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## THE ILLINOIS WORKMEN'S COMPENSATION SYSTEM: A DESCRIPTION AND CRITIQUE

*Douglas F. Stevenson\**

*Illinois' workmen's compensation system has been the subject of intense debate in the last several years. As a result, the statutes governing the area have undergone considerable amendment. The author describes the current system and points out many of the weaknesses and absurdities that still exist despite those recent efforts.*

Workmen's compensation, the initial "no fault" concept, is designed to provide a simple, inexpensive and expeditious remedy for disputes involving accidents arising out of and in the course of employment. Because of trial delay, the classic common law doctrines of negligence and fault in assessing financial liability do not lend themselves to resolving the injured worker's immediate problems such as medical care and financial sustenance of his family during recuperation from an injury.

Few employees recovered under the negligence concept because of the defenses of contributory negligence, the fellow servant rule, and assumption of risk doctrine.<sup>1</sup> If one did recover, there was a lengthy period when his family had no income. Even with the best of intentions, an employer could hardly supply medical attention or family sustenance without his conduct being construed as an admission of liability, with the consequent risk of a large jury verdict.

In the "no fault" concept of workmen's compensation, the employee gave up his right to a jury trial and the employer agreed to furnish medical attention and make immediate payments for lost time whether or not there was negligence, in return for limited liability. The task of determining the rights and liabilities under this new concept was given to an administrative agency, the Illinois Industrial Commission, with the directive that "the process and procedure before the Commission shall be as simple and summary as reasonably may be."<sup>2</sup>

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1. 1 T. ANGERSTEIN, ILLINOIS WORKMEN'S COMPENSATION § 2 (rev. ed. 1952).

2. ILL. REV. STAT. ch. 48, § 138.16 15(1977).

How well is the workmen's compensation system working in Illinois? First, the system is about to choke. The number of filed cases at the Illinois Industrial Commission has almost quadrupled since 1950 from 15,000 per year to 57,500 in 1977.<sup>3</sup> There has been no commensurate increase in personnel or improvements in its antiquated procedures. The crush is more than the agency can handle.<sup>4</sup> Second, almost all of these cases involve attorneys operating under the adversary system, with the associated complement of doctors for examination and testimony. The expense of common law litigation is not reduced in accordance with the expectations.<sup>5</sup> Third, because of the constant pressures to increase the level of benefits, workmen's compensation is no longer a system in which the liabilities are truly limited.<sup>6</sup>

Last, it is illusory to claim that the public has been insulated from the cost of these workmen's compensation benefits simply because the burden has been placed upon the employers. Every employer must recover the cost of these benefits in the price of his product or service, a price which is paid by the consuming public. If an employer does not recover this as well as his other costs, he inevitably goes out of business. Whether an employer pays directly or carries insurance, the cost burden is roughly the same.

The dramatic increase in workmen's compensation benefits in 1975 and the consequent increase in cost have affected the Illinois business climate. Illinois is the highest of some thirty-three states recently surveyed by the Illinois Fiscal Commission.<sup>7</sup> Workmen's compensation and unemployment insurance costs (also dramatically increased in 1975) are two of the three most negative factors in the Illinois economic climate. Illinois producers are at a disadvantage with respect to competitors from other states and other countries because of this disproportionate cost burden. The state's major sources of tax revenue, the sales and income taxes, depend upon business volume

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3. These figures are the most accurate estimates available based on the docket books of the Illinois Industrial Commission.

The Commission has a tremendous base for statistical data in its files but little ability to retrieve the information. Recognizing the severity of the problem, the Commission contracted in 1974 with Delta Systems Corporation for development of a computerized information control system for the Industrial Commission. However, the new system lacks programming or capacity for retrieval of meaningful information.

4. See text accompanying notes 14-16 *infra*.

5. See text accompanying notes 26-36 *infra*.

6. See text accompanying notes 49-95 *infra*.

7. ILLINOIS FISCAL COMMISSION, REPORT ON ECONOMIC AND FISCAL TRENDS IN THE STATE OF ILLINOIS 14-17 (December 2, 1977).

which must expand if the state is to have the necessary revenues to meet the apparently inevitable inflation in the cost of government, as well as to insure jobs for future Illinois citizens.

The legislature, the ultimate arbiter, must recognize the impact of its actions upon the general welfare of the state. It is this writer's observation that a majority of the legislature has functioned in this area as if it were umpiring an intramural football game between management and labor with little thought to the wider consequences.<sup>8</sup>

This Article will examine the operation of this "no fault" law in Illinois, the Industrial Commission which administers it, and the various interest groups at work within it, as seen by the author after twenty-seven years of involvement. The observations made are not intended as personal criticism of any particular persons participating in the system. Its criticisms and recommendations are directed at the system itself. Nor is this Article intended to cast doubt upon the feasibility of no fault systems in other areas. It should demonstrate, however, that the current Illinois workmen's compensation system is no model.

This Article is a description and a critique of the Illinois workmen's compensation law and procedures. One questions whether it can properly be called a "system" in the legal sense; within a very loose legal framework, it is a series of *ad hoc* decisions by more than twenty-five individuals pursuing no published common standard or philosophy in making adjudications. Similar cases are not similarly decided. This Article further questions whether the primary beneficiaries of the "system" are injured workers or the lawyers who practice within it.

#### THE CURRENT CRISIS IN THE SYSTEM

In brief outline, the Illinois system is a voluntary one in which the benefits are supposed to flow from the employer, or the insurance company, to the employee without the need for any legal proceeding. Medical attention for an injured employee and the prompt payment of weekly benefits to sustain his family, in the event there is lost time, are immediate problems for the injured worker. Permanent disability, if any, is theoretically so finely demarcated and structured as to seldom result in a dispute.

Only in the event of a dispute about the compensation payable does the Commission have any jurisdiction.<sup>9</sup> A complaint,

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8. See text accompanying notes 96-102 *infra*.

9. ILL. REV. STAT. ch. 48, § 138.19 (1977).

called an Application, is filed and heard by an arbitrator at the first level.<sup>10</sup> Either side may appeal to the full Commission and present additional evidence and oral argument before the full Commission.<sup>11</sup> The decision of the Commission may be appealed to the circuit court<sup>12</sup> and then directly to the supreme court.<sup>13</sup>

This simple statement of the basic procedure belies the complexities and idiosyncrasies of the process as it actually unfolds. This "process in action" is the basic subject matter of this Article.

### *The Litigation Explosion in Workmen's Compensation*

The litigation explosion in workmen's compensation is real. Its explanation reveals many inadequacies of the process. The number of filed cases has almost quadrupled since 1950.<sup>14</sup> The increase in numbers is fairly uniform throughout the state. Some of us recall in the early 1950's when only fifteen cases were on the docket in Joliet for one day each month. In October, 1977, an arbitrator spent five

10. *Id.* Seldom utilized is an authorized committee of arbitration, in which each party may appoint a person to work with a person appointed by the Commission.

11. *Id.* § 138.19(e).

12. *Id.* § 138.19(f)(1). The State of Illinois, however, is forbidden to appeal beyond the Commission.

13. ILL. SUP. CT. R. 302(a). Under the Judicial Article of the Illinois Constitution, appeals go to the appellate rather than the supreme court. ILL. CONST. art. VI, § 6. However, the supreme court agreed to take workmen's compensation cases directly from the circuit court in 1964 at the request of the labor unions in order to get labor support for the 1964 amendment to the Judicial Article of the Constitution. The author, representing employer organizations, participated in the conferences which led to Rule 302(a).

14. By definition, all filed cases are cases in which disputes have arisen. ILL. REV. STAT. ch. 48, § 138.19 (1977).

According to the docket books of the Commission, the numbers are as follows:

1950	15,168
1955	21,037
1960	25,218
1965	29,256
1970	34,699
1971	34,663
1972	34,624
1973	38,846
1974	40,290
1975	40,117
1976	48,189
1977	57,484

The progression is almost geometric; the number doubled between 1950 and 1965 and nearly doubled again by 1977.

days in Joliet with an average number of 75 cases set for each day. Other examples of the current load for an arbitrator are Benton—135 cases for two days, Macomb—47 cases for one day, Aurora—157 cases for two days, Taylorville—71 cases for one day, Wheaton—392 cases for four days.

Obviously, one arbitrator sitting in these locations cannot hear evidence and make decisions on even ten percent of these cases. While some may be settled between the parties without trial, the balance must be continued to a future date when they join other new cases. The number of new filings exceeds those disposed of by trial or settlement. The increased number of filed cases does not fully reflect the litigation load. More than half of the arbitrators' decisions are appealed to the full Commission,<sup>15</sup> creating a burden which that body can hardly discharge.

Even the Supreme Court of Illinois finds that a substantial portion of its case load is appeals in workmen's compensation cases. While it affirms the Commission in most cases, the continued flow of appeals reflects the dissatisfaction and frustration of litigants with the Industrial Commission. The supreme court, obviously bored with its workmen's compensation docket, has come very close to affirming contradictory decisions of the Industrial Commission. One can find support for almost any position in the decisions of the supreme court.

The voluntary portion of the Illinois workmen's compensation system—the prompt furnishing of medical attention and the immediate payment of temporary total compensation for lost time accidents—works well.<sup>16</sup> The present system for handling disputes, however, is incompatible with its purpose—to provide a speedy, inexpensive remedy. The litigation explosion merely aggravates and exposes the problem. The problem suggests one remedy, namely to increase the number of hearing officers and commissioners to accommodate the increased load. But before adopting this simplistic solution, one should examine the reasons for this litigation explosion and the basic machinery involved.

### *Causes of the Litigation Explosion*

Some alleged causes of the litigation explosion in workmen's compensation can be dismissed. It is not explained, for example, by increases in the number of persons employed. According to the Illinois

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15. This is the comment of several commissioners. See note 3 *supra*.

