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Workers' Compensation in Michigan: Costs, Benefits and Fairness: A Report to Governor James J. Blanchard's Cabinet Council on Jobs and Economic Development from Theodore J. St. Antoine, Special Counselor on Workers' Compensation

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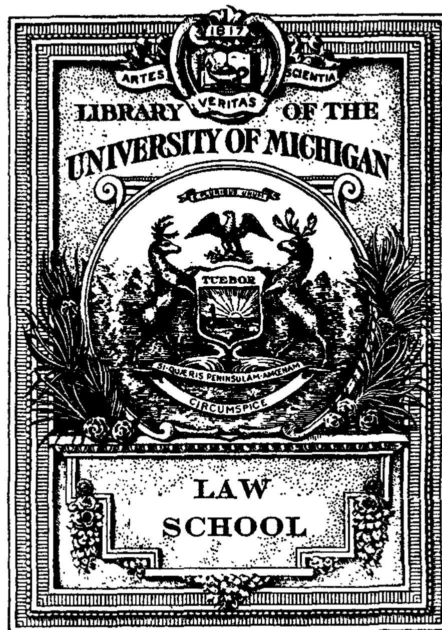
WORKERS' COMPENSATION IN MICHIGAN:

COSTS, BENEFITS, AND FAIRNESS

A Report to Governor James J. Blanchard's
Cabinet Council on Jobs and Economic Development

from Theodore J. St. Antoine
Special Counselor on Workers' Compensation

December 1984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December 12, 1984

Honorable Ralph J. Gerson
Chairperson, Governor's Cabinet Council
on Jobs and Economic Development
The Capitol
Lansing, Michigan 48903

Dear Mr. Gerson:

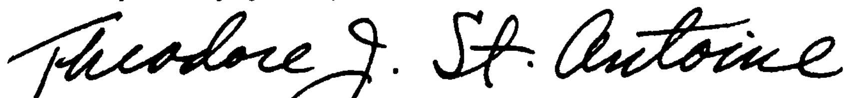
I have the honor to send you and the Cabinet Council on Jobs and Economic Development my attached report as the Governor's Special Counselor on Workers' Compensation, in accordance with the charge given me by Governor James J. Blanchard on September 14, 1983. I understand the Cabinet Council will review my findings and conclusions, and ultimately report its recommendations to Governor Blanchard, mindful of the Governor's desire to ensure a workers' compensation system that is "just, humane, and equitable for all parties."

As discussed more fully in the Introduction of my report, I am most grateful to you and many others throughout the State, both in and out of government, who gave so unstintingly of their time and effort to assist me in this study.

My conclusions are encouraging. Legislative changes of the past few years, specifically, the provision for open competition in insurance and the tightening up of benefit eligibility in the workers' compensation law, appear to have saved the business community well over a half billion dollars in the last two years, while at the same time the maximum weekly benefits for many disabled workers have been increased substantially.

Since the workers' compensation amendments of 1980 and 1981 have not yet been definitively interpreted, and the long-range effects of competition in insurance are still unknown, I urge caution in pursuing further major substantive legal changes at this time. The case backlog at the Workers' Compensation Appeal Board has become staggering, however, and I do recommend significant modifications in the decision-making process. Finally, I propose the creation of a new, permanent workers' compensation labor-management advisory council to engage in an ongoing review of the system and to recommend appropriate changes to the Governor and the Legislature.

