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Workmen's Compensation Legislative Trends Throughout the Country

*Alfred A. Porro, Jr.**

ANY ATTEMPT to comprehensively analyze the voluminous and detailed Workmen's Compensation and Industrial Employee legislation throughout the United States awakens one to the vast scope of our industrial society.

The magnitude of progress in this field dominates all other considerations of this survey, designed to show what aspects of these laws are in the throes of legislative revision, with emphasis on advances in vocational rehabilitation, coverage of public employees, and expansion of occupational disease classifications.

This survey encompasses not only legislative revisions, repeals and amendments proposed or pending before State lawmakers, but attempts a preview of future activity. Accordingly, much of the information here set forth is a product of correspondence, interviews and conferences with representatives of the appropriate departments or divisions in many states—those people with a finger on the pulse of Workmen's Compensation trends.

As the pendulum continues to swing toward a worker-employee society, the industrial complexity of a powerful, modern nation has necessitated innovations protecting the worker. An example of this is the revolutionary idea of retraining at industry expense a worker no longer able to do his former job because of a disabling injury.

Workmen's Compensation legislation, perhaps one of the most crucial areas of employee protection, has felt many growing pains brought about by political pressures and changing economic and health conditions. It has now generally reached a plateau throughout the country requiring revision, adjustment, and refinement.

Many legislative commissions and study groups have been created recently in different States with varying magnitude and scope of assignment. In 1963 California lawmakers created a Workmen's Compensation Study Commission. The seven-member group was composed of two lay representatives, an employers' representative, an insurance industry representative, a labor representative, and a member of the legal profession.¹ In April, 1965 the Commission submitted an exhaustively comprehensive report with numerous recommendations.² Many of the recommended changes have been enacted into law by the California legislature.

* Of the New Jersey Bar.

¹ Cal. Labor Code § 6200 (Supp 1966).

² Report of the Workmen's Compensation Study Commission, California, (1965). For a summary of the recommendations and of changes enacted see International Association of Industrial Accident Boards and Commissions, Newsletter, April 1966.

Recently, the Lower House Committee supplemented the Study Commission's efforts and recommendations in the areas of permanent partial disabilities, heart cases, and uninsured employers.³

An experienced Workmen's Compensation Advisory Committee, with some members serving for over 20 years, has had a profound effect on the course of Workmen's Compensation legislation in Wisconsin.⁴ Most legislative changes in that State have emanated from the studies and conscientious dedication of the Committee.

A recently proposed bill in the State of Kansas⁵ contains numerous proposals agreed to by the Governors' Joint Advisory Committee on Workmen's Compensation.

Knowledgeable and specialized committees of this type generally have had a salutary impact upon legislative progress and revision. Such committees, given the facilities and authority to proceed, are needed in many states.

Various Workmen's Compensation Directors and Commissioners, on the other hand, are making strides towards influencing state lawmakers. The Industrial Commissioner of Iowa drafted and submitted 13 bills to the legislature after he had previously itemized them in a comprehensive report.⁶ Similarly, recommendations have been made by the Director of the Florida Industrial Commission, and the New Jersey Director of Workmen's Compensation. In much the same manner, the State Labor and Industrial Commission of New Mexico has taken major steps to influence its legislature to revise its law in accordance with commission proposals.⁷ The office of the Industrial Commissioner of South Dakota has been an efficient and valuable counterpart to its forward-looking legislature.⁸ Few states occupy the position of Georgia where no recent changes have occurred in the area of Workmen's Compensation.⁹

I. Legislative Review

A review of recently passed or pending legislation from representative states establishes a high tempo of activity and reveals certain major areas of revision common throughout the United States.

³ See Assembly Interim Committee on Finance and Insurance Report (1967); see also *Transcript of Hearing on Workmen's Compensation*, San Diego, Jan. 27-28, 1966.

⁴ Letter from Ralph E. Gintz, Director, The Industrial Comm. of Wisc., to Alfred A. Porro, Jr., April 17, 1967.

⁵ S. 221, 1967 Sess., Kansas.

⁶ Workmen's Comp. Serv. Twenty-seventh Biennial Report, Iowa, (Jan.-June 1966).

⁷ See minutes of The State Labor and Industrial Commission of New Mexico, December, 1966. The meeting was held for the purpose of reviewing proposed changes in New Mexico's Workmen's Compensation Statute.

⁸ Letter from Lloyd B. Peterson, Deputy Comm'nr, South Dakota Industrial Comm'n, to Alfred A. Porro, Jr., March 20, 1967.

⁹ Letter from James C. Pullin, State Bd. Workmen's Compensation, to Alfred A. Porro, Jr., March 16, 1967.