16. This is a consensus drawn from conversations with attorneys. There are no statistics. See note 3 *supra*.

Department of Labor, there were 3,160,000 employed persons in 1950 and 4,424,900 in 1975.<sup>17</sup> This increase in the working population does not explain a quadrupling of litigated cases by the Illinois Industrial Commission.

The number of accidents does not explain the increase either. In fact, the National Safety Council reports that "lost time" accidents decreased from 940 (per million hours worked) in 1950 to 668 in 1976.<sup>18</sup> The United States Bureau of Labor Statistics notes that the total number of occupational injuries had declined by sixteen percent, the number of "lost time" cases by nine percent, and the number of fatalities by ten percent from 1974 to 1975.<sup>19</sup>

Other factors which may bear examination are an increased awareness of legal rights, increased activity on the part of unions, lawyers, doctors, or others, and increased benefits. These three items merge in any discussion, for each contributes to the other.

### *The Unions*

With the principal organizing drives over, union leadership has turned more and more to providing services for its members as a partial justification for the union's existence and dues structure. While the state and national labor organizations handle legislative problems, many local unions are active and supportive in individual injury cases. Many local unions have workmen's compensation committees whose members attend instructional classes and learn about the field of workmen's compensation in order to counsel members who suffer injuries in employment. This is a thoroughly legitimate service not unlike those which clubs and organizations, even political organizations, perform for members.

In the present state of workmen's compensation in Illinois, however, the union activity amounts to little more than a lawyer referral service. Frequently, the union fills out the Application and the attorney never meets his client until the day of the hearing. Not unnaturally, a considerable number of attorneys are eager to be the one to whom the union refers its members. The selection of an attorney based upon his ability, character, ideological affinity, or prior friend-

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17. See ILLINOIS BUREAU OF EMPLOYMENT SECURITY, ILLINOIS TOTAL CIVILIAN WORK FORCE EMPLOYMENT & UNEMPLOYMENT (1972).

18. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 28 (1977).

19. See ILLINOIS BUREAU OF EMPLOYMENT SECURITY, LABOR FORCE INFORMATION FOR AFFIRMATIVE ACTION PROGRAMS—ILLINOIS (1976).

ship is, of course, the usual and customary way in which attorneys obtain clients, and such practice is beyond criticism.

More questionable, perhaps, is a common arrangement in which an attorney provides free legal services to the union or its officers in return for the referral of all the workmen's compensation cases. This *quid pro quo* is beyond the bounds of ethics but is so diffused or obfuscated that it is seldom detected. A more blatant practice involves vacation houses owned by attorneys which are available for union leaders and business agents who cooperate.

Frequently, an injured employee "signs up" with a lawyer, even while the employer or insurance company is paying the medical bills and the temporary compensation—the full obligations of the statute. No lawyer can get anything more for the claimant at that time. But, by filing the case, the lawyer "secures" his fee on any eventual recovery. Any amicable settlement between the employer and employee becomes impossible because of the attorney's fee. I have asked several claimants after the litigation just why they went to a lawyer so quickly, and the frequent response is, "The business agent told me that if I didn't get my ——— over to Blank & Blank right now, he would never send me out on another job!"

The ability to refer legal business is jealously guarded by some business agents and union officials. The unions do not police this area of conduct on the part of its officials any more than the bar polices the lawyers. But, as a basic concept, informed union counseling could save considerable litigation costs to its members, if the Commission's decision-making processes were comprehensible to the union counselors and to employers instead of being the private preserve of the lawyers.

### *The Lawyers*

Most lawyers tend to specialize in cases for the claimant or for the defense. This was always generally true in metropolitan areas, and with the vast increase in the number of cases, this specialization has now spread to even smaller cities in Illinois. From a geographic standpoint, individual lawyers cover a wide territory. Chicago lawyers are regularly in attendance in Peoria, Decatur, East St. Louis and Centralia. The fees are lucrative enough to justify the time and expense of such traveling. For the defense of claims, employers and insurance companies with a wide geographic spread may want the same attorneys traveling throughout the state to represent its common policy under a state-wide law. However, it is surprising to see



Chicago attorneys dominating the plaintiff's docket in Galesburg, Kankakee, Danville, and Rock Island.

The lawyers compete with each other, but few are critical of the system; the financial rewards are too satisfying to want to tinker with it. Defense attorneys are fully employed on hourly or per diem charges. And a claimant's attorney, even with just a few cases a day, on a contingent fee of twenty percent of the recovery, is well rewarded.

The standard twenty percent fee for the claimant's attorney seems modest in comparison to common law contingent fees of thirty-three and one-third percent in the personal injury field. But, in contrast to other personal injury lawyers, the workmen's compensation lawyer can handle two, three or even fifteen cases in one day. He rarely spends time or money in legal research, pleading, depositions, filing or answering motions, or investigation. There is no filing fee. The only out-of-pocket expense is the medical examination.<sup>20</sup> His time usually involves only an initial interview (perhaps), making an appointment with a doctor, and a telephone or verbal negotiation with the defense counsel. Even a trial takes less than an hour in ninety percent of the cases. Prior to 1975, the average trial or settlement award at the Commission was at least \$1100 to \$1200.<sup>21</sup> Even two or three such cases at a twenty percent fee produced a rather satisfying day. Five, eight or more cases produce an even more satisfying day. Many claimant lawyers have this kind of volume day after day.

Since 1975, with the benefit level more than doubled,<sup>22</sup> the standard twenty percent fee produces more than double the amount of dollars. Small wonder that Chicago lawyers began to invade new territories downstate, or that more and more lawyers have entered the field of workmen's compensation practice. Fear of "no fault" legislation in itself caused some lawyers to abandon or curtail automobile cases to enter the field of workmen's compensation. Like an inverse of Parkinson's Law, the number of filed and litigated cases increased to accommodate the new participants, from 40,000 in 1974 to 57,000 in 1977.<sup>23</sup> Some lawyers became specialists in acquiring the cases, and others, by referral, in handling the cases. None of this interest by lawyers is illegitimate or dishonorable. We all (and not just lawyers)

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20. It is common practice in Illinois for the attorney to advance this cost. In several states, Indiana for example, the attorney does not.

21. This is a consensus figure developed on the basis of conversations with attorneys. See note 3 *supra*.

22. See text accompanying notes 49-95 *supra*.

23. See note 14 *supra*.

wish to make a living—even a good living. But, no one should assume that the litigation explosion reflects any “accident explosion” in Illinois. The statistics refute any such conclusion.

The methods of some lawyers for “getting the cases” raise serious questions. Some extend loans, even pay cash to a claimant for “signing up.” Most defense lawyers have encountered the statement from opposing counsel, “I can’t settle the case for that amount. I’ve already loaned the guy \_\_\_\_\_ dollars!” About two years ago, a major employer received eleven identical applications—identical except that each was filed by a different claimant’s attorney. The surprise was that the claimant had not worked for this company for more than five years. Of course, this claimant was never seen again; he had already collected through loans and “advancements” from the attorneys when he signed up.

In the view of many, it is the lucrative lawyers’ fees which have “fueled” the litigation explosion far more than any other factor.<sup>24</sup> The financial interest of plaintiff lawyers is strong indeed. In 1976 and 1977, this group hired a legislative lobbyist to protect this interest in Springfield. It even started to form a “not for profit” educational association to advance the role of lawyers in workmen’s compensation on a tax-deductible basis. One does not question the legitimacy of anyone advancing any cause in the legislature or engaging in an educational endeavor. But, the conduct illustrates the depth of lawyer interest as a factor in the litigation explosion.

### *The Doctors*

The doctors who frequently examine and testify in workmen’s compensation cases are hardly responsible for the case load since a lawyer has already filed the case. But, these doctors are a necessary adjunct to the process, and any description of the process would be incomplete if they were omitted. The law requires each side to submit its medical report to the other side at least forty-eight hours in advance of the hearing.<sup>25</sup> The tremendous increase in litigation results in a corresponding increased demand for medical examinations and reports.

While many defense attorneys are content with the final report of the treating doctor and the hospital records, if any, the claimant’s

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24. The Chicago Daily News, Jan. 28, 1978, col. 1, at 12, in an editorial remarked: “In Illinois, attorneys are involved in 91% of the cases compared to 10% in Wisconsin. In Illinois, an arbitrator can grant an attorney up to 20% of his client’s total award, compared to 10% in Wisconsin.”

25. ILL. REV. STAT. ch. 48, § 138.12 (1977).

lawyer seldom is. So, a small coterie of specialist doctors has developed—developed to a degree that many of these doctors do nothing but examine and testify. New doctors recently were added to satisfy the increased demand. Their business depends upon writing reports satisfactory to the lawyers who hire them, and their reports become more and more extreme in their competition for business. Naturally, the defense lawyers need doctors to counter the extreme findings of the plaintiffs' doctors, and so a group of examining and testifying defense doctors has developed.

The ridiculous extreme has been reached. Certain claimant lawyers now charter buses — from Mattoon, Champaign, Rockford — to bring their clients to Chicago for examination by a particular testifying specialist. One doctor examines, takes x-rays, and writes reports on thirty-five to forty claimants a day (a busload) between 9:00 a.m. and 3:00 p.m. with some time out to run over to the Industrial Commission to testify. His reports cover cases ranging from dermatitis, to laminectomies, to complicated occupational diseases, heart attacks, and psychiatric problems.

The medical reports, in practice, become part of the pleadings rather than an aid in finding truth. It is the norm at the Commission for the plaintiff's medical report to show "50% loss of use of the leg" and the defense report to show "no evidence of disability." Cases are frequently settled on the "balance of the terror" imparted by the two medical reports, for neither has the ring of truth. If the case is tried, the Commission and its arbitrators can only guess at where the truth may lie. If they believe a little from each, they give credibility to the bigger of the two lies. The fact that there are doctors willing to distort the truth creates disputed questions where none exist. Such doctors are an essential element of the litigation explosion.