Very truly yours,



Theodore J. St. Antoine
Governor's Special Counselor
on Workers' Compensation

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I. INTRODUCTION

On September 14, 1983, Governor James J. Blanchard issued the following statement and charge in appointing Theodore J. St. Antoine as Special Counselor on Workers' Compensation:

> In the past two decades, workers' compensation has been the subject of much discussion and debate among all segments of the industrial community and the several branches of state government in Michigan. During this period, three separate commissions have engaged in extensive analysis of the Michigan Workers' Compensation Law. In 1980, and again in 1981, substantial amendments were added to the statute. Nonetheless, the controversy over this system continues.
>
> Important and deserving interests are at stake. The employee who is the victim of industrial accident or disease is entitled to prompt, reasonable compensation. The employer who must pay should be burdened with no more than fair and appropriate costs. The public generally must be assured of a vibrant, competitive economy in this State.
>
> In order to respond to the pressing need for further review in this area, I hereby appoint Theodore J. St. Antoine, James E. and Sarah A. Degan Professor of Law at the University of Michigan, as Special Counselor on Workers' Compensation, with the following duties and functions:
>
> > (1) To review and analyze the operation of the existing Michigan statutes, including the recent amendments, to determine how adequately and effectively they are protecting employees against losses from industrial accident or disease without imposing improper or excessive costs on employers;
> >
> > (2) To examine current administrative practices and procedures to determine whether all parties are being fairly treated in the various proceedings and whether the law is being enforced in a timely and efficient manner;
> >
> > (3) To determine if there are distinctive areas of system abuse in Michigan which may make the system more costly;
> >
> > (4) To examine the current insurance and funding arrangements to determine whether adequate, efficient, and appropriate provision has been made for the coverage of various industrial injuries and

disabilities;

(5) To compare the standards and procedures under the Michigan statutes with those of other industrial states to determine whether the insurance coverage is effectively competitive with that of other industrial states;

(6) To consult with employers, employees, labor organizations, the medical profession, insurance carriers, legal counsel, government officials, and other appropriate individuals and groups to determine their needs and concerns and the impact of existing administrative procedure and practice on their various interests;

(7) To report his findings and conclusions to the Cabinet Council on Jobs and Economic Development for their review, consultation with the Governor's Commission on Jobs and Economic Development and recommendations to the Governor, concerning the amendment or alteration of existing administrative procedures and law so as to ensure a workers' compensation system for the State of Michigan that will be just, humane, and equitable for all parties.

Governor Blanchard added: "I am pleased that leaders of business and labor have agreed to this process and are pledging to work to implement the special counselor recommendations. This process also has the support of the legislative leadership, which is a strong signal that the Special Counselor's work will indeed help Michigan set aside its traditional business-labor warfare over workers' compensation."

During the past fourteen months I have met with many interested groups and individuals in this State. I am deeply indebted to all of them for their generosity in taking the time and trouble to arrange presentations, compile data, and provide frank and illuminating comments on the actual operation of the Michigan compensation system. Organizations with which I consulted, sometimes more than once, included the Michigan Manufacturers Association and the "Big Three" automobile companies; the Michigan State Chamber of Commerce; the Michigan State AFL-CIO, along with representatives of the Auto Workers, the Steelworkers, and other major unions; the Economic Alliance; the Council of the Workers Compensation Section of the State Bar; the Governor's Entrepreneurial and Small Business Commission; the Governor's Commission on Jobs and Economic Development; the Greater Detroit Chamber of Commerce; the Michigan Mutual Insurance Company; the Michigan Self-Insurers' Association; the State Accident Fund; the Michigan Merchants Council; the Michigan Trial Lawyers Association; and the Michigan Injured Workers Organization. I am also especially indebted to several distinguished members of both the

plaintiffs' and the defendants' compensation bars for speaking with me privately to give me the benefit of their technical expertise. Numerous other individuals and groups submitted their views in writing.

Members of both the legislative and the executive branches of State government were most giving of their time, counsel, and assistance. I spoke with the majority and the minority leadership and Labor Committee members from both the Senate and the House. There were frequent sessions with the Director of the Commerce Department, the Director of the Labor Department, the Director and the Deputy Directors of the Bureau of Workers' Disability Compensation, and a representative group of administrative law judges and members of the Workers' Compensation Appeal Board. Other officials consulted in State government included the Insurance Commissioner, the Director of Management and Budget, the State Personnel Director, the State Business Ombudsman, and various members of their staffs. In addition, I spent one day each visiting with the Directors and staff members of the workers' compensation systems of Minnesota, Wisconsin, and Ohio. In the course of the year I also attended two national conferences on workers' compensation, one at the University of Maine and the other at the Cornell School of Industrial and Labor Relations.