Even a cursory investigation reveals that coverage, both in types of employment and extent, is increasing. In fact, only in peripheral areas has there been any reduction. For example, a proposed amendment to New Mexico's Workmen's Compensation Act would reduce the compensation payable if the employer provides safety devices where required, or the employee fails to use them when provided. By the same token, the amount would increase if required safety devices are not provided.¹⁰ Adjusting the Workmen's Compensation system to new conditions in our society fosters the need for change in the administrative aspect of the law. The extent and character of the revisions depends on the needs of each jurisdiction, but they share the common objectives of facilitating the processing of claims, and providing prompt and adequate relief to the injured or disabled employee.

The ascension of benefit rates and coverage extension has been apparent for more than a decade, as evidenced by amendments to the laws in several states. Amendments to Virginia's Workmen's Compensation enacted between 1954 and 1964 extended coverage to include sheriffs and their deputies, town and county sergeants, commissioners of revenue, city treasurers, attorneys for the Commonwealth, clerks of various courts and several other public positions.¹¹ Vermont added to its occupational disease section in 1951,¹² in 1963 increased the death benefit to dependents from \$300.00 to \$500.00,¹³ and in 1965 extended the time for which compensation is payable for disablement or death.¹⁴ In 1965, New Jersey provided that volunteer fire companies and first aid or rescue workers may obtain compensation insurance,¹⁵ and created a presumption that any respiratory disease contracted by a volunteer fireman is occupational.¹⁶ New Jersey in 1966 updated compensation schedules and amounts payable for compensation and care.¹⁷

In 1963 Wisconsin increased weekly benefits for temporary and permanent total disability, also augmenting death benefits, again increasing these rates in 1965.¹⁸ In addition, the legislature eliminated any statute of limitations for injury or death caused by exposure to ionized radiation,¹⁹ and extended coverage to members of legally organized res-

¹⁰ New Mexico, H.B. 223, 28th Legis., 1st Sess., (1967).

¹¹ Va. Code Ann. § 65-4 (Supp. 1966).

¹² Vt. Stat. Ann. tit. 21 § 1019 (1951).

¹³ Vt. Stat. Ann. tit. 21 § 639 (Supp. 1965).

¹⁴ Vt. Stat. Ann. tit. 21 § 1006 (Supp. 1965).

¹⁵ N.J. Rev. Stat. § 34:15-74.1 (Supp. 1966).

¹⁶ N.J. Rev. Stat. § 34:15-43.2 (Supp. 1966).

¹⁷ N.J. Rev. Stat. § 34:15-12 (1966).

¹⁸ Wis. Stat. Ann. § 102.11 (Supp. 1967).

¹⁹ Wis. Stat. Ann. § 102.17(4) (Supp. 1967).

cue squads, serving as auxiliary police.²⁰ This year Wisconsin extended the statute of limitations as to claims of employees whose employers had paid full salaries during the period of disablement. Previously their claims would have been barred in 6 years, although they may have been in need of further treatment after that time.²¹

In 1964 Kentucky enacted a new section which extended coverage to all employees of Departments, administrative bodies, and agencies of the State. A noteworthy provision gives the Commissioner of Finance authority to extend coverage to State employees not included in the chapter.²²

The picture in the States during this decade, in addition to the current activity indicated, demonstrates also the trend toward more comprehensive coverage. For example in 1961 and 1963 Alabama raised disability benefits and increased medical and hospital coverage,²³ as did Kansas.²⁴ Between 1963 and 1965 South Dakota and Idaho raised their disability and death benefits.²⁵ In 1965, Idaho, in addition to raising benefits, revised its provisions concerning silicosis and extended the statute of limitations for claims of that disease.²⁶ In 1966, South Dakota also revised its occupational disease provisions by adding radiation and similar injuries to its list.²⁷ The following year that State again raised its disability and death benefits and extended coverage to certain game wardens performing the duties of peace officers.²⁸ During the three year period beginning in 1963, New York greatly expanded job coverage and consistently increased its disability, death, and medical benefits.²⁹

Benefits, whether for temporary or permanent disability, or for death, have undergone a continual upswing. The economic tempo, rising cost of living, and the influence of organized labor can be accredited primarily for this pattern. Seldom is there to be found a recommendation of no increase, as recently made by a lower house committee of the California legislature with respect to minor permanent partial disability. But when made, such a recommendation usually can be explained by the high level of benefits already afforded the injured employee.³⁰

²⁰ Wis. Stat. Ann. § 102.07(7) (Supp. 1967).

²¹ Wis. Stat. Ann. § 102.17(4) (Supp. 1967).

²² Segal, *An Analysis of the 1964 Amendments to the Kentucky Revised Statute Ch. 342—1964*, 53 Ky. L.J. 743 (1964).

²³ Ala. Code tit. 26, § 279, 289, 293 (Supp. 1965).

²⁴ Kan. Gen. Stat. Ann. § 44-510 (Supp. 1961).

²⁵ S.D. Code § 64.0401-03 (Supp. 1960); Idaho Code Ann. § 72-306 (Supp. 1965).

²⁶ Idaho Code Ann. § 72-1200 et seq. (1965).