#### *Others*

A new vocation has developed in the personal injury and workmen's compensation fields. A claim adjuster for a large insurance company was recently investigating why an injured employee had not returned to work, even after the doctor gave him a full release. He was told by the claimant that he had been making so much money referring injured persons to attorneys that he had decided to do that full time and not return to his regular job.

Persons in this vocation carry the forms with them, sign up the claimant, and then give the papers to an attorney. They are usually compensated as "investigators" by the attorney. In workmen's compensation, the attorney sometimes does not meet his client until the

day of the trial. In addition, there are the taverns in Chicago, Joliet, Rockford, and many other cities which always have a supply of attorneys' business cards. Hospital and ambulance attendants as well as policemen and doctors make references, frequently for a reward of some tangible nature.

#### THE ANTIQUATED SYSTEM IN ILLINOIS

##### *A Purely Adversary System*

The Illinois process and procedure in workmen's compensation has scarcely changed since 1913.<sup>26</sup> The provisions of the Act, except for the dollar figures, are much the same. The revision of 1951, while a new Act in form, was merely a rearrangement and codification of the prior law done under an express mandate not to make any changes of substance or procedure.<sup>27</sup> It is a pure adversary system in the ancient, pristine splendor of the 19th century. The Industrial Commission and its arbitrators have no jurisdiction to enter any kind of order except as a "dispute" has been submitted to it by the parties, usually by the attorneys.

Such a system ignores two of the three basic elements of workmen's compensation benefits: immediate medical attention and immediate payment of temporary total compensation benefits to sustain the worker and his family during any period of lost time due to the injury. Inability to receive these benefits at the time can be disastrous to the individual involved. Existing procedures focus on the third element of benefits, the permanent disability. Lawyers, who have guided all the amendments to the statute throughout the years, have seldom bothered with these two vital areas of benefits, for few such cases reach litigation and provide fees.

In several other states, notably Wisconsin, jurisdiction attaches as soon as the accident is reported. The administrative agency immediately issues orders for the medical attention and the immediate payment of temporary total compensation, without the need for attorneys or for a hearing. Its jurisdiction continues, even to the point of assessing the permanent impairment, if any, all without the intervention of lawyers or formal hearings. Only if the employer or employee disagrees with this on-going process is there a formal hearing.<sup>28</sup>

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26. The first Illinois Workmen's Compensation Act was passed in 1911 but soon was replaced by the Workmen's Compensation Act of 1913.

27. The mandate was from the "agreed bill" committee. See text accompanying notes 96-102 *infra*.

28. WIS. STAT. § 102 (1977).

The result is that most injured workers enjoy the full benefits of the statute under the supervision of the administrative agency, and never need to employ a lawyer. In fact, unless there is a dispute as to whether the accident occurred, or a difficult question as to whether the accident caused a particular disability, there is no issue requiring legal expertise. The statute is clear as to the weekly rate to be paid and medical attention is the special province of doctors, not lawyers. The only issue on which opinions could differ is whether a permanent impairment exists. Permanent impairment itself is a medical, not a legal question, which the administrative agency can resolve on the basis of medical reports with or without the assistance of lawyers whose only function would be to present those medical reports. Of course, the Wisconsin system is not favored by lawyers who argue that only the adversary system protects the rights of the individual. In the more than 100 amendments to the workmen's compensation law in 1975, not one amendment diluted in any respect the adversary system.

But even the adversary system, as we know it in our courts, has made great strides in reducing litigation. Both the courts (state and federal) and many administrative agencies have recognized that the trial of a case should not be a game of "hide and seek," and now have modern rules of pre-trial discovery, depositions, interrogatories, notices to admit genuineness of documents, and pre-trial conferences, all designed to ascertain truth and simplify disputes, thus encouraging settlements or reducing the time involved in litigation. But none of these modern advances have touched the Illinois workmen's compensation system.

The Illinois Workmen's Compensation Act has only two minor means of pre-trial discovery. First, reports of medical examinations must be submitted forty-eight hours before the hearing if that doctor's testimony is to be presented,<sup>29</sup> and secondly, the deposition of an out-of-state witness may be taken on order of the Industrial Commission. This procedure is pre-1900 and is still called in the statute a *dedimus potestatem*.<sup>30</sup> One can subpoena witnesses or records, but only for the hearing, not for any pre-trial discovery.

Some attorneys do play "hide and seek" with medical reports until just forty-eight hours before the hearing. The defense does not know with any certainty what disability is being claimed until that time. The defense has no time to satisfy itself that the medical report is

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29. ILL. REV. STAT. ch. 48, § 138.12 (1977).

30. *Id.* § 138.16.

accurate or to get authority for any settlement. Or, the employee may have left the employment or moved to another city; he may or may not be working elsewhere; he may or may not still be under medical treatment. Each of these factors may be material in leading to a settlement rather than a trial. But, the defense has no way of finding out. It cannot even serve a simple interrogatory to find out what kind of injury will be alleged. So, the case must be tried, and the defense gets its "discovery" during the trial. It then orders a medical examination and any other investigation for the appeal hearing where additional evidence can be presented.<sup>31</sup>

An arbitration hearing involves the time and expense of an arbitrator, a court reporter, two lawyers, doctors, lay witnesses perhaps, and considerable clerical work by the Commission staff. It would frequently be an unnecessary expense if the facts were obtainable in advance. An appeal must then be filed, within fifteen days,<sup>32</sup> while the facts just discovered at the arbitration hearing are checked out. The appeal starts another train of clerical work including the preparation of a costly transcript of the evidence, an expense which would be saved if there were simple pre-trial discovery as in all other tribunals.

An appeal from the final order of the Commission to the courts is also a clumsy procedure from the 1890's. Five separate documents carrying designations such as "Writ of Certiorari" and "Scire Facias" are required to effect an appeal.<sup>33</sup> Until 1964, when the Illinois Supreme Court obtained true rule-making power,<sup>34</sup> the ancient "Writ of Error" was the only means of appealing to the supreme court. Although Illinois has a modern Administrative Procedure Act,<sup>35</sup> it only applies to such agencies as the legislature may from time to time designate. Lawyers and labor unions have kept it from being applied to the Industrial Commission. Illinois also has a modern Administrative Review Act<sup>36</sup> providing for judicial review of administrative agencies, but it does not apply to Workmen's Compensation Act cases. Illinois remains in a "dark tunnel," with an antiquated statute and powerful vested interests seeking to maintain the status quo.

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31. *Id.* § 138.19(e).

32. *Id.* § 138.19(b).

33. *Id.* § 138.19(f). The other forms are: Praeceptum for Writ of Certiorari, Certificate of Mailing, and Bond on Writ of Certiorari. The Illinois Administrative Review Act requires only a simple Notice of Appeal, plus a bond, if needed.

34. ILL. CONST. art. VI, § 4.

35. ILL. REV. STAT. ch. 127, §§ 1001-1021 (1977). A 1977 amendment to this Act may render certain provisions applicable, particularly § 1014 requiring a statement of facts and findings of law in all contested cases. P.A. 80-1035 § 1 (1977). It remains to be seen how the Commission will deal with this law.

36. ILL. REV. STAT. ch. 110, §§ 264-279 (1977).

It is difficult to blame the current Commission and its arbitrators for faults in a system so legally antiquated. Therefore, nothing in the next two sections of this Article is designed to be critical of the incumbents who did not create the system. The lack of vision or will to improve it, however, is a fault shared by many.

### *The Commission*

The administration of the law is given to a Commission consisting of five persons whose background is restrictively circumscribed. The statute prescribes:

2 of whom (one from each of the 2 major political parties) shall be representative citizens of the employing class . . . and 2 of whom (one from each of the 2 major political parties) shall be representative citizens of the class of employees . . . and one of whom shall be a representative citizen not identified with either the employing or employee classes. . . .<sup>37</sup>

Except for the bipartisan qualification adopted in 1967, this provision remains unchanged since 1913. The change was made to bring some continuity to Commission membership; before this change, a new Governor usually appointed five new, totally inexperienced commissioners from his party.

Each new commissioner, once appointed, has an ambivalent role: does he function as a judge *under* the law, or does he lobby within the Commission and make adjudications as a continuing advocate of employers or of employees? Every practicing attorney in this field will relate that it does make a difference whether Commissioner A or Commissioner B rules in a particular case, even though each is enforcing the identical law. The question is whether individual rights should be at the mercy of such assignments. The Rule of Law and respect for law in our society depend upon similar cases being similarly decided. This does not happen when each commissioner pursues his independent judgment and philosophy.

The effect is violative of the Equal Protection Clause of the Constitution.<sup>38</sup> However, no lawyer could prove an equal protection case without the most exhaustive kind of research analyzing thousands of cases, for the Commission has never established any standards for itself or its arbitrators. One cannot prove a deviation from a fair standard when there is no standard in the first place. One may say that

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37. *Id.* ch. 48, § 138.13.

38. U.S. CONST. amend. XIV.

this conduct is no different than the differences among judges in the courts who may have varying predilections. However, a commissioner may claim his bias has statutory sanction.

The work of members of the Commission is long and arduous. They approve settlement agreements, and they hear appeals from the decisions of the arbitrators. One week of each month, four commissioners fan out throughout the state to hold Hearings on Review (appeal hearings) near the place of the injuries. Over half of the decisions of twenty arbitrators are appealed to a commissioner.<sup>39</sup> Each appeal will, or should, involve reading a somewhat lengthy transcript of the evidence heard on arbitration, hearing additional evidence, and listening to oral arguments. The workload is enormous. Because of the number of appeals, the full Commission sits two to three days a week just hearing oral arguments.