Finally, I was fortunate enough to get several leading authorities on workers' compensation to provide specialized studies on various aspects of the subject. Professor John F. Burton, Jr. of Cornell, Chairman of the 1971-72 National Commission on State Workmen's Compensation Laws, undertook a comparative study of workers' compensation costs and benefits in various states, with particular emphasis upon the Great Lakes region. He was assisted by one of the most knowledgeable persons concerning the Michigan system, Dr. H. Allan Hunt, Research Director of the W.E. Upjohn Institute for Employment Research, and by Alan B. Krueger and Dane M. Partridge. Professor Arthur Larson of Duke, author of the standard treatise on workers' compensation law, prepared a comparative review of the currently hot legal topics of exclusivity of remedy and third-party suits. Professor Solomon Axelrod of the University of Michigan School of Public Health reported on the timely and sensitive issue of medical costs containment. Dr. Axelrod also arranged for Eugenia S. Carpenter, Research Scientist at the Michigan School of Public Health, to investigate the important but often neglected area of vocational rehabilitation. Lastly, Professor Larwrence Joseph of Hofstra University School of Law prepared a comprehensive study of the treatment of occupational diseases in the workers' compensation systems of the Great Lakes states. I shall set forth the principal findings of all these studies in the main body of my report. The complete reports will eventually be made available in limited quantities in separate appendices.

Acknowledgment and sincere thanks are also due Michael Madden, who served as my liaison in Lansing throughout this project; Robert A. Boonin, my legal research assistant; and Nan Druskin, my indefatigable secretary.

II. HISTORICAL BACKGROUND

Workers' compensation was a pioneering form of no-fault insurance. By the beginning of the Twentieth Century, the rapid growth of industry in the United States, often marked by inadequate attention to the safety needs of working people, had produced a veritable plague of industrial accident. Yet injured employees seeking damages from their employer found that the common law had erected three almost insurmountable obstacles to their recovery. These doctrines, developed in the quite different preceding era of small, paternalistic, frequently family-operated firms, were contributory negligence, the fellow servant rule, and assumption of risk.

Under the principle of contributory negligence, even if an employee could establish that the employer's negligence caused an accident, the employer would not be liable if it could show that negligence on the part of the employee contributed in any way to his injury. The fellow servant rule prevented recovery if the injury resulted from the negligence of a co-worker. Assumption of risk was based on the notion that a worker was free to bargain for wages commensurate with the hazards of a given job. Thus, voluntary acceptance of employment under obviously dangerous conditions amounted to an assumption of the risk that injury might result from those conditions.

After some halting efforts were made to modify the harshness of the common law doctrines, a whole new concept emerged to sweep the country in the second decade of this century. Drawing upon European antecedents, all but eight of the states had enacted workers' compensation laws by 1920. These incorporated the principle that industrial accident was part of the cost of the finished product, and that compensation for resulting death or injury should be paid by the ultimate consumer, without regard to the fault of either employer or employee. In their ultimate form, workers' compensation laws represented an important trade-off between employers and employees. Employers lost their traditional common law defenses, but on the other hand employees lost the possibility of maintaining tort actions and securing enormous damage awards from sympathetic juries. The ideal was a swift, sure, nonlitigious system to make the injured employee whole for his actual wage loss and medical expenses.

The Michigan statute was initially adopted as Public Act 10 of 1912. It applied to personal injury and death "arising out of and in the course of employment," except for that caused by an employee's own "intentional and willful misconduct." The law was substantially rewritten by Public Act 317 of 1969. Significant amendments were added in 1980 and 1981, and these will be a major concern of this report.

