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WORKMEN'S COMPENSATION IN OHIO

FOREWORD

ARTHUR LARSON*

Emerson once said that, if you take a jar of honey and turn it upside down, the first two-thirds of the contents will pour out almost immediately. But you could be turned into a marble statue and hold the jar into eternity, and the last one-third would never all come out.

So it has been with workmen's compensation in America. In the decade from 1911 to 1921, when revulsion against the inadequacies of common law remedies for industrial injuries was at white heat, workmen's compensation laws burst across the country so rapidly that all but eight states had such laws by 1920.

It took thirty years to cover the remaining eight.

Similarly, for various reasons chiefly having to do with administrative difficulty, coverage of the original acts was incomplete, as to employers and employees covered, kinds of injury and disease, and circumstances of injury. In forty years we have never been able to close those gaps.

As to coverage of persons: we still see the same old exceptions in most states: agricultural, domestic, charitable, educational, small-firm.

As to kinds of injury and disease: we still in some states see, for example, narrow schedules of occupational disease, and discrimination against mental and non-traumatic harms.

As to circumstances of injury: we still see a variety of restrictions—"by accident," narrow "arising-out-of" tests, and the like.

The reason for this honey-jar phenomenon is not at all mysterious. The same thing has happened in almost every field of remedial legislation or action. We get perhaps something under half of the work force covered by minimum wage legislation and two-thirds by unemployment compensation, we reduce air and automobile accidents to a certain level, we get teacher shortages down to a certain point; then we seem to conclude that the unsolved problems and evils are, though unfortunate, somewhat tolerable, and we ease up on the pressure for improvement. The most potent groups and organizations lose some of

*Director, World Rule of Law Center, Duke Law School.

the original burning fervor for reform. The unprotected minority are apt to be weak and unorganized.

Of course, improvements are constantly being made in workmen's compensation.

But the trouble is that the new demands on workmen's compensation are outrunning the progress being made in catching up with old deficiencies!

We must remember that we are dealing with a piece of legislation that, in essence, is a product of the Gay Nineties. Most of our acts, as mentioned above, are themselves over forty years old, and they in turn were heavily patterned after the British Act of 1897.

In some states, compensation acts, by virtue of constant amendment, have been brought to a reasonably advanced state. But even the best acts are unprepared for many of the demands put upon them by the new conditions of today and tomorrow.

Let us merely list several of the contemporary developments that require adjustment in compensation laws.

CORRELATION WITH OTHER SOCIAL INSURANCE. When workmen's compensation started, it had the field to itself. Now there is an urgent need to incorporate specific provisions defining the relation of workmen's compensation benefits to social security and unemployment insurance benefits, as well as to lesser systems.

ATOMIC RADIATION AND OTHER NEW HAZARDS. Entire new categories of injury and disease are already upon us, and others may be looming in the future. States with specific lists of covered occupational diseases are still far from catching up with diseases that were well identified over twenty-five years ago, such as silicosis. Must we again wait twenty-five years before we get around to dealing with radiation poisoning, hard metal poisoning, and other new diseases?

MENTAL AND NERVOUS INJURY. When the original acts were passed, mental injury was too elusive to be easily handled as a subject of liability. We still have much to learn, but we know enough by now to test work-connection in most cases, and we have little excuse for continued slighting of this peculiarly tragic kind of disability.

CONFLICT OF LAWS. Jurisdictional questions have multiplied in recent years, because of the high volume of interstate employment in transportation, construction, and commerce. The gears of our state conflict of laws sections are wildly out of adjustment. Sometimes they pile up all over each other, with great clashing and jamming. Sometimes they miss each other completely, so that the purpose of compensation is thwarted altogether.

NEW EMPLOYMENTS. All kinds of new categories of employment are appearing, many of which miss coverage in the usual act: civil defense workers; workers on industrial farms; quasi-independent con-

tractors, who are employees in fact but contractors under common law tests.

SECOND INJURY FUNDS. Great strides have been made in employment of the physically handicapped. But many acts still do not have a good second-injury provision to facilitate this kind of employment, especially when the impairment is more subtle than obvious loss of a member.

REHABILITATION. Techniques of rehabilitation have been vastly advanced in recent years. Yet only a minority of statutes make a specific effort to supply both the administrative supervision and the financial support that are necessary to make rehabilitation a standard concomitant of compensation recovery.

Many other examples of this kind could be given, but these may serve to support the basic contention, which is that the problem of workmen's compensation is getting away from us faster than we are catching up with it.

What can we do about it?

Most of all we need, before much longer, to make a Big Push. Improvements as usual will not do the job.

I want to call particular attention to the fact that I am not talking about liberalization and generosity as such; I am talking about improvement. Often improvement will take the form of liberalization. But often it takes the form of greater efficiency and resultant savings—as when duplications between social insurances are eliminated, or costly jurisdictional questions avoided, or compensation benefits and premiums reduced by putting rehabilitated men back to work.

As one contribution to the special effort needed, especially in meeting the sort of newer problems mentioned above, several of us in the Labor Department prepared a check-list of successful and useful provisions for compensation acts. Although we had consulted with a number of state administrators in advance, and although we offered the draft merely for the convenience of states, the project fell victim to the misguided notion that this modest and gentle service was really a veiled campaign to federalize workmen's compensation. However, I understand that this draft is still being used as a guide in a number of states and has had an impact on specific legislative changes. It can serve a valuable purpose in making available to *each* state, in one place, the fruits of the best efforts, trials and errors, and draftsmanship, of *all* states.

Of course, legislation is only part of the process of amelioration. Judicial decision contributes a large part toward helping the acts carry out their real purpose with increasing effectiveness. It is gratifying to watch the steady rounding-out of case law on such issues as the aggressor defense, hotel-fire injuries, heart attacks caused by normal exertion, and dozens of other similar developing doctrines. Now and then, in

place of this measured advance, we see a display of dazzling decisional progress—as in the case of Michigan recently.

The kind of improvement we need will require special efforts on all fronts: judicial, legislative, administrative, medical, academic, and professional.

This symposium is a contribution to the kind of basic understanding which must be central to any successful effort, and I commend the thoughtfulness of the editors of the Ohio State Law Journal in making it available to us.