When over half of the arbitrators' decisions are appealed, it should be obvious that these "first level" hearings are not really resolving disputes. The fault here is that of the Commission. First, it has failed to give directions or standards to the arbitrators to aid them in making decisions. Secondly, the variations of philosophy and conduct among the commissioners themselves make any attorney (for either side) feel he may do better on appeal just by the luck of the draw concerning which commissioner is assigned to his case.

The rapid increase in caseload has rendered this system incapable of performing its function without some changes. But strong, vested, politically active interests are bent on maintaining the status quo. Any breath of reform which might affect the lawyers' privileged position is strongly opposed by both lawyers and labor unions.<sup>40</sup>

### *The Arbitrators*

The arbitrators are the hearing officers at the first level in Industrial Commission proceedings. It is a full-time job and the work is arduous. The pay is \$34,000 a year. There is no special training required, and none given after an appointment other than to spend one or two weeks with an experienced arbitrator before starting to hear cases.

In Chicago, the arbitrators are at work from 8:45 a.m. to 4:45 p.m. each day, hearing cases most of the time. Downstate, the arbitrators travel to various cities, sitting one to eight days in each location from

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39. See note 3 *supra*.

40. Why the labor unions identify with the plaintiff lawyers is unknown, but in over 20 years of observation, the author has yet to see any deviation from the alliance between them.



9:00 a.m. to 4:45 p.m. A court reporter attends with them. They hear cases three weeks each month and have one week free for administrative duties.

Before 1967, the job of arbitrator was pure patronage. Each time the Governor changed, all the arbitrators changed, with rare exceptions. This always meant a loss of some experienced talent, for as in our judicial system, patronage did produce some good arbitrators. In 1967, Senator Arrington sponsored a bill placing arbitrators under civil service.<sup>41</sup> The incumbents merely had to pass the test to remain in office,<sup>42</sup> and an eligibility list for future appointments was established.<sup>43</sup>

The arbitrators must know the rules of evidence, for they apply in all proceedings. They must also have knowledge of medical terms and a considerable amount of common sense. Many are well qualified. But from the decisions, one never knows whether they have these qualifications or not. Their decisions are stereotyped documents, just filling in blanks. In the most complicated fact situations, the arbitrator's decision contains only the simplistic finding of "sustained an accident" or "did not sustain an accident," with no discussion or description of the facts.

Many other administrative agencies at the state and federal level in disputed cases write a statement of facts or a summary of the evidence and findings of fact and law.<sup>44</sup> The only order received by the parties at the Industrial Commission is a one-page document reciting the ultimate statutory findings. From such a document, no one can tell whether the arbitrator had discerning judgment, noticed particularly significant pieces of evidence, or merely flipped a coin. All decisions look just alike.

Such a shield can conceal incompetence. Worse yet, it permits an arbitrator to reward friends and punish enemies with little fear of detection. Attorneys frequently feel that happens, for lack of any logi-

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41. ILL. REV. STAT. ch. 127, § 63b104c(14) (1977). This statute exempts only the Secretary from the Personnel Code.

42. All except one passed it.

43. The actual testing was bona fide and severe. There was a written examination in legal and medical areas, and an interview conducted by experts from outside Illinois.

Governors Kerner and Ogilvie followed the civil service law in every respect. Governor Walker, however, abandoned the testing procedures and made several appointments on the old patronage basis.

44. Illinois Administrative Procedure Act, ILL. REV. STAT. ch. 127, § 1014 (1977). Even the job specification for Arbitrator states: "4. Writes decisions, involving summarization of material evidence, statement of findings of fact and conclusions." Ill. Dept. of Personnel, Spec. Code 1850, Position Code 1401 (Dec. 1, 1970).

cal explanation in the decision. A simple statement of facts or summary of the evidence in the decisions would make the process more rational. Illinois is unique in not requiring any such statement from its hearing officers.<sup>45</sup>

Even more puzzling is how arbitrators and commissioners arrive at the degree of disability, an issue present in almost every decision. This is the question whether and to what degree a particular part of the body has suffered a loss of use. In its decisions, the Commission and the arbitrators merely state the conclusive fact, "25% loss of use of \_\_\_\_\_," and nothing more.

There is no common standard which the twenty arbitrators and five commissioners share and follow. As a result, similar cases are not necessarily similarly decided. Awards in virtually identical cases can vary 300% to 500% in either direction, even though each "trier of fact" is following an identical law.<sup>46</sup> Attorneys, of course, know the characteristics of the various arbitrators and do considerable jockeying to obtain or avoid particular arbitrators. In Chicago, attorneys patrol the halls to see which arbitrators are occupied or free before deciding they are ready for trial and stepping up to be assigned. Many decide the time is not ripe for trial and disappear for a cup of coffee until different arbitrators are available. This process may repeat itself several times a day.

Again, this situation is not the fault of the arbitrators. The Commission has prescribed no standards for them to follow. To their credit, a group of arbitrators themselves arranged for advice and counsel from specialty doctors when faced with the confusion of the new 1975 provision for partial loss of hearing.<sup>47</sup> Most follow the good advice they received, although none is bound to do so.

Usually, an administrative agency establishes definitive rules spelling out the details left to it by the legislature. This was not done by the Illinois Industrial Commission, however. In 1977, the legislature specifically directed the Commission to make and publish rules "for determining the extent of disability sustained,"<sup>48</sup> an issue present in almost every case. No action has been taken thus far.

In its own interest, in order to facilitate its own ability to operate currently, the Commission must break out of its antiquated, passive

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45. See note 35 *supra*.

46. This explains why over half of the arbitrators' decisions are appealed to the full Commission. Such "variations" among decisions inevitably lead to appeals.

47. Lecture by Dr. M. Reese Guttman, otolaryngologist, arranged by the Arbitrators' Association (March, 1976).

48. ILL. REV. STAT. ch. 48, § 138.16 (1977).

background. It now has the power to adopt rules for all to follow "for determining the extent of disability"; if it does so, *and follows its own rules*, more and more cases will be settled voluntarily on a fair basis for all, and its litigation load would become manageable. Simple discovery may or may not be within the Commission's rule-making power, but if an effort were made, most parties would cooperate. Trials would not have to be undertaken as the only means of finding out the facts.

The antiquity of the basic law is the responsibility of the legislature which may have to decide whether to subsidize the adversary system further or pursue the more economical Wisconsin system. The Commission today is boiling and churning with activity, but falling farther and farther behind. The legislature should not simply throw more money at the problem; the problem requires deeper examination.

#### BENEFIT LEVELS IN THE 1975 LEGISLATION

Thus far, this Article has dealt with the delivery system of Illinois benefits. We now turn to the level of benefits. The 1975 amendments to the Illinois workmen's compensation and occupational diseases laws<sup>49</sup> were truly drastic. The costs to Illinois business for these programs are by far higher than in any other industrial state in the nation.<sup>50</sup> In theory, workmen's compensation should replace the economic loss sustained. In Illinois, the benefits far surpass such losses.

#### *The Weekly Benefit Rate*

In 1975, the weekly benefit rate in Illinois went from the level of \$80-\$124 per week, depending on the type of claim and the number of dependents of the employee, to two-thirds of gross wages, subject to a maximum figure of the "state average weekly wage in manufacturing industries." Further, the benefit rate could never be less than fifty percent of the employee's own wage.<sup>51</sup> Provision was further made for escalation every two years up to 1981, the maximum rate to increase to 133 $\frac{1}{3}$ % of this "state average weekly wage in manufacturing" in 1977, 166 $\frac{2}{3}$ % in 1979, and 200% in 1981.<sup>52</sup>

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49. *Id.* § 172.36-.54(b).

50. ILLINOIS FISCAL COMMISSION, REPORT ON ECONOMIC AND FISCAL TRENDS IN THE STATE OF ILLINOIS 14-17 (Dec. 2, 1977).

51. ILL. REV. STAT. ch. 48, § 138.8(b) (1977).

52. *Id.*

Some unusual cases arose. Two corporate executives in the \$70-\$90,000 income bracket were killed in accidents arising out of and in the course of their employment. Their widows, both in their thirties, are now receiving \$35-\$45,000 tax free per year for the rest of their lives under the "never less than 50%" provision. This was rather startling, even to the legislators who are covered by the Act also. Spouses were perhaps becoming more valuable dead than alive. The "never less than 50%" provision was deleted in 1976.<sup>53</sup>

In 1977, the escalation section was also modified. The first 133 $\frac{1}{3}$ % escalation was permitted, but only in cases of amputations, temporary total compensation, permanent total disability, and death. The 1979 and 1981 escalations were deleted. For all other types of benefits, the maximum weekly benefit was "state average weekly wage."<sup>54</sup> Further, the state average weekly wage was to be determined by the average wage in *all* employment in Illinois, as computed by the Unemployment Compensation Bureau, rather than the "state average weekly wage in *manufacturing industries*" enacted in 1975.<sup>55</sup> The state average weekly wage is re-examined every six months. By January 15, 1978, the "state average weekly wage in manufacturing" had progressed to something over \$240 per week. But, the overall state weekly wage, which is now the standard for determining benefits was \$230.05 per week.<sup>56</sup> 133 $\frac{1}{3}$ % of that standard is \$306.73 per week, which is the current maximum weekly benefit for amputations, temporary total compensation, permanent total disability, and death. For all other benefits the maximum is \$230.05.<sup>57</sup> It is apparent that these new maximums are more than twice the weekly maximums in existence prior to July 1, 1975. While not all employees get the maximum, by the very definition of "average," more than half of the Illinois work force is above this average, and the next lower quartile receives a substantial increase over the prior level.<sup>58</sup>

The original premise of workmen's compensation in 1913 was a "two-thirds of weekly wages" formula.<sup>59</sup> Advocates of the 1975 pro-

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53. P.A. 79-1450 (1976).