In 1979 Dr. H. Allan Hunt of the Upjohn Institute for Employment Research quoted from a 1962 speech by William Hart, then-Director of the Michigan Workmen's Compensation Department, setting forth Hart's catalog of the major

problems confronting the Michigan system at that time. They were as follows (quoted in H. A. Hunt, **Workers' Compensation in Michigan: Problems and Prospects** 7-8 (Upjohn 1979)):

1. There are too many contested cases.

2. There are too many redemptions.

3. Payments to workers are not prompt.

4. There is an inadequate consciousness of rehabilitation.

5. Maximums provided by law are not realistic.

6. Political propagandists are using the field of workmen's compensation to make required reforms impossible and to push regressive measures which endanger the whole program.

Dr. Hunt concluded that Hart's diagnosis was generally still valid seventeen years later, but omitted a number of problems confronting the system in 1979. As we shall see, the observations of both Hart and Hunt retain much force in 1984.

III. COSTS AND BENEFITS

The 1980 and 1981 "reform legislation" substantially modified Michigan's workers' compensation law. Many of these amendments did not take effect, however, until January 1, 1982, or March 31, 1982. The most important changes included the coordination of workers' compensation benefits with unemployment compensation benefits, employer-financed wage continuation plans, pension plans, disability insurance plans, and the amount of an employer's contribution to old age benefits under Social Security. The basic benefit formula was changed from two-thirds of gross wages with a maximum of two-thirds of the State's average weekly wage to 80 percent of after-tax wages with a maximum of 90 percent of the State's average weekly wage. Minimum benefits were eliminated except in the case of death and scheduled injuries. The so-called "fictional 40-hour week," was eliminated, and fringe benefits were generally excluded from the calculation of an employee's average weekly wage. "Disability" was statutorily defined for the first time with regard to personal injuries, and the rules governing "favored work" were tightened. A presumption was established against a wage loss on the part of a retired person who is drawing a private or government pension. In addition, a 1981 amendment would have prohibited redemptions, effective January 1, 1984, but this ban was lifted by a 1983 statute, which imposed stricter controls on redemptions and required each party to an approved settlement to contribute $100 to a new Redemption Fund to help defray the State's administrative expenses.

Besides these substantive changes in the workers' compensation law, there have been significant changes in insurance law and practice. In December 1981 the Michigan Legislature mandated a 20 percent overall reduction in workers' compensation insurance rates, effective January 1, 1982. In response, the Michigan rating bureau, a private organization which at that time filed rates on behalf of all insurers writing workers' compensation insurance in Michigan, announced a voluntary 22.2 percent rate reduction, effective January 1, 1982. Then, during 1982, the Legislature provided that open competition in the writing of workers' compensation insurance in Michigan would go into effect on January 1, 1983.

Unfortunately, **it is much too soon to draw any definitive conclusions concerning the ultimate effect of all these interacting statutory changes.** Less than two years have passed since the effective date of fundamental modifications in both the substantive law and the insurance coverage of workers' compensation. The eventual impact on employers' costs and employees' benefits will not be known for several more years. All that can be expected at this time are preliminary, tentative findings. With those qualifications, however, I believe that what follows is the most accurate and up-to-date set of figures the state of the art permits.

A. Workers' Compensation Costs: Interstate Comparisons and Michigan Trends

1. **Comparative insurance rates.** As mentioned earlier, Professor John F. Burton, of the Cornell School of Industrial and Labor Relations, and Dr. H. Allan Hunt, of the Upjohn Institute, collaborated in producing a report entitled, "Interstate Variations in the Employers' Cost of Workers' Compensation, with Particular Reference to Michigan and the Other Great Lakes States." Their paper runs to about 200 double-spaced pages, including footnotes and tables, and contains the most intricate statistical analysis. Although the full report will be made available separately in limited quantities, I shall do no more than cite its most salient points here.

Professor Burton has devised a highly sophisticated technique for meaningful comparisons between the workers' compensation costs of different states. He starts by rejecting the crude method sometimes employed of ascertaining the ratio of earned premium to payroll for each state. Such an approach wholly fails to take account of the varying mix of industry from state to state, and the varying extent to which self-insurance may be practiced. Burton uses as a constant the model of the **national** payroll distribution according to as many as 71 major occupational classifications. Using the insurance rates applicable to each classification in a particular state, he can then calculate an average rate for every state that will be genuinely comparable to all others.

