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Problems in Occupational Disease Compensation

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The papers presented in this section cover an important set of issues in workers' compensation for occupational diseases. First, we are presented with data indicating that the current state systems have serious problems compensating victims of asbestos-related diseases and, by inference, other occupational diseases which are even less well understood. Then, we are given proposals for solving the problems of compensating occupational diseases, solutions proposed to be implemented at the federal level.

Spatz's paper presents a "best case" picture of occupational disease compensation in the United States. He chooses a state system with no artificial barriers to compensation; the most well-known occupational disease agent; and workers who had been under study and were therefore likely to be more aware of the occupational origin of their diseases. In spite of these favorable conditions, Spatz documents serious problems faced by survivors of insulation workers who died from asbestos-related diseases. The issues are familiar ones, echoing those discussed by Barth and Hunt,[1] and by Barth[2] in his recent study of asbestos insulation workers. In Spatz's

study, workers' compensation claims for asbestos-related disease were generally controverted, resulting in long delays, high legal expenses, and uncertain outcomes. Most claimants were not paid the full dependency amount, but received a smaller award, a settlement, or no award at all. Survivors of insulators waited a median period of 19 months to have their claims resolved.

Spatz concludes that "our current system of workers' compensation has been inadequate" in its handling of occupational disease. He and Elisburg provide suggestions for altering state workers' compensation systems which, in their views, will improve the compensation of occupational disease victims and their survivors.

These comments will focus on one aspect of occupational disease compensation, the uncertainty that leads to many of the problems presented in Spatz's paper. Before that, I would like to list some basic criteria by which the adequacy of occupational disease compensation can be judged.

Criteria for Judging Occupational Disease Compensation Systems

Elisburg presents some of the basic goals of workers' compensation: (1) complete coverage of injuries and illnesses arising out of and in the course of employment, (2) prompt delivery of benefits, (3) a "reasonable" level of benefits, including full payment for medical benefits and rehabilitation. I would like to add to this list: (4) efficient delivery of benefits, i.e., a low expense-to-benefit ratio, and (5) certainty about what injuries and illness are covered. In addition, one could suggest: (6) minimal compensation for injuries and illnesses that are not work-related.

Spatz's work suggests that the first five goals have not been met for asbestos-caused deaths. Survivors often do not apply. When they do apply, their claims are often con-

troverted. Settlements are partial, decisions are apparently capricious, substantial legal costs are incurred, and awards are delayed for many months. These problems lead quite naturally into a discussion of reforms designed to improve compensation for occupational diseases. While Spatz does not address the sixth goal, the history of the federal Black Lung compensation program gives us fair warning that altering the workers' compensation system does not necessarily lead to unambiguous improvement.

The Nature of Uncertainty About Occupational Disease Causation

There are many problems involved in occupational disease compensation, including the artificial legal barriers to compensation and the apparent widespread ignorance of workers and their spouses about the workers' compensation remedy for occupational diseases. In these comments, however, I would like to focus on one type of problem, the *uncertainty* surrounding occupational illness compensation.

There are several types of uncertainty which affect the ability of workers' compensation to function effectively. Uncertainty about the agent that caused the worker's illness appears to be the primary distinguishing factor. Uncertainty about workplace exposures that occurred many years ago creates additional problems. Some common characteristics of occupational disease that contribute to this problem are:

1. The signs and symptoms of a chronic occupational disease are usually not related to a unique occupational exposure. Medical and epidemiological knowledge may be insufficient to distinguish a disease of occupational origin from one caused by nonoccupational exposures.

2. A disease can have several causes, both occupational and nonoccupational. A worker who smokes and has been exposed to ionizing radiation at work may develop lung

cancer. Since both cigarette smoke and ionizing radiation are risk factors for lung cancer, neither can be considered the unique cause. Moreover, it may not be possible to determine the contribution of each exposure to the risk of developing the disease.

3. Even where there is scientific evidence about disease causation, the evidence will be presented in an adversarial setting, and there is no guarantee about how that evidence will be interpreted at hearing, or that all cases with the same factual base will receive consistent decisions.

4. The disease may develop years after exposure began, or even after exposure ceased. Because of this, records establishing employment and exposure may be difficult or impossible to obtain, and memories of events and exposures may be unclear.