²⁷ S.D. Code § 64.0805(21) (Supp. 1960).

²⁸ S.D. Code § 64.0102 (Supp. 1960).

²⁹ N.Y. Work. Comp. Laws (Supp. 1963-1966).

³⁰ Letter from Malcolm R. Peattie, Ass't Adm. Director, Dep't of Industrial Relations, to Alfred A. Porro, Jr., March 22, 1967.

The legislative activity in these areas of Workmen's Compensation provide an economic barometer by which we can mark our progress. As economic activity increases across the nation, so also will the demands for increased benefits intensify in state legislatures.

II. Occupational Diseases: Crescendo of Legislation

Perhaps the most propulsive area of growth in Workmen's Compensation law during the past 10 years is occupational disease coverage. The expansion has gathered momentum with the increasing awareness of causal connection between various diseases and the particular work done. Today 48 states provide some form of occupational disease coverage. Only Mississippi and Wyoming lack it.³¹

The forms this legislation takes in the various states is indeed diverse; however, they may be categorized generally as follows: (1) Express list of diseases relating to itemized occupations or processes; (2) general requirements for a disease to be work-connected, and a list of recognized diseases; (3) occupational diseases included within the definition of "injury" when certain statutory prerequisites are met with no lists of diseases or occupations; and (4) work-connected diseases deemed compensable if certain requirements are fulfilled without any express listing of individual or occupational diseases.

Typical of the first category is Iowa's statute³² which lists occupational diseases in one column and defines the process or occupation in a second column. Idaho's law is similar, but augments the schedule of diseases and occupations by relieving the employer of liability unless the disease is due to the nature of the employment in which the hazards actually exist and the disease is actually contracted during employment.³³ Maine also requires the disease be due to causes and conditions characteristic of and peculiar to the occupation and arise out of and in the course of employment.³⁴ New York's statute also falls into the double-list category. In addition to the lists, Section 47 states, "If the employee, at or immediately before the date of disablement, was employed in any process mentioned in the second column . . . and his disease is the disease in the first column . . . , the disease presumptively shall be deemed to have been due to the nature of the employment."³⁵

New York's law states specifically what all the laws in this double-list category actually do: create a presumption that the disease was caused by the employment. Of course, a direct causal connection must

³¹ See 47 Iowa L. Rev. 809, 811 (1962) for a compilation of all State's laws on occupational diseases.

³² Iowa Code § 85A.9 (Supp. 1966).

³³ Idaho Code Ann. § 72-1202, 72-1204 (Supp. 1963).

³⁴ Me. Rev. Stat. Ann. tit. 39, § 183 (1965).

³⁵ N.Y. Work. Comp. Law § 47 (1962).

be shown. Nevada's law is also definitive in its requirement of causal connection. The disease must appear to have followed as a natural incident of the work which must be fairly traceable as a proximate cause, and not come from a hazard to which workmen would have been equally exposed outside of the employment. The disease need not have been foreseeable, but after its contraction must appear to have its origin in a risk connected with the employment, following as a natural consequence. Section 617.450 follows the causal requirements with a schedule of diseases and processes or occupations covered.³⁶

Virginia's statute is typical of the second classification: general requisites of work-connected diseases followed by a list of qualifying sicknesses. It reads:

. . . the term "occupational disease" means a disease arising out of and in the course of employment. No ordinary disease of life to which the general public is exposed outside of the employment is compensable . . . A disease shall be deemed to arise out of the employment only if there is apparent to the rational mind, upon consideration of all the circumstances (1) A direct causal connection between the conditions under which work is performed and the occupational disease, (2) It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, (3) It can be fairly traced to the employment as the proximate cause, (4) It does not come from the hazard to which workmen would have been equally exposed outside of the employment, (5) It is incidental to the character of the business and not independent of the relation of employer and employee, and (6) It must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction.³⁷

The statutes of Tennessee,³⁸ Montana,³⁹ and New Mexico⁴⁰ are nearly identical in this respect to Virginia's using much the same wording in their general descriptive tests for a disease to be adjudged work-connected. Arkansas, in addition to its list of diseases requires that the diseases be due to the nature of the work, characteristic of and peculiar thereto, and that the diseases actually be incurred in the employment.⁴¹ Kansas is also restrictive in its statute, exacting the conditions that the disease be contracted while engaged in the employment, and that the occupation have a particular hazard that is in excess of the hazard of such a disease attending employment in general.⁴²

³⁶ Nev. Rev. Stat. § 617.440, 617.450 (1963).

³⁷ Va. Code Ann. § 65-42 (Supp. 1966).

³⁸ Tenn. Code Ann. § 50-1101 (1955).

³⁹ Mont. Rev. Codes Ann. § 92-1301 (1947).

⁴⁰ N.M. Stat. Ann. tit. 81 § 13 (1947).

⁴¹ Ark. Stat. Ann.

⁴² Kan. Gen. Stat. Ann. § 44-5A01 (Supp. 1961).

