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On Efforts to Reform Workers' Compensation for Occupational Diseases

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Background

In very recent years, the topic of occupational diseases has become a subject of discussion at the various conferences and seminars that are held on workers' compensation. This reflection of the considerable interest in the adequacy of the state workers' compensation systems in terms of diseases associated with the workplace represents a dramatic change from the disinterest in the subject that characterized the period before the mid-1970s. The reasons for the remarkable growth in attention to this subject need not occupy us here. What is of interest, however, is that the context of these discussions seems to be, invariably, the problems and difficulties of providing a sound, adequate and fair public program to compensate victims of such disabling and killing diseases. In the presence of such widespread concern, much discussion has focused upon efforts to reform workers' compensation. The purpose of this essay is to describe the essential questions that potential reformers must resolve as they design alternative mechanisms that seek to improve the functioning of the compensation system. Most of the efforts to

broadly change occupational disease compensation have not been successful. This failure is partly due to the complexity of these questions and to the broader implications of the possible answers.

Efforts to reform occupational disease compensation cannot be analyzed *in vacuo.* Beginning in about 1969, a variety of steps were taken that were designed to fundamentally alter the nature of state workers' compensation laws. In the wake of the Farmington, West Virginia coal mine disaster, Congress enacted the Coal Mine Health and Safety Act that year. Title IV of the law dealt with the widely perceived inability of state laws to compensate victims of coal workers' pneumoconiosis by creating a federal compensation program, with coverage ostensibly limited to a single disease, for a single occupation, and with eligibility limited in several important respects. For example, benefits were to be paid only for death or permanent total disability, thereby totally excluding any direct involvement with temporary disability or partial disability.

The Black Lung program initially attempted to split up compensation by paying benefits out of federal general revenues to victims with "old cases," and by turning over to the states newly developing cases after a short period of transition. The law was significantly amended in 1972, 1977 and 1981. For our purposes, it is sufficient to observe that it has become a permanent federal program, one whose presence serves as a constant reminder of federal activity in the workers' compensation field.

The second major impetus for reform in that era was the Report of the National Commission on State Workmen's Compensation Laws issued in 1972. The Commission owed its existence to Section 27 of the Occupational Safety and Health Act of 1970. More specifically, it was the product of several persons in the Congress who believed that such a

body would unlock the gates that historically had kept the federal government out of the domain of state compensation systems (Black Lung aside). It is a mark either of this group's optimism, or of its total frustration born of an inability to breech these gates till then, that its hopes rested with an essentially conservative Commission appointed by President Richard Nixon.

The Commission found many areas in need of overhaul. Of its 84 recommendations for reform, 19 were deemed to be essential ones. Most significant for our needs, the Report urged the states to act as soon as possible to clean up their laws and to comply at least with the "essential recommendations." Issued on July 1, 1972, the Report added that the Congress should step in and act if the states had not complied (at least broadly, presumably) by July 1975. The Commission supported the principle that the Congress should impose a set of minimum standards on each of the states if there was a lack of compliance with the "essential recommendations" in the three years. The 19 recommendations were the key to the potential standards.

It is instructive to observe the reform experience since July 1972. Clearly, no federal legislation of any sort dealing directly with state workers' compensation laws has come close to congressional passage. State-by-state progress has not been the cause of federal inaction. While many states did enact legislation since 1972 that moved them closer to the Commission's goals, the average state still meets only about two-thirds of the "essential recommendations." The hope that states would largely comply of their own accord by July 1975, obviating the need for federal minimum standards, has clearly not been met. What factors explain this apparent inability to achieve full-scale reform, either through voluntary state action or by the federal government?

At the state level I would point to several developments that made full compliance with the "essential recommendations" particularly difficult to achieve. First, the reforms were seen as being expensive, thereby raising insurance costs to employers. Such increases were difficult for state legislatures to justify in the decade following the Commission's Report, when state unemployment rates were reaching and holding levels not experienced since the outbreak of the Second World War. Interstate competition for jobs made such reforms unattainable on a state-by-state basis.

Many states did at least partially implement some reforms, and a number of these changes led to higher employer compensation costs. These changes, occurring as system utilization expanded, served to place limits on the extent of reform by the various states. The unexpected cost increases even led some advocates of the "essential recommendations" to withdraw their support of them.

