taken as less than actual earnings, the amendment goes on to say that in two cases it may be more. The first is that in which claimant has voluntarily limited his earnings. The second, and more important, occurs when he "fails to accept employment commensurate with his or her abilities." In such cases, the post-injury earnings are deemed to be "the amount which would have been earned if the employee did not limit his or her income or accepted appropriate employment."

The importance of this provision for disability theory is that it tempers the rigid actual-wage-loss test with the earning capacity test. It is earning capacity that should be crucial; actual wage-loss is significant as the best evidence of loss of earning capacity, but obviously some adjustments based on what the worker is "able to earn" must be made in such cases as the two provided for in this statute, to avoid conspicuous injustice.

Here again, as in the limited category of total permanent, the burden of proof of compensability of the wage loss is placed

99. Id.
101. Id. § 440.15(3)(b)(2).
102. Id.
103. See note 94 supra.
squarely on the claimant. 104 There are three specific grounds for termination of wage-loss benefits. The first appears to be addressed to a situation in which periods of qualifying for benefits have become so sporadic and rare that it may be presumed that there is no longer a serious ongoing disability: at the end of two years, if wage-loss benefits have not been paid for at least three consecutive months, all such benefits will end. 105

Benefits also cease when the recipient reaches age sixty-five. 106 And there is a flat outside time limit—for injuries occurring before July 1, 1980, 350 weeks, after July 1, 1980, 525 weeks, from the time of maximum medical improvement. 107 When the worker reaches age sixty-two, benefits are reduced by the amount of social security retirement benefits, up to fifty percent of wage-loss benefits. 108 Temporary total and temporary partial also, of course, remain on a wage-loss basis.

The second major package of reforms, that of simplifying the entire process of payment, is closely related to the wage-loss reform, in the sense that it is feasible only because the wage-loss reform has eliminated much of the complexity that consumed the time of lawyers, administrators, doctors, and judges—notably by getting rid of the tedious and artificial quarrels over the disability rating. Instead of this mystic number, which might or might not bear some discoverable relation to real disability relevant to compensation purposes, the key is now the straightforward provable fact of wage loss. 109

One theme pervading the amendments is that of doing everything possible to enable the claimant to look out for himself. Within seven days of actual knowledge of the injury, the employer must report it not only to the carrier, but also to the division and to the employee—including “a clear and understandable summary statement of the rights, benefits, and obligations of injured workers

104. The statute states: “Whenever a wage-loss benefit as set forth in subparagraph 1. may be payable, the burden shall be on the employee to establish that any wage-loss claimed is the result of the compensable injury.” FLA. STAT. ANN. § 440.15(3)(b)(2) (West Cum. Supp. 1980).
108. See id. § 440.15(4).
109. See id. § 440.15(3)(b).
under the Florida Workers' Compensation Law."\(^{110}\)

Just in case this might not be enough, the division on receipt of the report of injury shall "immediately mail to the injured worker an informational brochure as prescribed by the division which sets forth in clear and understandable language a summary statement of the rights, benefits, and obligations of injured workers under the Florida Workers' Compensation Law, together with an explanation of its operation."\(^{111}\) Then, on the chance that even two "clear and understandable" explanations have not got the message across, the division, in cases of apparent permanent injury, is supposed to contact the worker within three days, by telephone if possible, to discuss his rights and benefits and assist him in securing the benefits to which he is entitled:}\(^{112}\)

The employee too has a definite duty to do his part in the general pattern in which everyone keeps everyone else informed. If he suffers a compensable wage loss, he must report it to his employer within thirty days. The employer has a duty to inform the employee of this requirement.\(^{113}\)

Florida is, and was before the amendments, a "direct-payment" state. Accordingly, not only temporary disability and death benefits, but now the new "wage-loss" benefits must begin within fourteen days of the date of knowledge of the compensable wage loss, and failure to do so results in penalties, unless the claim is controverted.\(^{114}\)

An important change has been made in the formal claim procedure. One of the abuses of the past, which had seriously impeded the handling of legitimate claims, was the practice of filing "shotgun" claims, demanding "any and all" benefits to which claimant might be entitled, and insisting on hearings as well. Under the new procedure, the claim must state specifically the benefit that is claimed to be due but unpaid.\(^{115}\) Any nonconforming claim is subject to dismissal.

An informal procedure is provided in which the division ana-

\(^{110}\) \textit{Id.} § 440.185(2)(e).
\(^{111}\) \textit{Id.} § 440.185(4).
\(^{112}\) \textit{See id.}
\(^{113}\) \textit{See id.} § 440.185(10).
\(^{114}\) \textit{See id.} § 440.20(1).
lyzes each claim to see if it can be resolved without a hearing, and gives the parties non-binding advisory opinions.

As to hearings, the rules are sharply tightened to eliminate the wholesale and routine hearing demands of the past: "An application for a hearing concerning a claim shall . . . state the reasons for requesting a hearing and the questions in dispute which the applicant expects the deputy commissioner to hear and determine, so that the responding or opposing parties may be notified of the purpose of the hearing."116 Again, any noncomplying application is subject to dismissal.