West Virginia statute typifies the third category of laws in that occupational diseases are included in the definition "injury" covered by the statute, and no specific list of occupations or diseases is set forth.

The law reads:

For the purpose of this chapter, "injury" and "personal injury" shall be extended to include silicosis and any other occupational disease as hereinafter defined. . . .⁴³

The statutory requirements to be met in order to constitute a compensable disease are the same as those set forth in the Virginia statute quoted above. The Florida statute, also in the third category, requires that a disease must have resulted from the nature of the employment and must have actually been contracted while engaged in that employment.⁴⁴ The laws of Michigan⁴⁵ and Connecticut,⁴⁶ with variations in wording, use essentially the same conditions to determine whether or not a disease is compensable.

Although the fourth category into which laws providing occupational disease coverage can be divided overlaps the third, there is a distinct difference between these two types of laws. The states whose laws exemplify the fourth category do not attempt to include occupational diseases in the definition of an "injury," but rather treat them separately. These states do not, therefore, treat occupational diseases within the conceptual framework of existing compensation law which afforded benefits for "injuries," but instead simply add another concept to the law. However, these states, while using a different statutory format, use the same general tests as the other states to determine whether or not a disease is compensable. Among the statutes in this fourth category are Kentucky's,⁴⁷ Washington's,⁴⁸ Missouri's⁴⁹ and New Jersey's.⁵⁰

There are certain elements common to all the statutes covering occupational diseases. Basically, there must exist a causal connection between the employment and the disease, it must flow from the nature of the employment or be characteristic of and peculiar to that employment, it must not be contracted independently of the employer-employee relationship, and it must actually be incurred in that employment and be of such a nature that the workman would not be equally exposed to it outside the employment. Such a statutory framework, although un-

⁴³ W.Va. Code Ann. § 23-4-1 (Supp. 1963).

⁴⁴ Fla. Stat. Ann. § 440.151 (1965).

⁴⁵ Mich. Stat. Ann. § 417.1 (1948).

⁴⁶ Conn. Gen. Stat. § 31-275 (Supp. 1966).

⁴⁷ Ky. Rev. Stat. § 342.316 (1944).

⁴⁸ Wash. Rev. Code § 51.08.140 (1961).

⁴⁹ Mo. Rev. Stat. § 287.067 (1959).

⁵⁰ N.J. Rev. Stat. § 34:15-31 (Supp. 1966).

necessarily elaborate, eliminates the necessity for exclusive and unwieldy schedules of diseases and occupations or processes, although some of the states do employ such schedules.

The result of these elaborate definitions and schedules has forced the courts to interpret them. For example, in *American Bridge Div., U. S. Steel vs. McClung*,⁵¹ the Tennessee statutory list was held to include diseases "so closely related to the listed ones" as to be compensable. In *Victory Sparkler Specialty Co. v. Francks*,⁵² a girl contracted phosphorous poisoning over a two-year period. It was not a compensable disease according to Maryland law, but the court held it compensable as an accidental injury, reasoning that it was completely unexpected, and occurred because of the employer's negligence in not removing fumes whereby particles were carried into her body through a lesion. Several states' courts liberally construe the statutes to solve problems such as whether a disease is peculiar to the employment.⁵³ The language "diseases arising out of the employment" provides the courts with enough flexibility to adjust the statutory scheme to new causes, diseases, and conditions that may arise in the future. Nevada, in addition to the requirement that the disease arise out of and in the course of the employment, provides a list of diseases which is specifically not exclusive.⁵⁴ California's sole test of compensability is whether the disease arose out of and occurred in the course of employment. There is no statutory listing and diseases are compensable whether they naturally flow from the occupation or not. For example, pneumonia may be compensable if it arises out of and in the course of employment; however, if a disease is not normally associated with a particular occupation, the claimant must show an exposure in excess of that borne by the general public.⁵⁵

The trend has been toward greater coverage for work-related diseases. The danger of elaborate definitions and schedules is that they become obsolete all too quickly. Therefore, this area will continue to require more legislation in the form of additions to schedules or their elimination, and simplification of prerequisites to coverage. A few illustrations of bills pending or passed within the past two-year period will verify this conclusion. The Idaho Legislature is considering a new section fixing liability of employers to employees suffering ionized radiation

⁵¹ 333 S.W. 2d 557 (Tenn. 1960).

⁵² 147 Md. 368, 128 Atl. 635 (1925).

⁵³ *Giambattista v. Thomas A. Edison, Inc.*, 32 N.J. Super 103, 107 A.2d 801 (1954); *Lelenko v. Wilson H. Lee Co.*, 128 Conn. 499, 24 A.2d 253 (1942); and see 21 Md. L. Rev. 369 (1961).

⁵⁴ Nev. Rev. Stat. §§ 617.440 and 617.450 (1965).