At the federal level, efforts to enact minimum standards failed even more completely. The same fears about costs, particularly in the economically stagflated environment of the 1970s and early 1980s, contributed to congressional inaction. That aside, three other factors in particular deserve some note, though the list of the causes of failure is longer than this. First, any effort to enact federal legislation must contend with the various interest groups that have developed within the states during the decades that these programs existed. The issue goes beyond simply the reluctance to accept change by those individuals and organizations accustomed to earning a living from the compensation system. It is the sheer number of such groups and the inability to fashion compromises when so many parties have a stake that makes any federal reform legislation so difficult to achieve. Recall that substantial clout can rest with not only labor and management, but that it may reside also with state administrators, the plaintiff and defense bars, several elements within the in-

surance industry, the health professions, municipal officials and others. This is not to suggest that this kind of numbers problem exists solely when federal reform efforts emerge. It also exists as a problem when efforts for reform are made at the state level.

A second source of difficulties is the nature of the standards that can be administered by the federal government. It is quite apparent that those types of standards that are quantifiable are simpler to set, easier to target on for states, and less likely to be controversial when their compliance is evaluated. By contrast, a variety of possible standards involving a qualitative character would pose considerable difficulty in monitoring for a federal agency. As an example, employers and insurers that might be attracted to some federal involvement as a means of achieving reform often speak of the need for an improved "delivery system" in workers' compensation. Whatever is meant by this, it represents a qualitative sort of change that the federal government is not well equipped to impose on the states. Consequently, the relative ease of raising benefit levels, and the difficulty of assuring a better delivery system, have meant that orchestrating compromises aimed at legislating federal standards are necessarily harder to achieve.

The greatest stumbling block en route to any federal minimum standards has been the inability to find a mechanism whereby the federal government can enforce compliance. The experience under OSHA and Black Lung apparently have left many persons somewhat wary of "temporary" federal takeovers of existing state programs. Since there is no existing federal support of state compensation agencies or programs, the threat of a withdrawal of federal government monies has no meaning for the states. Moving claims into the already overburdened federal courts from state agencies or courts is also highly problematic.

Behind all these difficulties is the obvious aversion of Congress to making workers' compensation a federal program. It is hard to believe that the widespread extent of this view in Congress does not derive, in part at least, from the problems encountered in administering the three federal workers' compensation programs, Black Lung, the Longshore and Harbor Workers' Act and the Federal Employees Compensation Act. These programs serve as a constant reminder that nothing guarantees that a federal compensation program will operate more effectively than a state program.

The Need for Reform in Occupational Disease

While a large variety of potential reforms have been proposed, the most frequently cited ones are relatively few. Surprisingly, there appears to be little disagreement among most of the parties about the nature and the desirability of these most obvious areas of reform. This is not to minimize the differences of views when one leaves the general for the specific, nor the reluctance of the parties to hold back their endorsement of reforms as part of a bargaining strategy. Instead, this is to suggest that the substance of the reforms that have been and will be proposed are well understood.

There exist a variety of limitation rules in some state laws that can serve to bar otherwise obviously worthy claims. As such, they render affected workers or survivors unprotected under this social insurance program. Such rules take several forms. One such barrier requires that a claim be filed within some time period after the last workplace exposure to the source of the disease. A second sort of unrealistic requirement might deny eligibility unless the worker has been employed and exposed to the hazard for at least a minimum specified and arbitrary period of time. The limitation may be medically unsound, having no justification in terms of how

the disease is contracted. A third barrier involving timing may require that a claim be filed within a relatively short period of time subsequent to the development of the disease, even if the worker is not immediately disabled by the illness or aware of its presence. Such statutes of limitation may also bar claims from survivors who are not immediately aware of the work-relatedness of the killing disease.

A second cluster of barriers arises from the character of workers' compensation historically, as a mechanism for dealing with injuries caused by accidents. Such limitations have made it more difficult to receive compensation, and have even eliminated the possibility where the claimant could not demonstrate that an "accident" gave rise to the disability. Related to such barriers has been the denial of claims where a disease is thought to be an "ordinary disease of life," providing the claimant with little or no opportunity to prove that the specific instance was work-caused.