54. P.A. 80-37 (1977).

55. *Id.*

56. *Id.*

57. As this Article goes to print, the new rates which will be effective July 15, 1978 have been published. The new state average weekly wage is \$241.12; the temporary total rate is \$321.49; the maximum in a death case is \$349.60.

58. It should not surprise anyone that the insurance companies increased their insurance premiums in accordance with these increases in benefits, for these are sums they must pay out of premiums received.

59. See REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (August, 1972).

gram claim that the current benefit is merely the traditional standard. But, in 1913 there were no deductions for withholding taxes or social security. The two-thirds formula left considerable incentive for a person to work rather than stay home. Applying the two-thirds formula today leaves little difference between "take home" pay and workmen's compensation. Assume a person claiming one exemption at the following weekly earnings, with the required withholding for federal and state income taxes plus social security.<sup>60</sup>

<u>Weekly Earnings</u>	<u>Take Home Pay</u>	<u>Workmen's Compensation</u>
\$100.00	\$ 79.75	\$100.00 <sup>61</sup>
200.00	149.46	133.33
300.00	213.54	200.00
460.10	304.26	306.73

If one deducts from these "take home" figures the further expense of getting to and from work, lunch money, work clothes, and union dues, it is apparent that workmen's compensation provides as much spendable income as does working, and leaves no financial incentive to return to work.

The claim that the current benefit levels follow the original concepts of workmen's compensation is a fiction. Current benefits should be a percentage of "take home" pay, not gross wages, to be comparable to the initial philosophy.

### *Death Benefits*

Prior to the amendments of July 1, 1975, the amounts payable in death cases ranged from \$10,250 for a widow with no children to \$34,485 for a widow with four or more children.<sup>62</sup> These limits were replaced with the lifetime benefits at the weekly rates set forth in the preceding section—a maximum of \$306.73 per week, or about

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60. See DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, EMPLOYER'S TAX GUIDE (Circular E Supp. 1977).

61. ILL. REV. STAT. ch. 48, § 138.8(b)1 (1977). This is an aberration beyond logical explanation.

62. ILL. REV. STAT. ch. 48, § 138.7(b) (1977). Specifically, the amounts were as follows:

	<u>Min.</u>	<u>Max.</u>
Widow and no children	10,250	24,624
Widow and one child	11,200	26,220
Widow and two children	11,540	28,728
Widow and three children	12,830	31,179
Widow and four or more children	12,830	34,485

\$16,000 annually. And the minimum became six years of compensation, or \$115,000 even if the recipient was actually dependent for only one day.<sup>63</sup>

No one would deny that the prior death benefits were inadequate. However, it is also true that the new benefit levels represent a drastic increase. Workmen's compensation awards, at least for younger widows, are now in excess, in many instances, of what juries award in cases of death arising from negligent actions. Workmen's compensation is no longer a system of limited liability.

The 1977 legislature amended the death benefits section to provide that the maximum payable in any case is \$250,000 or twenty years of compensation, "whichever is greater."<sup>64</sup> However, twenty years of compensation for persons at the maximum rate is \$319,000 (twenty years at \$306.73 per week). For the highly paid employee, the \$250,000 maximum was obsolete when enacted!

The weekly payments are the same amount, irrespective of the number or type of dependents. The weekly rate, once established, is not reduced as long as any dependent is alive or eligible. Change in family circumstances or reduction in the number or age of dependents never affects it. In fact, it increases annually for inflation as the "state average weekly wage" increases.<sup>65</sup> This produces some curious results. For example, if the only dependent is one minor child, the benefits continue until the child reaches age eighteen, or twenty-five if the child is enrolled in any accredited educational institution.<sup>66</sup> A single child, therefore, as the only dependent, can receive \$16,000 a year while going to school, even through graduate school. He may make more while in school than on his first job!

On the general principle that workmen's compensation should be "compensatory for the loss," this is clear overcompensation; the deceased parent would never have given the child \$16,000 a year for his college education, if indeed, he financed his college education at all. Should the employer be required to do more than the deceased parent? Does the new law replace the loss or grant a windfall?

As to surviving widows or children, there is additional income from social security which, in combination with the workmen's compensation benefits, frequently produces gross annual income on a tax-free

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63. *Id.* ch. 48, § 138.7-.8.

64. *Id.* § 138.8(b)4.2.

65. *Id.* § 138.8(g). Employers and insurance companies are assessed one half of one percent of their compensation payments each year for the Compensation Rate Adjustment Fund. The State Treasurer, not the employer or insurance company, makes the payment. *Id.*

66. *Id.* § 138.7(a).

basis well in excess of the actual net wages of the decedent. The death is financially more beneficial for the rest of the family than if the decedent had lived.

The report of the National Commission on State Workmen's Compensation Laws, which the advocates of the 1975 legislation said they were following, recommended that the amount of workmen's compensation benefits be offset to the extent of any social security payments.<sup>67</sup> The Illinois legislature did just the opposite; workmen's compensation benefits are in addition to social security payments.

Opinions vary as to what should be the proper level of benefits in death cases. It seems beyond question, however, that the level of benefits should be related to the number of dependents and to the reasonable expectations of the dependents from the decedent had there been no death.<sup>68</sup>

### *Permanent Total Disability Benefits*

The level for permanent total disability benefits has increased in much the same way as the death benefits. The maximum weekly benefit is 133 $\frac{1}{3}$ % of the state average weekly wage.<sup>69</sup> The benefits continue throughout the lifetime of the individual. If he dies from the same condition involved in the accident, it is arguable that these benefits continue for his widow and children.

In addition to the workmen's compensation benefits, all true cases of permanent total disability receive social security benefits. The total compensation shall not exceed eighty percent of the employee's gross earnings prior to the disability. If this ceiling is reached, social security gets the reduction, not the employer. Of course, eighty percent of gross earnings on a tax-free basis is far better income than taxable wages from working.

Needless to say, benefits at this level are tempting to many persons. Frustrations with a job, inability to live up to a self-imposed image or to an image demanded by a spouse, parents, or anyone else, tempts a person to look for an excuse for non-performance, but with-

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67. THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 73 (July, 1972).

68. The writer recently received the following case to defend. In a two-week period, a 65-year-old employee married a 19-year-old girl (the daughter of his neighbor), took his retirement pension, and filed a workmen's compensation claim for an occupational disease. If the employee can win this case, he will "speak from the grave" for a very long time at his employer's expense. His 19-year-old wife may well receive 50 years of support from the employer, something she never would have received from her 65-year-old spouse.

69. As of January 15, 1978, the maximum weekly benefit was \$306.73.

out any financial sacrifice. Workmen's compensation gives just that. In fact, the financial rewards for *not* working are greater than for working.

The threat of an award of the tremendous sums involved in these lifetime benefits naturally frightens employers and insurance companies. The fear is real in that the Illinois Industrial Commission has shown little restraint in awarding permanent total disability whenever a claimant complains enough and stays away from work, even with a paucity of objective findings of disability. Attorneys know this, of course, and frequently advise a claimant to stay home if he wants a bigger settlement or award.

### *Temporary Total Compensation*

Temporary total disability is defined as that period necessary to restore a person to work status, or to the point where further medical treatment will not improve his condition. It might be described as the "period of the healing process."<sup>70</sup>

The new level of benefits, two-thirds of actual wages,<sup>71</sup> received on a tax-free basis, has considerably increased the length of the period of temporary total incapacity. The employee can stay home and be financially as well off as when he works. All he needs is the cooperation of his doctor, selected, of course, by him. For example, before July 1, 1975, the author observed that the average lost time period for a hernia operation was six to eight weeks. Now the average is ten to fourteen weeks. This lengthening of the period is an additional cost of the new law, not reflected in the increases in weekly rates.

Further, there was formerly a limitation of sixty-four weeks on the period of temporary total incapacity.<sup>72</sup> Any payments made after sixty-four weeks were applied against the permanent disability. The 1975 amendments removed any limitation on the number of weeks for temporary total disability,<sup>73</sup> so it can go on for life.<sup>74</sup> Whether called "temporary total" or "permanent total," the discussion of per-

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70. *Mount Olive Coal Co. v. Industrial Comm'n*, 295 Ill. 429, 431, 129 N.E. 103, 104 (1920).

71. ILL. REV. STAT. ch. 48, § 138.8(b) (1977). The maximum for temporary total compensation benefits is now \$306.73. Before July 1, 1975, this maximum was \$100.90 to \$124.30 depending upon the number of dependents.

72. ILL. REV. STAT. ch. 48, § 138.8(b) (1973).

73. ILL. REV. STAT. ch. 48, § 138.8(b) (1977).

74. The free choice of doctor provision enacted in 1975 is also responsible for longer periods of treatment and longer periods of temporary total compensation. See text accompanying notes 92-95 *supra*.



manent total disability, above, is applicable to the temporary total type of benefit. The weekly rate is the same, no matter how it is categorized.

### *Permanent Partial Disability*

It may seem contradictory to state that the lesser injuries are the major problem in Illinois. But this is the most expensive cost item in Illinois workmen's compensation, the most lucrative area for claimants' attorneys, and the most confusing area in workmen's compensation administration.<sup>75</sup> Almost by definition, the permanent partial disability case presents a lesser injury than death, permanent total or major amputations. The employee has returned to work at his regular job. The question presented is whether he has a permanent loss of use of some part of his body as a result of the injury. While some such injuries are of a serious nature, many involve minor scratches, incidental bruises or inconsequential fractures. In many other states these are described as "accidents without injury."

There is seldom any economic impact upon the employee as a result of the injury. His medical bills have been paid; if he lost time from work, he has received the equivalent of his take home pay on a tax-free basis; he has returned to his regular work at regular wages. But, in Illinois this is the largest single area of benefits and attorney fees, and, therefore, the lawyers' favorite playground. There are, of course, several hundred such cases for every death or amputation.