⁵⁵ Cal. Labor Code §§ 5412 and 5500.5; see also *Workmen's Compensation Study Commission Report 114*, April 1965.

injury.⁵⁶ In 1965 Idaho revised the provisions for silicosis.⁵⁷ South Dakota in 1965 included the exposure to ionized radiation as an occupational disease, and extended coverage to ulceration of the skin or destruction of the tissue due to prolonged exposure to roentgen rays or radium emanation⁵⁸ and declared tuberculosis an occupational disease under certain conditions.⁵⁹ Maine is considering a bill that would add asbestosis as an occupational disease,⁶⁰ and a bill eliminating the list of diseases and replacing it with a section setting forth prerequisites only.⁶¹ This year West Virginia modified the definition of occupational diseases to include silicosis and other occupational diseases incurred in the course of and resulting from employment.⁶²

III. Rehabilitation: Fulfillment of the Cycle

The fulfillment of the theoretical goal of Workmen's Compensation is rehabilitation and return of the injured employee to gainful employment. From the occurrence of the injury to treatment, temporary and interim income, and permanent disability benefits—rehabilitation constitutes the completion of the cycle. Compensation laws of 25 states contain provisions for the rehabilitation of industrially injured workers beyond those made by the Federal-State Program of Vocational Rehabilitation. Four states maintain their own rehabilitation centers and six other states provide a system for finding injured workers who may benefit by available services, informing them of the services and encouraging their utilization.⁶³

Having in mind the objective of returning the injured employee to his former status, whether in the same position or not, various means are employed, some with greater success than others. It is difficult to assess the value of one statutory scheme as against another; however, vocational rehabilitation envelops a definite goal, making intellectual evaluation possible. The success of a particular statute can be anticipated in advance by examining the statutory method and considering whether injured workers would be prone to take advantage of it. That the task of retraining an injured employee in some other skill suited to his changed physical condition or retraining him with a view toward

⁵⁶ Idaho H.R. 185, 39th Sess. (1967).

⁵⁷ Idaho Code Ann. § 72-1200 et seq. (1965).

⁵⁸ S.D. Code § 64.0807 (Supp. 1960).

⁵⁹ S.D. Code § 64.0805 (Supp. 1960).

⁶⁰ H.R. 93, 103rd Legis. of Me. (1967) amending Me. Rev. Stat. Ann. 4:4.39 § 193.

⁶¹ H.R. 731, 103rd Legis. of Me. (1967), amending Me. Rev. Stat. Ann. tit. 39 §§ 183 and 193.

⁶² W.Va. Code Ann. § 23-4-1, 23-3-4, 23-4-6, 23-4-8, 23-4-10, 23-4-15(b) and (c) (Supp. 1963).

⁶³ Report of the Workmen's Compensation Study Commission, California, p. 211 (1965).

restoring him to his former position is a worthwhile endeavor is hardly arguable. The problem is how to set up the program. The injured employee facing the prospect of competing in a different labor market, perhaps after many years of experience in his old job, may be reluctant to sacrifice immediate cash benefits in return for some uncertain and intangible benefit. On the other hand, maintaining the same level of cash benefits to injured employees while they are being rehabilitated would destroy the incentive of employers to contribute to rehabilitation facilities.⁶⁴

An exploration of some Workmen's Compensation statutes provides us a good overview of how the states have coped with this duality of interests. Wisconsin statute provides that an employee who is entitled to and is receiving instructions pursuant to provisions of the Congressional Vocational Rehabilitation Act, shall in addition to his other indemnity be paid his actual expenses of travel and maintenance. These payments are subject to the following conditions: 1) He must begin the course of instruction within 60 days from the date he is sufficiently recovered to permit the undertaking; 2) He must continue with such reasonable regularity as his health and situation will permit; 3) He may not have expenses of travel and cost of maintenance in excess of 40 weeks. 4) The Commission determines the rights and liabilities of the parties in the same manner as it does other issues under compensation.⁶⁵ Wisconsin's law provides also that the Board help handicapped persons to find gainful employment during and after their training.⁶⁶ This approach, while maintaining payments, attaches conditions to the rehabilitation program which will ensure that the injured employee will do his part in the effort to return him to the employee status. In addition they provide the rehabilitated employee with assistance in finding gainful employment which alleviates his reluctance to undertake rehabilitation.

New Jersey's statute, in addition to providing for rehabilitation and maintenance, has a novel provision for "workshops." A "workshop" is defined as "a place where any manufacture or handiwork is carried on, and which is operated for the primary purpose of providing remunerative employment to handicapped individuals (1) as an interim step in the rehabilitation process for those who cannot be readily absorbed in the competitive labor market, or (2) during such time as employment opportunities for them in the competitive labor market do not exist." The Commission is given the authority to establish and operate these workshops,⁶⁷ and this scheme goes a long way to eliminate the injured

⁶⁴ *Rehabilitation within the Workmen's Compensation Framework*, 19 Rutgers L. Rev. 401 (1965); Leonard, *Legal Road Blocks to Rehabilitation*, A. B. A. Sec. Ins. Neg. & Comp. 229 (1963).