Another area in need of change involves the benefit structure. It is hardly possible to justify differential benefits for victims of industrial injuries and diseases, either in terms of compensation or medical-health treatment. It is also difficult to justify benefit payments for workers or survivors that are based on earnings levels at the time of (last) exposure, when the disease develops one or two decades later. The combination of inflation and productivity gains render such historically-based benefit levels hardly worthy of the extended and costly controversy that can follow the filing of a claim.

Another set of problems that is widely acknowledged to exist for certain claimants involves the burden of proof needed to sustain a claim. It is not possible in so short a space to indicate the myriad difficulties that (potential) claimants may have in establishing what hazard caused the disease, or that the disablement or death from disease arose out of and

in the course of employment. In many instances the problem of proof relates even to the diagnosis of the impairment. This was the foremost issue that led to the passage of the Black Lung law, and this remains a central problem in claims for asbestosis and byssinosis.

Problems in Reforming Occupational Disease Compensation

Earlier in this paper a number of reasons were cited as to why workers' compensation reform efforts have encountered difficulties and why no federal legislation has been adopted of the sort recommended by the National Commission on State Workmen's Compensation Laws. All of these reasons exist as well, and impede progress toward reform in occupational diseases. Additionally, a variety of other problems exist that must be resolved if the process of reform is to be successful. In this section of the paper four sets of issues on which there is little agreement are described. They are treated in the context of possible federal legislation.

A. Coverage Issues

Any attempt to reform workers' compensation for occupational diseases immediately confronts issues of equity, costs and politics as it relates to coverage. At one pole are those proposals that would specify a single disease, or set of diseases attributable to a single hazard, or a single occupation or industry as the target of legislation. The advantages of so narrow a focus are thought to be political. By strictly limiting coverage in some such a manner, the costs of such a program will likely be more modest, an unambiguous virtue in an era of governmental austerity, at least as it might affect new programs. The other principal political virtue is that narrow and tightly bounded programs are seen as less threatening in the long run to those who advocate the reten-

tion of fully state-controlled workers' compensation systems.

The most obvious disadvantage of such narrow coverage is the inability to provide horizontal equity (equal treatment of equals) to those not covered. For example, the same disease that is compensable to a worker who loads a train with coal at a mine may not be compensable under the federal law for the worker unloading it at the electric utility or steel mill. How does one justify compensating an insulation worker with lung cancer but not a worker with the same disease who was formerly employed on the top side of a coke oven? The answer, clearly, is based primarily on the pragmatic assessment of what might get through the U.S. Congress, and not on the disparate excesses in standard mortality rates for the two groups of employees.

At the other pole in terms of proposed coverage are the schemes that would pull all occupational disease cases out of existing state workers' compensation systems and put these under some federal program. This proposal also violates the principle of horizontal equity, as it differentiates between workers with work-caused injuries being covered by the different state programs, leaving those with diseases subject to the federally determined criteria for eligibility and benefits.

Far more problematic is the question of how and where the line is drawn between disease and injury. It takes almost no effort to identify the many areas of ambiguity that arise when one seeks to cover all occupational diseases with a separate statute. In which grouping would one place the disabilities resulting from cumulative trauma? Are "back cases" instances of injury or disease? Where would hearing loss cases fit? Even where these grey areas are anticipated by the drafters of a statute, what logical criteria would they employ so as to explicitly place a category of harms under or outside of coverage? A wealth of experience exists to suggest

that no reasonable degree of foresightedness will be sufficient to prevent considerable litigation and uncertainty from arising over the issue of the appropriate jurisdiction for specific cases.

Somewhere between these polar positions on coverage is the one whereby the statute would cover only one or two diseases initially, but would allow for possible expansion subsequently, without the need of new legislative action. An approach of this sort, as found in Congressman Miller's proposed bill, has the apparent political virtue of compromising between those who would support occupational disease reform legislation only if coverage were very limited and specific, and those who would opt for very wide if not all-inclusive coverage. By initially moving only asbestos-caused (work-connected) diseases to the federal arena, but leaving open the possibility of future expansion of coverage of other specific classes of disease, the question of appropriate coverage is not eliminated but is simply transferred to a less direct and obvious position.