A tradition of hospitality has existed at the Industrial Commission with the corollary that anyone who has graced the Commission's halls should not leave empty-handed. Nothing heals without leaving disability or disfigurement in Illinois. In my own twenty-seven years experience, I recall when fractures did heal leaving no disability. Today, any fracture is deemed by the Commission to be at least a twenty to thirty percent loss of use of the fractured part of the body. If it has healed without any disability, it may be twenty percent; if there is anything slightly observable, it is at least thirty percent.

This is partly the result of the patronage heritage of the Commission. Each administration appointed by a new Governor wanted to show it could do more for the injured working man than did the last

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75. According to the data compiled by one major insurance company, this type of case represented more than 97% of the filed cases prior to July 1, 1975. It represented more than 85% of the workmen's compensation "paid-out" dollar. It was estimated that death benefits took only 2%, temporary total about 6%, and medical costs about 6% of the paid-out workmen's compensation dollar. No current figures are available. See note 3 *supra*.

one. So, a fracture which was formerly nothing began to become five percent, then ten percent and on up to the present level.

It is also the result of lazy defense counsel and claims departments over the years who will always pay something rather than expend the energy and cost of a trial. In times when fractures did heal without disability, some companies would pay five percent of the particular member rather than have a trial. It is not surprising that when commissioners found themselves approving settlement agreements for five percent even when there was no disability, they felt that they should award at least five percent in any tried case since so many companies were paying that. Once this level was established, the same lazy defense counsel and claim departments began to pay ten percent rather than face a trial. The commissioners followed suit and now the level for a "no disability fracture" is at least twenty percent of the member involved. This has been an inflation within the initial inflation caused by legislatively mandated increases in the weekly benefits.

A set of other "standards" has grown in the Commission. For example, a fractured os calcis is worth (at least) thirty-five percent loss of use of the foot, a fractured rib produces five to ten percent loss of use of an arm, a cartilage operation is worth thirty percent loss of use of the leg. One learns these "standards" only by being associated with the Commission for they are never printed or published in any manner.

The fallacy of these "standards" is that compensation is being awarded or paid in settlement based upon the initial type of injury, not on the residual "permanent partial loss of use" as the statute directs. Some persons are even undercompensated since no one actually looks carefully at their current condition of disability but only at the initial injury. Most, however, are overcompensated.

In the handling of these cases attorneys engage in ceremonial dances. First, the employee is sent to one of the claimants' stable of examining physicians with the aim of getting a medical report which shows gross restrictions of motion, tendonitis, tenosynovitis, and any other "-itis" which the claimant doctor's imagination can conjure. If possible, the doctor attempts to transform a finger injury into a hand involvement, or a hand into an arm involvement, for the greater the member involved, the more potential compensation is available.

On receipt of the claimant's medical report, the employer sends him to one of his stable of doctors in the hope of getting a report which states that there is "no objective sign of disability." Then, the two attorneys may examine the particular claimant and his injury themselves, or the arbitrator does so, and somewhere a guess comes

out as a settlement or award, without regard to which doctor, if either, stated the truth.

The cost of this ceremonial dance often expands to a point where it may exceed the value of the disability, if any. (For example, a medical examination with x-ray may cost from \$40 to \$150.) This renders a rational settlement difficult. Both attorneys, of course, now have a legitimate claim for attorney's fees. An arbitrator knows of these expenses and adjusts the amount of his award to cover them and still leave something for the employee.

Has this ceremonial dance and its expense done anything for the employee or the employer except increase the expenses for each of them? Neither of them probably had any disagreement with the treating doctor and his findings. Does a "system" such as this benefit anyone other than the attorneys and the doctors involved? How much better it might be if the Commission adopted standards which were known and published. Then, in accordance with the basic premises of law, the parties might well agree upon an appropriate settlement between themselves without the necessity of going to attorneys or to the Industrial Commission for litigation.

Lack of true standards plus the desire for fees encourage this litigation and expense. The author often has been confronted with the statement from opposing counsel, "the Company made a fair offer to this man, but I can't settle for that; I would not have done anything to justify a fee." So, the case has to be tried even though an acknowledged fair offer of settlement has been made. And somehow, the employer's "fair offer" gets conveyed to the arbitrator who feels he must award more than the employer offered, "because everybody knows that the employer was trying to get off as cheap as possible!" Or he exceeds the employer's offer just to keep the claimant's attorney from looking bad. Perhaps the employer only wanted to save the expense of ceremonial examinations and attorney fees by making this "fair offer," but the system frustrates any "fair offer" approach by increasing the cost, no matter how fair the offer was. Why should the employer or insurance company try to be fair at all if the result is a larger payment?

The National Commission on State Workmen's Compensation Laws in its 1972 report stated that permanent partial benefits are "the most controversial and complex aspect of workmen's compensation. We were impressed during our hearings and meetings that for no other class of benefits are there more variations among the States or more divergence between statutes and practices."<sup>76</sup> But it ducked the

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<sup>76</sup> THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 66 (July, 1972).

problem. "Nonetheless, we have concluded that the issue is as intractable that we would do a disservice to make precise recommendations for the restructuring of permanent partial benefits on the basis of the time for analysis that was available to us."<sup>77</sup> While making no specific recommendations in this area, some did insist upon the following statement in the Report bearing on the central problem of evaluating permanent partial disability: "A basis for rational evaluation of injury or disease is the recently published American Medical Association's *Guides to the Evaluation of Permanent Impairment*."<sup>78</sup>

While the legislature also avoided action in this area (rather the lawyers and labor unions did not include it in their 1975 package), one of its commissions reported under Suggested Legislation as follows: "The Industrial Commission would be required to adopt standards for evaluating impairment in cases of permanent partial injuries such as the American Medical Association's *Guides to the Evaluation of Permanent Impairment*."<sup>79</sup> This legislative commission further published a table showing how Illinois found a disability when other states did not.<sup>80</sup>

Percent of Cases Awarding Permanent Trial  
Compensation

Type of Case	California	Florida	Wisconsin	Illinois
Permanent Partial Award with no Temporary Total Payable	20%	22%	11%	53%
Permanent Partial Award with less than \$200 Medical Payments	12%	12%	17%	60%

This table demonstrates again that injuries which heal in California, Florida and Wisconsin do not heal in Illinois!

While the AMA *Guides* may not answer all of the possible hypothetical questions arising in the area of permanent partial impairment, they do cover seventy to eighty percent of the recurring

77. *Id.* at 67. According to one member's conversation with the author, however, the National Commission avoided the "permanent partial" issue not because the problem was so intractable, but because it wanted a unanimous report. If it had faced up to the problem, it would have alienated the union representatives and attorneys among the members of the Commission.

78. *Id.* at 69.

79. WORKMEN'S COMPENSATION INSURANCE SUBCOMMITTEE OF THE ILLINOIS INSURANCE LAWS STUDY COMMISSION, FINAL REPORT 52 (February, 1977).

80. *Id.* at 41.

kinds of disability.<sup>81</sup> A reduction of litigation in seventy to eighty percent of the Commission docket would be a real achievement. With these *AMA Guides*, an employer or insurance company would know what he ought to offer an employee for an injury. An employee could find out from his family doctor whether or not he is getting a fair deal for a fee of twenty dollars instead of a twenty percent attorney's fee. If the degree of permanent partial impairment were based upon fair standards and honest medical findings, awards would not vary from arbitrator to arbitrator or from arbitrator to Commission. Cases would be amicably adjusted without hearings, because of the certainty of result. The litigation explosion would be easily handled.

In fact, most cases involve only the question of the extent of disability. Do lawyers bring any essential skill to such a question? Isn't it a medical, not a legal question? No one can deny that lawyers are necessary in the current antiquated system. The problem is the *system*, not the lawyers, except as the lawyers rather unanimously, out of sincere self-interest, oppose any changes.

We have a very expensive system to determine very minor disputes such as whether a finger has twenty percent or twenty-five percent impairment. The expense is not justifiable to the injured employee, to the employer, or to the taxpayers who pay the commissioners and arbitrators. Any improvement here would mean marked improvement on the heavy docket of the Industrial Commission for cases of this category represent the vast majority of the total number of cases.

#### *Unjustifiable Discrimination in Permanent Partial Disability Cases*

The current statutory scheme contains gross discriminations in permanent partial disability. For example, the statute has a specific provision awarding twenty weeks of compensation for a fractured nose.<sup>82</sup> This is the number of weeks awarded whether the fracture heals well or poorly and whether any disfigurement shows or not.

Assume a fractured nose suffered by a truck driver who earns \$350 per week and one by a waitress who earns \$150 per week. The truck driver receives twenty weeks of compensation at two-thirds of his wages, at least \$230.05 per week or a total of \$4,601. The waitress receives \$100 for twenty weeks or a total of \$2,000. Yet the fractured nose may have far greater economic impact upon the waitress if it

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81. See note 75 *supra*.

82. ILL. REV. STAT. ch. 48, § 138.8(d) (1977).

affects her appearance than it has on the truck driver. Why should he get more than twice what she gets? There is no rational justification for one to receive more than twice as much as the other. Yet, this invidious discrimination exists, as a matter of law, under the Illinois statute.

Our statute fails to discriminate in its benefit structure in terms of the needs to be met. For anyone making less than \$345.08 per week, the weekly rate is the same, whether paid for the temporary total, a permanent total period, for death or permanent partial disability. Yet the needs are vastly different. In the first three areas, the breadwinner is not working, and the benefit paid should be measured by what he and his family need to sustain their standard of living. In the area of permanent partial disability, the employee has returned to work at his regular job. His needs bear no relation to family sustenance. Yet, the weekly benefit rate is the same in both situations.