⁶⁵ Wis. Stat. § 102.61 (1961).

⁶⁶ Wis. Stat. § 41.71 (6) (c) (1961).

⁶⁷ N.J. Rev. Stat. §§ 34:16-20, 34:16-27 (1955).

employee's fear of competing in a new labor market. New Jersey's system also grants the power to review, reconsider, extend and modify.⁶⁸ These last qualifications provide continuous jurisdiction over any given case and at the same time ensure that the injured workman will comply with the efforts to reeffectuate his employee status, thus easing the employer's fear that the injured employee will not do his part in the effort to return him to the employee status.

Michigan provides that the injured employee is entitled to rehabilitation, including retraining and job placement, limiting the time to 52 weeks, except in cases when by special order of the Department after review the period may be extended another 52 weeks. In addition, the loss or reduction of compensation is possible if there is an unjustifiable refusal to undertake a rehabilitation.⁶⁹ Michigan's statute offers a helping hand by providing job placement facilities. While the reluctance to undertake rehabilitation is eased with the one hand, the other hand holds a whip, forcing the injured employee into rehabilitation for fear of reduced or lost compensation benefits.

Nevada's statute authorizes the Commission to enter into cooperative agreements with the State Board for Vocational Education for the benefit of disabled workers. Such an agreement may provide that with the consent of the disabled employee the compensation money benefits due him are payable to the State Board for Vocational Education for deposit in the Vocational Rehabilitation Fund to be expended for the benefit of the employee. Within the limits of the money thus made available, the State Board provides allowance for living expenses while the disabled employee is undergoing examination, treatment or waiting or receiving restorative or vocational training, and pays for medical or psychological examinations and treatment and for prosthetic devices.⁷⁰ The drawbacks of this statute are that no encouragement is provided to give up immediate cash benefits in return for the uncertain benefits to be derived from rehabilitation, and the compensation benefits due the worker are channeled away from him to be returned only through an agency according to its standards.

Connecticut's statute provides that where the employee suffers injury disabling him from performing his customary or most recent work, the employer transfer him to work suitable to his physical condition, if such work is available, during the time the employee is subjected to medical treatment or rehabilitation, or both. During this period, in addition to compensation, the injured worker gets up to \$15.00 per week expenses for rehabilitation. The Compensation Commissioners are di-

⁶⁸ N.J. Rev. Stat. § 34:15-57 (1952).

⁶⁹ Mich. Stat. Ann. § 412:4A (1965).

⁷⁰ Nev. Rev. Stat. § 616.223 (1965).

rected to compile a list of rehabilitation facilities available in the state.⁷¹ The commendable effect of this statute is to get the injured employee back to work as soon as possible. However, from the employer's point of view, this system can be very costly. In addition to compensation, the employee may be collecting wages and an additional \$15.00 per week for rehabilitation expenses.

The Maine system of rehabilitation requires a determination that, because of the nature of the injury, vocational rehabilitation is desirable and necessary to restore the injured person to gainful employment. Reasonable and proper rehabilitation service is offered for a 52-week period, which can be extended for an additional year. The program is arranged in consultation with the division of Vocational Rehabilitation, Department of Education, or Division of Eye Care and Special Services of the Department of Health. Some conditions are imposed upon the worker who desires to take advantage of rehabilitation services. The injured must undertake the course within 60 days from the time that he has sufficiently recovered, and reasonable regularity in training is required. Also, the statutory scheme provides for review.⁷² Maine's statute has the salutary effect of encouraging injured employees to undertake rehabilitation while at the same time limiting the term and attaching conditions which will guarantee against malingering on the part of the injured employee. The fact that it also provides for review is an added safeguard against abuses of the system.

Mississippi's statutory scheme fosters the Commission's cooperation with Federal, State and local agencies in the rehabilitation of handicapped workers, directing it to promptly report to the proper authority industrial injury cases where retraining or job placement may be needed. Details and routine concerning the handling of rehabilitation cases are to be in accordance with agreements between the Mississippi Workmen's Compensation Commission and the Vocational Rehabilitation Division of the State Department of Education. The amount of additional compensation awarded to be used for vocational rehabilitation purposes is determined by recommendations of the Vocational Rehabilitation Division, depending upon the contemplated program, training needed and the necessary cost.⁷³ From the employees' viewpoint the award of additional compensation is indeed generous and an incentive to undertake rehabilitation. However, it might tend to create employer opposition, since the statute imposes no conditions on the employee's conduct in respect to the rehabilitation program.

Montana's Workmen's Compensation law provides that the Industrial Accident Board shall refer to the Vocational Rehabilitation Division

⁷¹ Conn. Gen. Stat. § 31-313 (Supp. 1966).

⁷² Me. Rev. Stat. Ann. Tit. 39, §§ 52, 54, and 100 (1964).