Once one allows for possible future enlargement of scope, the subsidiary issues begin with determining *who* shall decide when and if coverage is to be broadened. Shall it be the Secretary of Labor, the head of an autonomous commission, the National Institute of Health? Presumably, congressional veto will not be available to assure those who fear that decisions about future expansion could run amok if left exclusively in the hands of the executive branch. The U.S. Supreme Court has made this sort of assurance useless. In any case, the core of the question is, shall the expansion of future coverage be primarily in the hands of scientists and health professionals, or will it be left to those more sensitive to the political winds. One could design such a scheme where both types have an input, but one cannot avoid confronting the final step of some such process where it will be either the politicians or the epidemiologists who must decide.

Aside from the question of who shall decide what future coverage will be, a number of secondary questions must also be faced in preparing such reform legislation. Given some decision about *who* shall decide, one has to define *what* possible issues can be considered. For example, suppose the Secretary of Labor is given the responsibility to decide what new coverage may be. Would the Secretary be empowered to consider specific areas based solely on his/her own discretion? Could others force the Secretary to review certain issues? Could anyone block the Secretary from considering the review of possible areas of extension? Would the same rules apply for expanding coverage as for cutting it back? To what extent would possible expansion parallel the protracted and litigation-filled model of the OSHA standard-setting process?

Behind all these questions is the accumulated experience of all the interest groups in dealing with the federal government in the areas of workers' compensation and in occupational health. From the vantage point of organized labor, there is the frustration of not having been able to get any sort of federal involvement in state workers' compensation programs (Black Lung aside). Additionally, there is a sense that OSHA standards have been too few, too slow and difficult to develop, and too timid. All the parties are aware also, that since the passage of OSHA in 1970, the law has not been amended at all. For labor this suggests that the need is to do more than to pass a marginally acceptable piece of legislation with the hope of accomplishing one's basic goals in subsequent amendments.

From the vantage point of industry, the asbestos sector aside, there is considerable concern about the federal government's possible expansion into broader areas of disease. The Black Lung experience is repeatedly cited as an example of politics dominating sound judgment. The extent to which Congress allowed the program to expand in the 1972 and

1977 amendments serves as a red flag to those who would prefer either no federal role in occupational disease or a narrowly defined one with no opportunity to widen it.

A different question regarding coverage that any reform must tackle is the range of exigencies for which benefits can be paid. While most proposals call for benefits to survivors in deaths from occupational disease, as well as benefits for permanent total disability, there is less agreement among supporters of reform beyond this. Potential areas for benefits include "medical only," temporary disabilities, and permanent partial disability. If a federal occupational disease bill provides coverage for any of these, the administrative burdens become far greater as the potential number of claimants is much larger in any of these categories than in death or permanent total disability. Further, compensating permanent partial disabilities can be especially difficult, whether it be for diseases or for injuries. If one takes the expedient route and does not cover such cases, however, serious problems develop in aligning the federal and the state programs where jurisdiction is based on subjective and widely varying estimates of the extent of impairment or disability.

A final question of coverage that needs resolution is the treatment of "old cases." Specifically, to what extent would a new federal reform law seek to deal with deaths and disabilities that occurred in earlier years? By covering such old cases, one is assured both that the costs will be higher and that problems of available evidence and proof become more complicated. Organized labor seems adamantly committed to having old cases covered.

If one decides to cover old cases, are all cases formerly under state jurisdiction to be opened or reopened? The Miller bill opts for some compromise by extending coverage to old cases only where no benefits have been previously paid. The potential for problems and for questions of equity

are too numerous to detail, but some must be noted. For example, suppose a worker had earlier received a "medical only" benefit through the state law, but was denied any benefits at a later date when claiming to be permanently and totally disabled. Suppose a worker received $500 for a temporary total disability. If the worker later dies, allegedly from the disease, will the survivor be able to claim federal benefits when state benefits are denied in the death claim?

B. Medical Issues

Once the questions of coverage are decided, a variety of issues emerge regarding eligibility. Specifically, aside from any potential federal legislation operating without the artificial barriers to compensation that have existed in some of the states, what would make a federal program more accessible to claimants than some of the state systems? Essentially, the answer would have to be that more rational or manageable (from the applicant's view) standards of evidence be required in such claims than exist currently.