Several more enlightened industrial states have recognized the fallacy in having the same weekly benefits for such unrelated needs. In the following table, Column A shows the rate for death, temporary total and permanent total, and Column B shows the rate for permanent partial:

	<u>A</u>	<u>B</u>
Indiana	\$120	\$60
Wisconsin	$\frac{2}{3}$ of wages	57
Missouri	95	80
Michigan	144	none
New York	125	95
California	154	70
Ohio	$\frac{2}{3}$ of wages	98
Illinois	$\frac{2}{3}$ of wages or \$306.73	$\frac{2}{3}$ of wages or \$230.05

As pointed out before, lawyers get most of their fees from this permanent partial area and strongly oppose any reduction.

#### *Pre-existing Disabilities*

Pre-existing conditions have been a blurred field at the Commission. Prior to 1975, there was a general premise that "the employer takes the employee as he is," and therefore was responsible for the total amount of disability following an injury unless some prior condition of disability could be proved in a definitive manner.<sup>83</sup> The 1975

83. *Caterpillar Tractor v. Industrial Comm.*, 33 Ill. 2d 78, 210 N.E.2d 215 (1965).

amendments expressly provided that any prior condition could not be taken into account in rendering any current award of disability unless that condition *had been paid for under the Illinois Workmen's Compensation Act*.<sup>84</sup>

Consequently, for a severe impairment suffered in an automobile accident, or any accident in any other state, or for a disease or a birth defect, the Commission was forbidden to take it into consideration. The employer pays as if it had never happened, even though the employee may have gotten a \$500,000 jury verdict for the earlier disability. Consequently, if an employer hires a handicapped person or has one on his payroll, he takes the risk that in the event of an injury to that person, he will not pay just for the effect of that injury, but for the sum total of disability for the employee's lifetime.<sup>85</sup>

The invidious nature of this amendment is best described by considering an injury to an eye. Formerly, one could show the visual acuity before and after the accident and pay only the difference (the added impairment). The 1975 amendment abolished this; the prior condition can be taken into consideration only if compensation has been paid for the prior condition.<sup>86</sup> This change in 1975, coupled with the Industrial Commission's peculiar standard on loss of vision, produces incredible paradoxes. Loss of vision is one area where the Industrial Commission has had a published standard.<sup>87</sup> According to this published standard, any visual acuity worse than 20/200 is considered total blindness. Whether the visual loss is correctible by glasses is immaterial; only naked vision is considered.

Consider the situation of a person whose naked vision is 20/300 in each eye, but is fully correctible to 20/20, and who has no other ocular problems involving the field of vision, eye motility, or anything else. If that person gets something in an eye as the result of an accident while employed, an evaluation of his naked vision will be "industrial blindness" at the Illinois Industrial Commission, and he can collect 100% loss of use of the eye. At the maximum weekly rate of \$230.05, he receives \$34,507.50, just for getting something in his eye.

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84. ILL. REV. STAT. ch. 48, § 138.8(e)17 (1977).

85. "Prior conditions" include hypertension, heart problems, diabetes and the like, found in a good number of good people who need jobs. The increasing tendency of the Commission (and the supreme court) to find strokes and heart attacks compensable inhibits the employment opportunities of such persons.

86. ILL. REV. STAT. ch. 48, § 138.8(e)17 (1977).

87. It is called the Wisconsin standard even though Wisconsin abandoned it in 1927 and now uses the standard set forth in the *AMA Guides*. Basically, it is the old Snellen Chart, measuring visual acuity on the 20/20 basis—naked vision only, without regard to its correctibility with glasses.

If that sounds ridiculous, consider that if he gets something in *both* eyes in this accident, then he will have total blindness in both eyes. Compensation will then not be just twice the \$34,507.50, but permanent total disability under a special definition in the Act<sup>88</sup> stating that 100% loss of use of two or more members (which includes the eye) is a permanent total disability for life. Total disability has a weekly rate of \$306.73. At twenty years of life expectancy, \$306.73 per week is just under \$319,000! And he can draw this money while continuing to work at any level of earnings he can command, and even after he retires. What an absurdity! Correctible vision is much less serious than uncorrectible defects. Yet Illinois compensates both the same.

At the same session of the Legislature, a statute was enacted granting the Illinois Fair Employment Practices Commission authority to enforce a statutory prohibition against discrimination in respect to hiring the handicapped.<sup>89</sup> This and the workmen's compensation provision regarding pre-existing disabilities work at cross purposes with each other. The current situation is grossly unfair to employers and inhibits the employment opportunities of the handicapped. It puts a potential \$15,000 to \$30,000 liability on hiring a handicapped person compared to other job applicants. For the employer, it is another "heads you lose, tails you lose" position.

Is it any wonder that vocational counselors have difficulty finding jobs for the handicapped? Is it any surprise that employers and insurance companies have reduced their activities in Illinois?

#### *Partial Loss of Hearing - New in 1975*

Prior to July 1, 1975, compensation was awarded only for total loss of hearing, not any partial loss. The 1975 amendment was simple; it allowed recovery for a partial loss of hearing, without giving any more specific guidelines.<sup>90</sup> The complexities of this simple legislative change are enormous. Coupled with the change about pre-existing conditions, it exposes every employer in Illinois to the immediate payment of the lifetime accumulation of hearing problems of all employees in Illinois.

There is the further complexity of just how hearing loss is measured. There are standards under the federal OSHA legislation that are identical to the *AMA Guides to the Evaluation of Permanent Par-*

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88. ILL. REV. STAT. ch. 48, § 138.8(e)18 (1977).

89. *Id.* § 853 (1977). See also *Id.* ch. 38, § 13.2.

90. *Id.* ch. 48, § 138.8(e)16.

91. 29 C.F.R. § 1910.95 (1977).



*tial Impairment*,<sup>91</sup> but there are no standards in the statute or at the Industrial Commission. No one knows what to expect.

Employers and the underwriters for insurance companies are left to guess just how loss of hearing will be evaluated by the Illinois Industrial Commission. For example, what does a loss of twenty-five decibels mean in Illinois in terms of impairment? Under the recognized standards, only losses in excess of twenty-five decibels are considered to be a loss of hearing. Only losses at the frequencies of 500, 1000 and 2000 are considered in determining the degree of loss. Only a noise level in excess of ninety decibels is considered as "harmful noise."<sup>92</sup> What if the Industrial Commission or one of its arbitrators or commissioners decides to measure loss at the frequency of 8000, a loss which can be measured even though such hearing is usually found only in dogs and rare "hi-fi" enthusiasts?

One insurance company cancelled insurance on a forging shop immediately. Its underwriters determined that there might well be an accumulated average loss equal to \$6,000 per employee in this 300-man shop unless the Commission adopted some sensible standard. There was no way it could charge a premium consistent with that risk under insurance regulations, and, if it could, it would bankrupt the employer.

There are also constitutional problems involved in holding any employer responsible for a hearing loss incurred prior to the change in the law of July 1, 1975. This will be the subject of extensive litigation; it is a subject which the legislature could have dealt with at the time, and thereby have avoided the extensive and expensive litigation which will now ensue.

One may ask about the magnitude of the hearing loss problem. Well, one major employer in Illinois has 400 cases pending with no intelligible means of knowing its potential cost.

#### *Complications of Free Choice of Doctor*

"Free choice" is a code phrase connoting all things good and fair in our society. However, the "free choice of doctor" provision that was added to the Illinois Workmen's Compensation Act in 1975 has drastically complicated and impaired the delivery of sound medical care to injured employees.<sup>93</sup> First, no employee can keep a doctor on tap for any accident which may happen. Only the employer is in a position to furnish prompt medical attention. Second, the employer or

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92. *Id.*

93. ILL. REV. STAT. ch. 48, § 138.8(a) (1977).

the insurance company can (and does) arrange for a better quality of patient care than most employees can command on their own. Third, the employer has a direct financial interest in providing quality medical care in order to regain the services of a valuable employee and minimize his workmen's compensation payments.

The 1975 legislation excludes the employer from having anything to say about the medical care of an injured employee; he just pays the cost of whatever medical care the employee seeks. While the Commission can control this medical care, who can call it to the Commission's attention? The employer does not even know who is treating his employee until the expense is already incurred.

There are, of course, valid arguments against the old system in which the employer had sole control of medical care, and any employee who sought his own medical treatment did so at his own expense. However, the experience under this new system is worse. The prompt payment of temporary total benefits at the time such benefits are really needed is drastically slowed for lack of proper medical documentation to support the issuance of checks. While the new law requires a doctor to furnish medical reports to the employer upon written request,<sup>94</sup> the doctor frequently does not do so and there is no means of forcing him to do so. The employer frequently does not know who is treating the employee in order even to make any such request.

The employee's own doctor is seldom acquainted with the employee's work place, and there is no coordination between his recovery, the accommodation of a temporary disability to possible job openings, or any progress reports concerning the employee's health. The employer does not know whether to seek a temporary or permanent replacement.

Some employees use the new law as a license to go "doctor shopping." There are actual instances, for example, where an employee states he has a back complaint. His first doctor, of course, believes his complaints, takes a full set of x-rays, advises heat and therapy, and after two weeks concludes that there is nothing wrong and releases the employee to return to work. The employee, either because his back still hurts, or he wants to do things other than return to work, goes to a second doctor. The second doctor, to protect himself against potential malpractice, undertakes the same procedures as the first doctor and two weeks later releases the employee to return to work. In my own experience, I have seen this process go through five and six doctors. The employer gets five or six medical bills virtually

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94. *Id.*

identical in content for the repetitive procedures. In the meantime, the employee is off work for ten to twelve weeks. Medical and weekly benefit costs can pyramid.

The employer is powerless to influence the employee's course of action, and usually is not even aware of the employee's actions until after it has all taken place when he gets the bill. As for the employee, he eventually falls into the hands of a doctor (sometimes recommended by his lawyer) who proposes more radical treatment. (Surgery always increases the value of a case.) Such employees frequently end up with a laminectomy, and afterward still have the same complaints they had at the beginning. Modern medicine suggests a second opinion before surgery; it does not happen in workmen's compensation.