⁷³ Miss. Code § 6998 (Supp. 1964).

of the Department of Education of the state workmen who have become disabled as a result of injuries sustained on the job, who, in the opinion of the board, can be vocationally rehabilitated. When the Division has provided all feasible vocational rehabilitation or has determined that rehabilitation is not possible or feasible, the Division must certify its determination to the accident board at which time the Board will reconsider and review any previous award of compensation to the injured. Acceptance or eligibility for benefits under the compensation act is not effected by participating in rehabilitation, and the worker is paid his actual travel and living expenses not in excess of \$30.00, and his expenses for tuition, books and necessary equipment.⁷⁴ Once again statutory review is available. Although no time or amount standards are provided in this statute, review, if used wisely, has the effect of providing an efficient, flexible system of rehabilitation.

New York, like Montana, allows additional compensation if necessary for rehabilitation. The expense is paid out of a special fund created by a \$500 contribution by an employer every time injury results in death and there are no dependents.⁷⁵ New York's approach makes funds available for rehabilitation thereby easing the financial strain on the employer. The fund is invested and earns an independent income. Payment into the fund is not a burden to the employer since the money would normally be paid in any event after the death of a workman who had dependents.

At present in California the determination of what services constitute medical care which the insurance carrier is required by law to provide and what constitutes rehabilitation not required to be provided by the carrier is left to the treating physician and the insurance company. It is recommended in the Study Commission's report that a directory of rehabilitation facilities be published. The California report recommends also that a rehabilitation unit be set up in the medical bureau of the Division of Industrial Accidents with a professional staff reviewing and approving rehabilitation plans, facilitating the execution of the programs, and maintaining a constant liaison between the treating facility and the employee's family. A labor code amendment to make it clear that injured workers have a right to such medical rehabilitation and that the worker be required to accept the plan has also been recommended.⁷⁶ There are bills pending in California on behalf of labor groups that would allow for mandatory rehabilitation treatment.⁷⁷

⁷⁴ Mont. Rev. Codes Ann. §§ 92-1401, 92-1402 (1963).

⁷⁵ N.Y. Work. Comp. Law § 15 (Supp. 1963-1966).

⁷⁶ Report of the Workmen's Compensation Study Commission, California; pp. 216-223, (1965).

⁷⁷ Letter from Malcolm R. Peattie, Asst. Admin. Director, Dept. of Industrial Relations to Alfred A. Porro, Jr., March 22, 1967.

The California study commission proposals would provide a well balanced approach through limitations of dollar expenditures and built-in penalties, insuring that the injured workman fully participates in the program.

Having reviewed the various approaches taken by several states, let us return to the major problems involved in framing rehabilitation legislation: returning the injured workman to his former status while minimizing his attendant problems, and encouraging the industry of which he is a part to accept the responsibility for this expense. Suspension of payments coupled with continuing jurisdiction probably provides the best compromise, since payments may be resumed at some future time, if the injured employee becomes unemployed because of his handicap,⁷⁸ and the actual dollar expenditures on the part of the industry are often reduced. Armed with the knowledge that his payments would be resumed if unemployment ensues, the employees' reluctance to accept rehabilitation in lieu of cash benefits is ameliorated. At the same time the reluctance of industry to provide substantial rehabilitation benefits is abated.

The utilization of the suspension of payments approach necessarily involves continuing jurisdiction over any given case. Some states make specific provisions for suspension and resumption of payments. For instance, Pennsylvania, New York, and New Jersey have broad provisions for continuing jurisdiction into which suspension may be read.⁷⁹ Because this concept recognizes and effectively deals with the major obstacles to an effective rehabilitation system, it is hopefully the direction that this type of legislation will take in the future.

IV. Public Servants: Toward Complete Coverage

The fulcrum of the original Workmen's Compensation laws was the intention to cover industrial employees and those under contracts of hire, and not those in the public service.⁸⁰ Because of this premise, persons in the public service have been divided into two categories, those who perform duties and functions under a contractual relationship, and those who perform duties in elected and appointed positions. The niceties in making this distinction and the great variety of theories, guide lines, and controversies is a subject in itself.⁸¹ The first category can

⁷⁸ *Op. cit. supra* note 64.

⁷⁹ Pa. Stat. Ann. Tit. 77 § 772 (1963); N.Y. Work. Comp. Law § 123 (Supp. 1963-1966); N.J. Rev. Stat. Ann. §§ 34:15-57 (Supp. 1952).

⁸⁰ See Rationale of *Mann v. Lynchburg*, 129 Va. 453, 106 S.E. 371 (1921), which deemed public officials outside the scope and intent of the legislation and verified it by historical background of the legislation which contemplated a contractual relationship.

⁸¹ 3 McQuillin, *Municipal Corporation* 169 et seq. (3d ed. 1963); Mechem, *Public Officers* 3-11 (1890).

theoretically and psychologically be likened to a laborer or worker. The high-level, distinguished office holder, however, is viewed as the employer or manager. Further, the necessity of appropriating public tax funds to pay for the insurance has, from a practical point of view, caused coverage in this area to trail conservatively behind that of the laborer or workman.