Several sorts of changes are likely under any federal reform. Most likely there would be some resort to presumptions that would ease the claimant's evidentiary burden. While the presence of presumptions seems likely to be found in almost any reform proposals, a host of questions about them needs to be resolved before incorporating them in new legislation. Just as in the case of coverage, support for reforms will hang on how these are answered.

The most significant questions parallel those raised about coverage. Are presumptions to be limited to what is placed in the original statute, or is there some way of adding to or modifying them administratively? Who is to determine what the presumptions are to be, who can initiate the process of changing them, what is the process to be of setting them, and what challenges to them will be permitted? Are presumptions

to be limited to medical issues and exposure questions? Can the presumptions be rebutted or not? The constitutionality of an irrebuttable presumption has been upheld, but the clamor over the single one found under Black Lung has never subsided. In the presence of rebuttable presumptions, the administrative agency will likely determine in the regulations that it sets, precisely how academic it may be to seek to rebut. One possibility is that rebuttable presumptions are *de facto* impossible to rebut. Alternatively, they may be written in such a way that they are of little help to the claimant. In large measure, this issue depends upon whether it is a government agency that is in a position to rebut an invoked presumption, or if it is a private sector employer or insurer that is defending the claim.

A second set of health issues involves the use of medical panels. To what extent is it appropriate to use such panels of objective and technically qualified experts in cases where there is some dispute about a medical question? One of the most controversial issues that arose under Black Lung was the use made by the government of "B" readers to evaluate the quality of and diagnoses from chest X-rays.

There are three basic sets of medical problems that may arise in occupational disease claims. Disputes about them are not equally well dealt with by impartial medical persons. Questions of diagnosis are probably the best ones to be settled by such specialists. Issues relating to etiology are probably much less amenable to resolution by a panel. The third area depends upon the principle of compensation used by the agency in question. Medical panels are ideal for settling disputes regarding the extent of impairment, but they are not at all suited to deciding whether the claimant's degree of disability has been fairly assessed.

Aside from issues of how to use such experts, questions arise regarding their selection, remuneration and tenure. Ad-

ditionally, some decisions must be made about the ability of the parties in a claim to challenge the findings of such experts.

C. Financing Issues

Any federal occupational disease legislation that goes beyond simply requiring the states to meet certain standards implies that a new financial obligation will be incurred by some party or other. The need for new funding sources is especially significant where old cases are to be covered. Presently, there appears to be a universal antipathy to having this burden fall on the U.S. Treasury, as was done in the case in the Part B segment of Black Lung.

A variety of possible options have been weighed. On one side are those who wish to apply some variant of experience rating to a funding scheme so as to make only "responsible employers" pay where their employees developed disease. Such an approach has appeal to those who view this as furthering the safety and health goals of a compensation system through the use of appropriate incentives. This sort of funding plan also satisfies the needs of some who want to mete out punishment to responsible employers. A variation of this, as found in the Miller bill, would seek needed funding from an entire industry but not try to establish who the responsible employer was on a case-by-case basis, nor employ any experience rating at the level of the firm.

There are several grounds for objection to either of these funding approaches. The experience under the Black Lung Act demonstrated the enormity of the task of identifying responsible employers, particularly in older cases. Alleged responsible parties challenged and fought almost every single old case attributed to them. In many of the cases the only possible employer (where the worker had been exposed to coal dust) was no longer in business or unable to pay the

compensation. Where the workers had been employed by several different employers, the choice of the liable party often could appear to be capricious or a matter of convenience, but not justice. (In a building trade such as insulation work, asbestos workers can work for several different employers within a single year!)

To overcome some of these problems, the Miller bill opts for a sort of superfund, financed by a tax levied on the entire industry from which the disease originated. This approach immediately encounters some immense problems. First, on what basis does one allocate the tax on the industry? Does one use current levels of employment, sales, profits? What criteria are employed to split these among importers, manufacturers, distributors, fabricators, and possibly certain users? What of firms that were formerly in the asbestos industry, for example, but are now no longer involved? And unlikely though it may be, new firms could enter the industry without any past history of usage, thereby having no reasonable probability of generating claims against the fund in the next few years. Are they to be absolved of the tax, and accordingly given a competitive edge on the industry?