A further move toward discouraging excessive use of lawyers is a curtailment of the availability of "add-on" attorney's fees, a device pioneered by Florida.117 Such add-on fees, in which the claimant's attorney's fee is added to the award, are now allowed in only three situations: (1) a successful claim for medical benefits only; (2) a case involving bad faith on the part of the carrier causing the claimant economic loss; and, (3) a contested case in which the payability of benefits is denied and the claimant prevails on the issue of coverage.118 The principal effect of this limitation is that add-on fees will not be sanctioned when the only issue was degree of disability.

Finally, it may be noted that all of this is accompanied by an upgrading of the responsible administrative body to the status of a separate division within the Department of Labor and Employment Security, to be known as the Division of Workers' Compensation. In keeping with the theme of maximizing administrative participation in disposing of cases, both the number and the status of positions within the division are increased.119

VIII. OTHER WAGE-LOSS LEGISLATION DEVELOPMENTS

The "back to wage-loss" movement is by no means confined to Florida. For example, in the opposite corner of the country, Oregon is seriously considering a reform that carries the movement

117. See 3 A. Larson, supra note 31, § 83.12.
even further, and adds an exciting new dimension of its own by making the primary goal of the system the rehabilitation and re-employment of the injured worker.\textsuperscript{120}

The adoption of the wage-loss principle would be even more definitive than in Florida, in that no exception is made for major member total permanent disability, and no token payment is made for any other permanent impairments.\textsuperscript{121} Oregon would thus extricate itself even more completely than Florida from the mare's nest of disability evaluation.

The distinctive feature about the proposed Oregon plan is that everything is focused on reemployment. This begins with the change of name of the law to the Workers' Recovery Law,\textsuperscript{122} and is announced emphatically in the statute's statement of purpose: "The primary purpose [changed from "one purpose"] of this chapter is to restore the injured worker as soon as possible and as near as possible to a condition of self support and maintenance as an able-bodied worker."\textsuperscript{123}

That this is no mere empty generality is shown by the operative sentence that follows:

Claims shall not be closed . . . nor wage loss benefits terminated until one of the following occurs:

(a) The attending physician has approved the worker's return to regular employment;

(b) The worker refuses to comply with the work-rehabilitation plan ordered by the director;

(c) The worker commences employment; or

(d) The worker is able to perform work at a gainful and suitable employment.\textsuperscript{124}

The heart of the plan is a new portion applicable only to employers of ten or more. If the employee is able to perform the primary duties of his position, the employer must reinstate him.\textsuperscript{125} If the employee cannot perform these duties, the employer must nevertheless reemploy him in any other position whose primary duties the employee is able to perform. To this end, the department may

\begin{itemize}
  \item \textsuperscript{120} See H.B. 3125, 60th Or. Legis. (1979).
  \item \textsuperscript{121} See id. § 5.
  \item \textsuperscript{122} Id. § 8(3). Corresponding changes are made in the names of the Board and Department. See id. § 8(1)-(2).
  \item \textsuperscript{123} Id. § 26(1).
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} See id. § 2(1)(a).
\end{itemize}
even require reasonable job site modifications.\textsuperscript{126}

If neither of these courses is open, the department must commence an extremely thorough rehabilitation, retraining, and job search program.\textsuperscript{127} All of this is backed by a tough provision for suspension of all income benefits to an employee who refuses reemployment or a work-rehabilitation plan without good reason.\textsuperscript{128}

Another theme pervading the draft is that of incentive and motivation. Since the strongest possible disincentive to reemployment is receipt of benefits exceeding wage, every precaution is taken to forestall this possibility. Thus, not only federal social security receipts are an offset to wage-loss benefits,\textsuperscript{129} but benefits from any government program,\textsuperscript{130} and even private benefits from a plan contributed to by the employer, up to the worker's sixty-second birthday.\textsuperscript{131}

There are many other interesting and ingenious proposed changes, only one of which may finally be noted. As an incentive to induce new employers to employ a worker who has not been reemployed by his old employer, the “director may pay such amounts as are necessary as an incentive to reimburse new employers for wages paid to injured workers,” up to twenty-five percent of the wage for the first four months, and up to thirteen percent of the wage for the fourth to eighth months.\textsuperscript{132}