Burton's next problem was to determine what **is** the critical insurance "rate." The published "manual" rates are only a point of departure in seeking to find what any given employer actually pays. After adjustments to take account of experience rating, certain expense and loss constants, premium discounts, retrospective rating, and dividends, Burton arrives at what he defines as the **high adjusted manual rate**. In recent years even that adjusted rate has had to be further modified to reflect such competitive devices as open competition, deviations, and schedule rating. That brings Burton finally to what he calls the **low adjusted manual rate.** In a state like Michigan, where open competition prevails, it is the low adjusted manual rate that best represents the actual net cost of insurance to an employer.

In assessing the impact of open competition, Burton begins cautiously: "One view of workers' compensation is that prior to open competition, the use of dividends, retrospective rating, et al. had squeezed all excess profits and unnecessary expenses out of workers' compensation insurance. If this is true, then arguably the only result of open competition will be to reduce insurance rates at the beginning of the policy period with a corresponding reduction in dividends at the end of the policy period. This view amounts to saying that open competition has no impact on the employers' costs of workers' compensation...." After that warning, Burton proceeds as follows in the draft version of his report:

The other view of workers' compensation insurance is that prior to open competition and other competitive devices discussed in this section, excess profits or unnecessary administrative expenses existed in the insurance industry, and that open competition eliminates or reduces these expenses, thereby reducing the costs of workers' compensation to employers. This view is equivalent to saying that the difference between manual rates and adjusted manual rates is greater in states with open competition.

Michigan is the only state with data that permit a preliminary assessment of this view. Open competition has been in effect in Michigan since January 2, 1983. Lines (3) and (4) of Table 14 present data provided by the Compensation Advisory Organization of Michigan (CAOM) for 1984 policies for which information was available by August 1984. Comparable data for all 1983 policies are provided in lines (3) and (4) of Table 15. These data are derived from the "Information Page" that each carrier must file with the CAOM for each workers' compensation and employers' liability insurance policy sold to Michigan employers. The "Information Page" contains information on the insurance classifications, the annual payroll, manual premium, and total estimated annual premium after application of premium discounts, experience rating, et al. The only factors influencing insurance costs that are not included on the "Information Page" are retrospective rating and dividends. These factors are discussed below.

In states without open competition, carriers are required to use the manual rates included in the state's current schedule as the starting point for determining the premiums charged to employers. Had Michigan not adopted open competition, the simulated manual rates shown in line 1 of Tables 14 and 15 would have represented these initial charges. Under open competition, the initial charges offered to employers will vary among carriers. The average manual rates charged by carriers in actual transactions with employers during 1984 are shown in line 3 of Table 14 for five different combinations of employers. Similar information for the average manual rates in actual transactions in 1983 are shown in line 3 of Table 15. The data indicate that under open competition, the manual rate charged by carriers are considerably less than the manual rates that would have been charged using the procedure used to develop manual rates in states without open competition. (This can be seen by comparing (1) and (3) in Tables 14 and 15.)

Under open competition in Michigan, carriers are also able to compete by using different experience rating formulas, expense and loss constants, and premium discounts than are used in states without open competition. The insurance rates actually charged to employers in Michigan during 1984 after these factors are taken into account are shown in line 4 of Table 14 for five different combinations of employers. Similar information for the actual charged rates in 1983 are shown in line 4 of Table 15.