There are other instances of employees spending six months, three times a week, in chiropractic treatment with no change in symptoms or complaints. This is not to disparage chiropractors who frequently show good results from their treatment, and who frequently get employees back to work in two or three weeks. But, if symptoms persist for six months, further chiropractic treatment is unlikely to change those symptoms and complaints even though the heat and massage are comforting. In the meantime, the employer or the insurance company pays, pays, and pays.

There are numerous instances of doctors simply catering to the desires of the patient rather than recognizing any independent medical responsibility. For example, one company received a "return to light work" letter from a treating doctor and placed the employee as a guard at a railroad crossing inside the plant. But this job paid \$7.00 an hour instead of his former \$8.00 an hour, which the employee did not like. (His tax-free workmen's compensation was more satisfactory.) The following day, the company received another letter from the doctor stating he was not capable of returning to "light work." The employee and the doctor were in different cities, seventy miles apart, and the second letter was not the result of any examination or treatment by that doctor but of a telephone call from the employee stating he did not want to go back to work. The doctor accommodated his patient.

While the employer does have the right to request a medical evaluation at any time,<sup>95</sup> he does not have the right to interfere with treatment in any way. If he regards the further treatment as unnecessary and refuses to pay the bills or to pay further temporary total

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95. *Id.* § 138.12.

compensation, he runs the risk that the Industrial Commission, perhaps one year later, will second guess him, hold his refusal improper, and subject him to penalties. From the employer's standpoint, it is another dilemmatic situation.

There should be provision for prior notice to the employer of any radical treatment and an interim hearing by the Commission concerning the adequacy or necessity of the medical treatment. In the present system, even the mechanics of setting up such a hearing would take four to eight weeks, and will not solve the current dilemma of the employer or the employee, particularly when an eager surgeon has already scheduled the operation.

Free choice of doctor might work well if the Illinois procedure became administrative, even paternalistic, with medical reports being submitted directly to the Commission, and with the right in it to supervise the medical treatment. However, Illinois has no procedure for day-to-day supervision of these matters as they occur. Ours is a pure adversary system! This is in contrast to the workmen's compensation administration in other states, particularly Wisconsin, which has free choice of doctor but under supervision.<sup>96</sup> The employee must, at the very least, get approval of the Commission to change doctors, and a second opinion before radical surgery can be compelled.

The new free choice of doctor provision in the 1975 amendments has not improved the quality of medical care for employees; it has, however, greatly increased the expense and the complexity for employers and insurance companies. Unresolved are the following questions: What if the employee decides he wants to be treated with goats' intestines in Switzerland or with transcendental meditation in India? What is the employer's obligation? The Commission should adopt some rules before these situations arise.

#### THE LEGISLATURE AND WORKMEN'S COMPENSATION

Few issues bring out more intensity and combativeness in the Illinois Legislature than a workmen's compensation issue. The legislators get such pressure that they end up resenting the whole subject of workmen's compensation. For years, they relied upon the agreed bill process to solve the problem for them. Since the inception of workmen's compensation laws in Illinois, there had been an agreed bill process, and until 1975, no workmen's compensation amendments ever passed except through that process.

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96. WIS. STAT. § 102.13 (1977).

What was this agreed bill process? Until the Walker administration in Illinois, 1973-1977, it was a conference convened on the call of the Governor and the Chairman of the Industrial Commission. Representatives of the employers and of labor attended, as did members of the House and Senate labor committees. After initial flowery speeches, labor and management nominated three to five persons as its negotiators who then met in private sessions. Usually, these negotiators reached an agreement about the changes in the law, drafted the legislation, and submitted it to the legislature where it passed without any dissent. All legislators who voted for it received a gold star for the particular vote on their voting record from both management and labor.

Sometimes, the negotiators could not reach any agreement. Years ago when this occurred, members of the legislature would begin to attend the sessions and frequently were able to conciliate the parties into an agreed bill. In recent years, however, no legislators have attended the negotiating sessions.

The agreed bill process did provide a forum in which each side had to put forth its requests and justify on some rational basis the reasons for its requested changes. Such a forum is essential in dealing with a fairly complicated law. No substitute forum was established when labor abandoned the agreed bill process in 1975. The agreed bill process had certain deficiencies. Management and labor were primarily concerned with the dollars involved, and little else. In fact, as deadlines for action approached, the dollars became the only subject discussed. And, since the agreement was usually reached only late in the session, the legislation seldom concerned itself with anything else. Any other ideas to improve the Industrial Commission or its administration fell to the side.

We negotiators (the author was one of them for many years) were also the practicing lawyers at the Illinois Industrial Commission. The position gave us some prestige with our clients and with the commissioners and arbitrators; their salaries were fixed in the Workmen's Compensation Act, and they were dependent upon the negotiators for any increases in salaries. Each of us "knew our way around the Commission," understood its variable processes, and were not concerned that, to others, these processes were unfathomable. We negotiators had the inside track. A wider forum in which legislators and other experts participated might have discussed procedures and included the interest of the public. But there was no such forum. The agreed bill process was the only game in town, and so we played it.

Over the years, the agreed bill process did not serve Illinois badly. Illinois benefits were always in the upper ten percent among all the

states. During the many years of Republican domination of the legislature, particularly the Senate, it was most unlikely that labor could have gotten anything more than it got under the agreed bill process. Then came Watergate. In the first post-Watergate election of 1974, the Democrats and labor obtained absolute control of the Illinois legislature. With this power, labor refused even to meet with representatives of the employers. Labor had its committed votes from November, 1974. It introduced the drastic bill of 1975 which passed both houses without a period or a comma being changed. Its drastic provisions were not even discussed in committee hearings despite valiant efforts by a few legislators. Labor told the legislators that its bill simply represented the recommendations of the National Commission on State Workmen's Compensation Laws. This was far from the truth, but labor never had to explain anything in the bill beyond "we need to follow these recommendations to keep the federal government from taking over this important state function."

In fact, the 1975 legislation went far beyond the national recommendations. The National Commission estimated that if all of its recommendations were adopted in Illinois, insurance rates might increase by twenty-six percent.<sup>97</sup> Already the Department of Insurance has approved an eighty-eight percent increase in insurance premiums, three times the estimate of the National Commission.<sup>98</sup>

The eighty-eight percent does not reflect the kind of increased premiums employers actually are paying. The insurance industry is frightened about the risks it is undertaking. Through changes of classifications and other means, the industry has won effective premium increases two to three times the rates in effect just prior to July 1, 1975. If an insurance company could not get this kind of premium, it simply refused to write the policy at all.

The insurance increases through 1977 were based solely on the legal changes in the statute. A request for another twenty-five percent increase has been filed in 1978 because insurance company experience has shown that Industrial Commission awards and medical costs are higher than was anticipated from the statutory changes. This twenty-five percent increase is pending before the Insurance Department.<sup>99</sup>

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97. THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 143 (July, 1972).

98. Order of Approval, Illinois Insurance Director, (June 16, 1976). There is a proceeding protesting this increase.

99. The 25% requested is on a compounded basis, i.e., 25% of 188%; if granted, it means a 235% increase over the pre-1975 rates.

The agreed bill process is now dead. It is obvious that when labor believes it has the votes, it wants no part of any forum in which it might be compelled to justify the reasonableness of its demands. But there is a crying need for such a forum of disinterested people whom neither management nor labor would control. If the legislators themselves will not undertake the effort and study required to understand the problem and bring forth rational solutions, then it should appoint a commission of others to do so. The issues involved are too important to be resolved solely on the basis of the lobbying strength of management versus labor. It is the public which pays the costs of workmen's compensation in every product and service it purchases. The state, cities, school boards and other municipal corporations (the taxpayers) pay this cost in every product and service which they purchase.<sup>100</sup>

Legislators, in this writer's experience, are frequently proud when they have "solved" a problem without adding one penny to the governmental budget. But the expense of this workmen's compensation solution shows up in increased prices to all citizens of Illinois, in the weak competitive position of Illinois industry against competitors from other states and nations, and in the long run, it has an impact on the state's own revenue from its income and sales taxes.

A final absurdity involves the state's own employees. The state already has a disability pension program which was credited against any award of workmen's compensation for the same disability.<sup>101</sup> In 1975, this credit was repealed; now the state pays both.<sup>102</sup> For firemen, their pension fund pays sixty-five percent gross wages whenever they are disabled.<sup>103</sup> If they also have a workmen's compensation claim, they get two-thirds of wages in addition to the sixty-five percent of wages from the pension fund. They remain at home drawing 130% of what they could make working. Why would anyone want to return to work?

The legislature simply was not aware of what it passed in 1975. Many committed themselves in November, 1974 to vote for labor's workmen's compensation and unemployment insurance bills and turned deaf ears to any explanation of labor's bills. Some made the commitment in 1974 expecting there would be an agreed bill anyway, so the commitment would not be too embarrassing. They were em-

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100. Workmen's compensation alone is now seven percent of the bid price in heavy construction.

101. ILL. REV. STAT. ch. 108½, § 14-167 (1973).

102. *Id.* § 14-129 (1977).

103. *Id.* § 4-110.

barrassed though because labor, having the committed votes, then refused to participate in the agreed bill or any other conference.

In the context of legislative battles, the changes made in 1976 and 1977 were a courageous effort about which the majority can be proud. The lobbying of management and labor was intense. In terms of impact, however, these 1976 and 1977 changes were minor and cosmetic only, affecting less than two percent of the cost, and leaving Illinois still the state with by far the highest benefit levels. The legislature must go beyond the role of mere mediator between the lobbying pressures. For Illinois has a mess on its hands, which can only be cleaned up if the legislature, or some public commission it creates, digs in and truly understands the problems. Any such commission must have public members outside the control of management or labor.