Delaware also in 1980 had under active consideration a wage-loss bill, based on a study and recommendations of the broadly-based Delaware Workmen's Compensation Study Commission.\textsuperscript{133} The bill, in addition to making wage-loss replacement the central mechanism of the act,\textsuperscript{134} adopts the direct-payment method of administration.\textsuperscript{135} It is also notable for its thoroughness in coordinating compensation benefits with those of other systems, both public and private.\textsuperscript{136} However, it goes much further than the Florida Act in making concessions in the form of “supplemental benefits,”

\begin{itemize}
\item[126.] \textit{See id.} § 2(2).
\item[127.] \textit{See id.} § 3.
\item[128.] \textit{See id.} §§ 4(5), 6(3).
\item[129.] \textit{See id.} § 7(1).
\item[130.] \textit{See id.} § 18.
\item[131.] \textit{See id.} § 12(4).
\item[132.] \textit{Id.} § 45(2).
\item[133.] \textit{See S.B.} 582 (Substitute 1), 130th Del. Gen. Ass. (1980).
\item[134.] \textit{See id.} § 2221.
\item[135.] \textit{See id.} § 2220.
\item[136.] \textit{See id.} § 2215.
\end{itemize}
independent of actual wage loss, for loss or loss of use of major members—but the amounts are substantially smaller than present schedule awards.\textsuperscript{137} A notable contribution to good administration is provided by the creation of the office of "coordinator," a sort of ombudsman who takes individual responsibility for particular cases, and to whom the claimant can always turn for help with his claim.\textsuperscript{138} Because of the savings from eliminating full-size schedule awards, the bill is able to raise the maximum benefits for weekly benefits to almost double their current level.\textsuperscript{139}

Finally, it may be noted that Saskatchewan actually enacted in 1979 a wage-loss type of act,\textsuperscript{140} again on the strength of an excellent study by the Saskatchewan Workers' Compensation Act Review Committee. The Saskatchewan Act resembles the Delaware bill in allowing non-wage loss payment for permanent impairments, also at a much lower rate, not to exceed $10,000.\textsuperscript{141} Similar reform bills are under consideration in other Canadian provinces.

\section{IX. Conclusion: The Fifty States as Fifty Laboratories}

Out of all the disagreement on basic compensation issues reflected in this discussion, there may well emerge at least one point of agreement: the states should be free to experiment with different and even conflicting ideas of what a compensation system should be and how it should work.

For some years, the overriding controversy in compensation circles has centered around the prospect of some form of federal standards. In 1979, this issue appeared to give way to the wage-loss controversy as the principal topic of conferences, seminars, and debates. Indeed, the emergence of the wage-loss reform movement, as exemplified by the Florida amendments and the Oregon bill, is one of the strongest possible arguments against federal standards, under which this kind of experimentation would unavoidably be stifled. Historically, at least until very recently, practically all innovations in workers' compensation have been the result of the freedom of individual states to discover by trial and error what works and what does not. The second injury fund, for example, was an ingenious invention that solved the problem of the impedi-

\textsuperscript{137} See id. § 2224.
\textsuperscript{138} See id. § 2240.
\textsuperscript{139} See id. § 2221.
\textsuperscript{141} See id. § 67.
ment to hiring of the handicapped produced by the "full-responsibility rules," while still paying full benefits for injuries contributed to by the handicap—a device which all states but one\footnote{142} have adopted, with assorted variations that are constantly being added to.

Nothing could be healthier for workers' compensation than to have a number of states undertake their own efforts in their own way, as many are doing, to find solutions for the perennial and growing compensation problems of soaring costs, excessive litigation, misplaced expenditure, and inadequate protection. Then let experience be the judge.

But while experience is being gained, there must also be patience. It will be at least two or three years before any useful appraisal can be made of the Florida reform, for example. The signs so far are reassuring.\footnote{143} The system appears to be working as its sponsors had hoped. Meanwhile, as suggested at the outset, the working out of Minnesota's extreme physical-impairment approach can also be watched. Here the signs are less encouraging. In 1974, when Minnesota avowedly adopted the physical-impairment theory by legislative amendment, its average manual rate was $1.65—ranking twenty-first in the country. By 1978, it had risen to $2.83, placing it fourteenth in rank.\footnote{144} The rate of litigation in Minnesota is also very high—twenty times that of South Dakota and two and one half times that of Wisconsin.\footnote{145} The Minnesota Study Commission singled out disability evaluation as a significant factor in producing this rate.\footnote{146} It may be only a matter of time until Minnesota finds itself approaching the situation Florida faced in 1978—with a $5.30 manual rate, and with seventy-nine percent of litigation time consumed by disability evaluation controversy.

For this reason, it has been thought useful to provide the present analysis, for the benefit of not only Minnesota but other states traveling down the same road, to point out some of the pitfalls on that road, and to examine the choice made by one state, Florida, to avoid them by a complete change of direction.

\footnote{142}{Only Georgia has no such fund.}
\footnote{143}{Since the reforms took effect in August of 1979, the number of wage-loss claims is 574, compared to 13,000 permanent partial disability claims for a similar period under the old act. \textit{See} Kaplan, \textit{Suit Challenges Work Comp Law}, Business Insurance, Aug. 4, 1980, at 1.}
\footnote{144}{\textit{See} Study Comm'n, \textit{supra} note 76, at 165.}
\footnote{145}{\textit{See} id. at 212.}
\footnote{146}{\textit{See} id. at 213.}