5. Records of exposures to occupational hazards may never have existed. Only in recent years, with the promulgation by the federal government of health regulations, have exposure data been collected regularly for health hazards other than ionizing radiation.

Only rarely can a physician diagnose a disease as definitely arising out of and in the course of employment. These exceptions occur when the disease has a unique causative agent to which there is a documented occupational exposure. Unfortunately, few occupational diseases fall into this category. Mesothelioma is apparently one that does, but lung cancer and other lung diseases, hearing loss, low back pain, etc. may be caused by both occupational and nonoccupational factors. It is often difficult or impossible to determine which of these factors caused the disease in a specific case, or even to determine their relative contribution. This is not caused only by the inexactness of the few available epidemiological studies of occupational disease. Even when epidemiological studies are able to accurately determine excess risks of

disease in *populations,* they are not able to determine which *individuals* in those populations would not have developed the disease without occupational exposure. In many cases, this uncertainty cannot be resolved.

The Impact of Uncertainty on the Administration of Occupational Disease Claims

Because it is necessary to demonstrate that an injury or illness occurred "out of and in the course of employment," uncertainty about the etiology of certain diseases implies uncertainty about whether those diseases are compensable. This uncertainty will often mean that a claim, if filed, will be controverted. This controversion, with ensuing delays and expenses, is the proximate cause of the symptoms of a poorly functioning system, namely, long delays and high legal and administrative costs.

Suppose that out of a group of 1000 workers it was known that 30 would eventually develop stomach cancer, but that, because of occupational exposures, 65 workers actually developed cancers. It is not possible to determine clinically which of the workers would have developed the cancer in the absence of occupational exposure. There are a number of toxicological and epidemiological studies that indicate that a substance is a carcinogen, but estimates of its potency vary. In addition, exposure records are not available on the workers. Reasonable and informed workers with stomach cancer will attempt to collect workers' compensation, and reasonable and informed insurers will controvert their claims. The probable outcome is that settlements will be reached for substantially less than would have been paid if the workers won, but much more than they would have received if they lost. The process of negotiation may take over a year and cost both claimants and insurers a great deal in legal expenses. Neither side will be completely satisfied, but both will prefer settlement to the uncertainty of a hearing.

A profit-maximizing insurer or self-insured employer will controvert a claim when the expected gain from controversion is greater than the legal and administrative costs. As the probability of winning at hearing increases, and as the value of the claim increases, the advantage to the insurer of controversion grows. For occupational injuries, there is generally nothing to be gained from controversion.[3] For occupational diseases, where uncertainty is high and disabilities are often permanent and severe, the stakes are high. An insurer would be poorly serving its shareholders and customers if it did not controvert many of the cases brought.

Proposed Legislative Remedies

The extensive controversion of occupational disease claims makes it impossible for workers' compensation systems to meet the goals enumerated above, or to follow Elisburg's excellent prescription: "I suggest that the system . . . be designed to keep adjudication to a minimum and to focus on eliminating the adversary mentality."

Elisburg suggests two types of legislated changes in the administration of workers' compensation designed to reduce adjudication by eliminating the *legal* uncertainty about whether diseases are occupational in origin. These changes are: (1) the promulgation of legal presumptions and (2) establishing expert, impartial medical boards to determine the cause of, and to evaluate the degree of impairment due to, the claimant's illness. Spatz also suggests the use of presumptions. He suggests rebuttable presumptions that consider the claimant's burden to be met when "statistical evidence shows a higher incidence of a disease among groups of workers exposed to specific substances."[4]

Occupational Disease Presumptions

Workers' compensation presumptions can specify a set of conditions that determine when the burden of persuasion is

shifted from the claimant to the defendant. Experience with presumptions is not limited to the federal Black Lung program. A number of state workers' compensation systems have presumptions linking exposure to hazardous substances and illness, linking job and exposure, and even linking job and illness.[5] New York law (Section 47) provides that any exposure to harmful dust for a period of 60 days or longer is presumed to be harmful in the absence of substantial evidence to the contrary. Thus, a worker with lung disease who was exposed to silica dust for longer than 60 days would be presumed to have silicosis, unless the insurance carrier or employer could demonstrate otherwise. Kentucky has a similar presumption, which states (Section 342.316(5)) that for a worker with pneumoconiosis and employment exposure for 10 years or more to an industrial hazard that is a cause of pneumoconiosis there is a rebuttable presumption that the disability or death is compensable. In several states, including New York, employees in specified jobs are presumed to be exposed to hazards associated with those occupations, even if there is no evidence to support this assertion. In New York, any workers who develop anthrax while working with, or immediately after handling, wool, hair, bristles, hides, or skins, are presumed to have anthrax caused by their work.