Aside from the question of who, specifically, is to pay, there are a number of questions regarding the nature of the fund itself. Either a fund of this sort builds up reserves prior to or as future obligations develop, or it operates on a pay-as-you-go basis. The former approach pushes many of the costs onto the front end of the program and is not attractive to existing firms that would bear the brunt of these costs. The latter approach shifts some of these direct tax burdens into the future and could thereby shift them to other employers. With no basis for determining what the costs of an occupational disease bill will be under a pay-as-you-go basis, revenues would need to be adjusted frequently, perhaps annually, in order to avoid significant surpluses or

shortfalls in the fund. All this implies a highly flexible scheme of taxation. Understandably, employers, members of Congress and others are loathe to provide this sort of discretion to set tax rates to a Secretary of Labor or any other political appointee, especially where the rate may not be made uniform in the industry, where the industry is difficult to define, and where exit and entry to the industry by some firms may have an immense impact on the costs borne by other firms therein.

The superfund approach is also not likely to be endorsed by those who seek to use the tax as the source of incentives to employers to maintain a healthy and safe workplace. So long as each taxed employer pays the same rate as other firms in that sector, there is no reason for the firm to reduce the exposure to the hazard in question.

D. Exclusive Remedy Issues

Efforts to achieve reform of workers' compensation practices in cases of (occupational) disease owe much to the difficulties spilling over from the tort system. It is no coincidence that those employers who have shown some willingness to move toward federal reforms are those now facing huge costs from tort actions brought by (alleged) victims of occupational diseases. Their support for such change emanates from a realization that any options to bar further suits must be accompanied by the guarantee that the remaining remedy, workers' compensation, be made more accessible to potential users. If such a *quid pro quo* were not possible, there would be no reason for those employers who support federal action to do so. Similarly, without such a bargain, organized labor would never willingly accept the principle that workers' compensation be the exclusive remedy in disease cases. Indeed, it will be a challenge for reform-minded parties to move some elements of organized

labor to this compromise. If labor cannot be budged from its current public position of seeking to retain the right to sue third parties, however, the prospects for federal reform are reduced considerably.

The difficulty of achieving a compromise between labor and at least some employers is complicated by other factors. Organized labor, particularly at the state level, has never invested significantly in the development of an understanding of the workers' compensation system. There was little apparent need to do so as long as expert opinion was available to them, typically provided by plaintiffs' attorneys familiar with state practices and issues. The interests of such practitioners were generally consonant with those of the unions and their members. On this issue, however, there is considerably less overlap of mutual needs. The trial bar has no apparent interest in having future lawsuits by workers or survivors barred in disease cases. Any promise of a more effective workers' compensation system holds less interest for them than maintaining and expanding the opportunity to sue. If organized labor is to move towards the *quid pro quo,* they will have to do so without guidance or support from their traditional ally and source of expertise.

At the time of this writing, it is probably true that only a small proportion of U.S. employers, weighted by any criterion, are attracted to the *quid pro quo* of reforming workers' compensation through federal intervention, and being absolved of liability under tort in future occupational disease cases. This small group consists primarily of businesses involved with asbestos. There exist, however, firms in other industries that are very sensitive to these issues out of a concern that other industries will eventually be dragged down by third party suits for occupational diseases. For a number of reasons, these firms are loathe to identify themselves or the basis for their interest.

Other Needs

One of the principal shortcomings of how compensation systems have dealt with occupational diseases is the underutilization of this remedy by potential applicants. The problem is one that appears to be large and well identified. None of the potential reforms noted above bear directly on this issue, at least so far as underutilization has resulted from worker (or survivor) ignorance of their rights to compensation for diseases, or of the cause or nature of the illness. If this matter is not addressed in reform efforts either at the state or the federal level, the reforms will have relatively little impact on the usage people make of the system. Much more is known about the existence of underutilization for these reasons than how to ameliorate it. Perhaps that is why proposed reforms regularly seem to avoid confronting the matter.