The distinction between an employee and office-holder is deeply rooted in early law. The words "employee" or "workman" were simply not construed to include the elected or appointed public official or servant.

The statutory development in this area has clearly reflected an increasing acceptance of the fact that public entities are on a par with private enterprise. In many other fields of law the changing nature of government and the sovereign has caused tremendous momentum away from previously accepted archaic distinctions and theories.⁸² Likewise, the same process is taking place in Workmen's Compensation Legislation. This trend combined with the trend of increasing and extending compensation benefits in general has resulted in the spreading inclusion of public offices throughout the states.⁸³ This process in most instances has not been complete. Rather, in a piece-meal fashion, various specific offices are included a few at a time. For example, Iowa specifically includes members of the Iowa Highway Safety Patrol and Conservation Offices, while making the specific exclusion of any person holding an official position or standing in a representative capacity of the employer.⁸⁴ Delaware excepts from coverage state and governmental agencies created by it, while allowing some officers and employees in specific areas to elect to come within coverage,⁸⁵ and extending coverage to duly organized volunteer firemen if they elect it.⁸⁶ Nebraska does not include any official of the state or any government agency created by it who has been elected or appointed for a regular term of office, but specifically includes volunteer firemen, water and street commissioners and civil defense workers.⁸⁷ South Dakota also excludes officials elected or appointed to a position with a regular term, but allows them to elect to come within coverage.⁸⁸ Virginia is another state which excludes per-

⁸² For example, witness the change in the area of sovereign immunity from tort liability. The Common Law established that the Sovereign could not be sued, but the marked trend throughout the country has been the erosion of the doctrine, both by legislation and case law.

⁸³ 5 A.L.R. 2d 415 (1948).

⁸⁴ Iowa Code § 85.61(3) (c) (1963).

⁸⁵ Del. Code Ann. Tit. 19 § 2309 (1959).

⁸⁶ Del. Code Ann. Tit. 19 § 2312 (1959).

⁸⁷ Neb. Rev. Stat. § 48-115(1) (1959).

⁸⁸ S.D. Code § 64.0102(2) (b) (Supp. 1959).

sons elected or appointed for a definite term,⁸⁹ and Louisiana excludes officials of the state, of any political subdivision, or of any unincorporated public board or commission.⁹⁰ Some states on the other hand include all public officers and appointees. For example, Missouri defines the word employee as every person in the service of any employer under any contract of hire, express, implied or written, or under any appointment or election.⁹¹ Maine's statute states that "employee" shall include officials of the state, counties, cities and towns which have accepted the provisions of the act.⁹² Wisconsin defines an employee as including all officials in the service of the state or of any municipality whether elected or under any appointment. In addition, it includes peace officers, firemen, and members of rescue squads within coverage.⁹³ New Jersey, in addition to the specific inclusion of volunteer firemen, rescue squads, fire marshals if they are injured in line of duty, uses the general terms to include all public officers.⁹⁴ Nevada specifically includes in the definition of "employee" Volunteer Firemen and Ambulance Service Volunteers, Volunteer Peace Officers, Trustees of School Districts and Junior Traffic Patrols.⁹⁵ Maryland's statute is interesting in that it extends coverage to Volunteer Firemen and Police Department members in specific counties.⁹⁶ The New York statute specifies groups that are covered, such as Sheriffs, Under-Sheriffs, and Deputies.⁹⁷

Since it appears that the trend is toward greater coverage for public officials, the simplest and most workable method would be to include all public officials, appointees, and employees in the workmen's compensation program. Acceptance of the fact by the public and legislators that persons in the public service are entitled to coverage when injured in the course of their employment is long overdue. Government today is a business and the people working in the government, whether elected, appointed or employed by virtue of competitive examinations, are working at a job, earning a livelihood for their families. Their employer, the public, should afford them a measure of protection by offering a compensation program. The elimination of distinctions between officer and employee in a contractual relationship is mandatory. In so modern and streamlined a society as ours, such archaic niceties are cumbersome and unfair.

⁸⁹ Va. Code Ann. § 65-4 (1966).

⁹⁰ La. Rev. Stat. Tit. 23 § 1034 (1950).

⁹¹ Mo. Rev. Stat. § 287.020 (1959).

⁹² Me. Rev. Stat. Ann. Tit. 39 § 2(5) (1961).

⁹³ Wis. Stat. § 102.07 (1955).

⁹⁴ N.J. Rev. Stat. § 34:15-43 (1965).

⁹⁵ Nev. Rev. Stat. §§ 616.070-616.075 (1965).

⁹⁶ Md. Code Ann. 101-34 (Supp. 1966).

⁹⁷ N.Y. Work. Comp. Law §§ 3, 54 (Supp. 1963-1966).