The assumption of the papers by Spatz and Elisburg is that presumptions are favorable to the claimant. This may not be the case. Twenty states have *negative* presumptions for some diseases. The typical negative presumption states that there must be minimum exposure to the relevant hazard for compensation to be paid. About half of these negative presumptions are rebuttable, while in 10 states there is no opportunity for workers with less than the mandated exposure to receive compensation.

Presumptions, whether stringent or liberal, should reduce uncertainty. For claimants who meet the criteria of the

presumption, more cases may be brought, since the presumption will serve to educate workers and attorneys about the possibility of successful claims. In addition, the rate of controversion for these claims will be lower, since the probability of the claimant's winning at hearing would be quite high. As a result, claims should be paid more rapidly than now, and there should be lower legal costs. Where there are settlements, the amounts will probably be higher. The existence of presumptive criteria may also serve to discourage prospective claimants who do not qualify, even if there is no explicit negative presumption. The criteria would reflect legislative policy in workers' compensation, and are likely to influence decisions even in cases to which they do not directly apply.

A presumption may be relatively generous to claimants, or quite restrictive. And herein lies the problem. Any presumption is likely to include in its scope workers without occupational disease, and is likely as well to exclude workers with occupational disease. Occupational disease experts can evaluate and summarize knowledge about the relationship between occupation, exposure, and disease, but they cannot decide on the basis of their scientific expertise whether to compensate fewer occupational disease victims in order to compensate fewer "undeserving" claimants.

The fact that such political decisions must be made does not, however, mean that future occupational disease presumptions will suffer from the same problems as the Black Lung program. Apparently, states with occupational disease presumptions have not experienced an explosion of successful claims as a result. Given current knowledge, one can only speculate on what would happen. While the concern of employers and insurers is understandable, most statisticians would be hard pressed to make predictions on the basis of a single observation.

Existing presumptions in state programs have not appeared to dramatically reduce litigation and substantially increase compensation of occupational disease claimants. The Black Lung program appears not to have distinguished adequately between occupational and nonoccupational disease. If any conclusion is supportable from these sparse observations, it is that the drafting and administration of presumptions is very important, and that their mere existence means little. The politics of legislation and of implementation are critical.

Medical Boards

The same may be said for medical boards. While the principle of impartial, expert evaluation appears to be a good one, achieving that goal may not be easy. In the highly contentious climate surrounding occupational disease compensation, expert medical boards have several drawbacks not shared by presumptions. First, they do not provide clear and objective guidelines to claimants and defendants *prior* to the decisions about filing and controversion. In addition, decisions over time and by different medical boards may not be consistent. On the other hand, consistent decisionmaking over time by medical boards may help to narrow the range of dispute and thus reduce the costs of resolving occupational disease claims.

A Bolder Approach

The development of workers' compensation early in the twentieth century created administrative systems where legal systems had previously existed. Certainty increased for employers and workers; transaction costs declined. While coverage of all workers and adequate benefit levels have remained important issues in the compensation of workplace injuries, the system has clear advantages for all parties over the tort system.

This argument is more difficult to make for occupational diseases. While workers' compensation handles over 90 percent of injury cases administratively, with resultant certainty, speedy payment and efficient delivery of benefits, well over half of chronic occupational disease cases are controverted. Proposed reforms are uncertain in effect and arbitrary in nature.

Perhaps it is time to accept this fact and consider reforms in occupational disease compensation that focus on the most seriously disabling and fatal diseases, creating an administrative system that reduces or eliminates the requirement of demonstrating specific workplace causation. Such an approach would be more like mandatory first-party disability and medical insurance than workers' compensation. As long as such a program were carefully phased-in, with appropriate general funds, similar to second-injury funds to handle pre-existing disease, it could greatly reduce uncertainty and get payment quickly and efficiently to people who need them. An excellent argument for a mandatory first-party insurance scheme for occupational diseases has already been put forth by Peter Barth.[6] Barth proposes such a program, but limits it only to deaths from cancer. While this is a reasonable place to start, it is not apparent why the same arguments for covering deaths caused by cancer should not apply as well to cancer-induced disabilities, and to deaths and major disabilities from other chronic illnesses with occupational causes.