There are two additional adjustments to manual rates that are not reflected in line 4 of Tables 14 and 15. The adjustments due to retrospectives rating cannot be measured in Michigan.... The other factor not

TABLE 14
Michigan Workers' Compensation Insurance Rates in 1984

	24 Classes in Division A	44 Classes in Divisions A & B	24 Manufacturing Classes in Divisions A, B, & C	56 Classes in Divisions A, B, & C	71 Classes in Divisions A, B, C & D
Average Costs of Manual Rates (Simulated) in Effect on January 1, 1984	2.071	2.214	6.223	2.432	2.903
Average Costs of High Adjusted Manual Rates (Simulated Using NCCI Data)	1.682	1.799	5.057	1.976	2.359
Average Manual Rates in Actual Transactions	1.627	1.720	4.960	1.908	2.239
Average [Charged Rates] in Actual Transactions	1.374	1.422	3.855	1.554	1.816
Low Adjusted Manual Rates after Estimated Impact of Dividends	1.239	1.283	3.477	1.402	1.638
Gross Impact of Open Competition $\frac{(1)-(5)}{(1)}$	40.2%	42.1%	44.1%	42.4%	43.6%
Net Impact of Open Competition $\frac{(2)-(5)}{(2)}$	26.3%	28.7%	31.2%	29.0%	30.6%

TABLE 15
Michigan Workers' Compensation Insurance Rates in 1983

	24 Classes in Division A	44 Classes in Divisions A & B	24 Manufacturing Classes in Divisions A, B, & C	56 Classes in Divisions A, B, & C	71 Classes in Divisions A, B, C & D
Average Costs of Manual Rates (Simulated) in Effect on January 1, 1983	2.203	2.327	7.038	2.602	3.045
Average Costs of High Adjusted Manual Rates (Simulated Using NCCI Data)	1.862	1.967	5.947	2.199	2.574
Average Manual Rates in Actual Transactions	1.724	1.818	5.316	2.021	2.347
Average [Charged Rates] in Actual Transactions	1.483	1.573	4.436	1.730	2.016
Low Adjusted Manual Rates after Estimated Impact of Dividends	1.360	1.443	4.068	1.586	1.848
Gross Impact of Open Competition $\frac{(1)-(5)}{(1)}$	38.3%	38.0%	42.2%	39.0%	39.3%
Net Impact of Open Competition $\frac{(2)-(5)}{(2)}$	27.0%	26.6%	31.6%	27.9%	28.2%

accounted for in line (4) of Tables 14 and 15 is dividends paid after the expiration of the policies. Dividends to policyholders are rather substantial nationally, representing 7.8 percent of standard earned premium in 1980-1982.

If open competition is driving down the initial rates charged to employers (manual rates) and also leading to competition in terms of premium discounts, experience rating, and similar factors, then reducing dividends is an obvious way for carriers to adjust their overall charges for workers' compensation insurance if the rates prior to open competition were not higher than necessary to cover losses and administrative expenses. It is too early for a definitive judgment about the impact of open competition on dividends in Michigan because open competition only began on January 1, 1983, because dividends are typically paid in a year on the basis of experience with policies from previous years, and because the latest data on Michigan dividends pertain to 1983. There is, however, one aspect of the Michigan experience in recent years that provides a possible clue to the impact that open competition will have on dividends. In 1981, the Michigan Legislature mandated a 20 percent overall rate reduction effective January 1, 1982. In response, WCRIAM, which filed rates on behalf of all insurers writing workers' compensation insurance in Michigan, announced a voluntary 22.2 percent rate reduction effective January 1, 1982. The benefit changes effective that date were estimated to increase insurance costs by 4.6 percent, and so the overall reduction of 22.2 was largely due to a 25.2 assumed improvement in experience. This large a rate reduction for 1982 could have been expected to result in lower dividends in 1983. However, dividends as a percentage of premium increased in 1983, both when 1983 dividends are compared to 1983 premiums and when compared to 1982 premiums.

The data on dividends on Michigan workers' compensation insurance indicate that dividends as a percentage of payroll increased every year from 1978 to 1983 when measured on a concurrent basis and increased every year from 1979 to 1983 when dividends are compared to the previous year's premiums. As indicated before, it is still too early to be confident about the ultimate impact of open competition on dividends in Michigan. However, through 1983, there is no evidence that dividends as a percentage of premium are declining in Michigan. The data used for subsequent adjustments of Michigan insurance charges will be a three-year average of dividends compared to premiums from the previous year.