Removing these diseases from workers' compensation coverage would eliminate uncertainty to workers, employers, and insurers caused by the difficulty of determining work-relatedness. Administrative and legal expenses would be lower than the current system, although at the cost of compensating workers with nonoccupational diseases. On the other hand, such a program has several potential drawbacks.

First, it may be very costly, if not constrained to a limited number of chronic diseases and only to deaths and major disabilities. Second, to the extent that there are incentives to reduce workplace hazards in current workers' compensation for chronic occupational diseases, such incentives would be reduced or eliminated.

The incentive effect would be small, in my opinion, since incentives for prevention appear ineffective under the current system of occupational disease compensation. The first problem is potentially the more serious. In some sense, the Black Lung program provided coverage for total disability and death from respiratory disease similar to the plan discussed in this section, but was more narrow in coverage of diseases and populations. This fact alone serves as adequate warning of the dangers of a plan that reduces or eliminates the necessity of demonstrating work-relatedness. As in the case of other reforms, the precise structure of the program, its implementation and its administration, would determine whether its costs were limited and its benefits targeted in a manner acceptable to workers, employers, and insurers. The political process would once again play a critical role.

Concluding Comments

The apparent unfairness and inefficiency of workers' compensation of occupational diseases arises in great measure from the inherent uncertainty about whether many chronic diseases are work-related. Changes in workers' compensation that attempt to cope with this uncertainty must, by their nature, be arbitrary. In creating legal certainty from essential scientific and factual uncertainty, violence must be done to both the science and the facts. Some reforms, like presumptions, have the potential to increase efficiency and fairness. However, the implementation of reforms occurs in the political arena, and experience with the Black Lung program

has left many observers with grave doubts about whether the political process can devise any reforms that adequately address the goals described in the first section of this paper.

There may be no satisfactory resolution to the problems of compensating occupational disease within the traditional workers' compensation framework. Since the limitations of the work-relatedness criterion are so great, more serious attention should be paid to reforms that attempt to remove occupational disease compensation from the workers' compensation umbrella. Such a move would be in the spirit of the change from the tort system to workers' compensation. At first, many employers objected to the idea of automatic payments to injured workers when the employer was blameless. Others were probably concerned about the costs of compensating all workplace injuries, regardless of fault. Yet the change from the tort system to workers' compensation is, I believe, a positive one. Similarly, research and experience may validate the utility of an analogous step for compensating occupational diseases.

NOTES

1. Peter S. Barth with H. Allan Hunt, *Workers' Compensation and Work-Related Illnesses and Diseases* (1980) Cambridge, MA: M.I.T. Press.

2. Peter S. Barth, "Compensation for Asbestos-Associated Disease: A Survey of Asbestos Insulation Workers in the United States and Canada," Chapter 5 of I.J. Selikoff, *Disability Compensation for Asbestos-Associated Disease in the United States* (1983) New York: Mt. Sinai School of Medicine.

3. The notable exception to this is controversion over the degree of permanent disability. Because of the difficulty of measuring permanent disability prospectively, and the substantial value of permanent disability awards, this issue is often disputed. It often complicates the settlement of

occupational disease claims as well, since many of them involve permanent disability.

4. This raises a more general question about the proper use of statistical evidence in workers' compensation proceedings. See, e.g., Michael Dore, "A Commentary on the Use of Epidemiological Evidence in Demonstrating Cause-in-Fact," *Harvard Env Law Rev* 7, 429 and Khristine L. Hall and Ellen K. Silbergeld, "Reappraising Epidemiology: A Response to Mr. Dore," *Harvard Env Law Rev* 7, 441. A matter of substantial importance is the degree of excess risk needed to satisfy such a presumption.

5. For a more detailed discussion, see Lloyd W. Larson, "Analysis of Current Laws Reflecting Worker Benefits for Occupational Disease" NTIS Report No. ASPER/PUR-78/4385/A (1979).

6. Peter S. Barth, "A Proposal for Solving the Problems of Compensating for Occupational Diseases (1983) (unpublished paper, delivered at Workers' Compensation Conference, Orono, Maine).