For 1983, the three-year average of dividends as a percentage of lagged premiums was 9.8 percent. This 9.8 percent was used to reduce the average charged rates for 1984 shown in line (4) of Table 14 to produce the low adjusted manual rates after estimated impact of dividends shown in line (5) of Table 14. A similar procedure was used for the 1983 rates shown in Table 15, where the low adjusted manual rates in line (5) are 8.3 percent lower than the average charged rates shown in line (4); the 8.3 percent impact of dividends is the 1982 figure.

The low adjusted manual rates shown in line (5) of Table 14 are our best estimates of what the five combinations of Michigan employers designated in the column headings of the table are actually paying for workers' compensation insurance in 1984, considering all the consequences of open competition, such as carrier decisions on manual rates, experience rating formulas, and dividends. These actual charges are considerably below the simulated manual rates shown in line (1) of Table 14, which represent our estimates of the manual rates that would have been promulgated on January 1, 1984, if open competition had not been adopted in Michigan. Line (6) of Table 14 indicates that the low adjusted manual rates in line (5) are from 40.2 percent to 43.6 percent below the simulated manual rates shown in line (1). It would be inappropriate, however, to attribute all of the differences shown in line (6) to open competition since even in the absence of open competition, most Michigan employers would have paid insurance rates less than manual rates because of premium discounts, dividends, et al. Our best estimates of what Michigan employers would actually have paid in 1984 if open competition had not been adopted are shown as the simulated high adjusted manual rates in line (2) of Table 14. The net impact of open competition is the difference between these high adjusted manual rates (line (2)) and the low adjusted manual rates (line (5)); **the percentage estimates of the net impact of open competition are shown in line (7) of Table 14 and range from 26.3 percent to 30.6 percent**, depending on the combination of employers chosen.

The apparent net impact of open competition on workers' compensation costs for Michigan employers is substantial, according to our best estimates. We stress that this finding must be used with caution. One reason, as discussed earlier, is that more time is needed before the ultimate impact of open competition on dividends can be determined. The substantial dividends [through 1983] may dissipate with time. Also, the initial result of open competition may be to induce a degree of competition among carriers that cannot be sustained over time. Arguably, some carriers are engaged in a form of predatory price-cutting that will jeopardize some carriers' financial solvency and ultimately will lead to more realistic (or sustainable) and higher rates. More time will be needed to assess the permanent consequences of open competition on workers' compensation insurance rates.

We do not have sufficient data to assess the ultimate impact of open competition. However, the 26.3 to 30.6 percent net impact for 1984 shown in Table 14 is consistent with several other data sets from Michigan. For 1983, the data on line (7) of Table 15 indicate that the net impact of open competition on insurance charges in Michigan was between 26.6 percent and 31.6 percent, virtually the same range shown from the 1984 data in Table 14. We also tried different weighting schemes for those five combinations of employers shown in Tables 14 and 15. Those tables relied on the national payroll distributions among the 71 insurance classifications. We substituted Michigan payroll distribution for the 70 classes with available data. For 1984, using the Michigan 1984 payroll distribution, the net impact of open competition was from 26.0 percent to 30.4 percent. For 1983, using the

Michigan 1983 payroll distribution, the net impact of open competition was from 26.0 to 33.4 percent. In essence, the different weighting schemes make virtually no difference in the apparent net impact of open competition on workers' compensation insurance rates in Michigan.

* * *

Michigan employers paid about $533 million for workers' compensation insurance premiums in 1983, and about $493 million in 1984. On the basis of Professor Burton's calculations that those amounts were about 30 percent less than what they would have been in the absence of open competition, one can estimate that **open competition saved Michigan employers $229 million in 1983 and another $212 million in 1984.**

After dealing with the likely effect of open competition on workers' compensation insurance rates in Michigan, Professor Burton proceeds to deal with interstate variations, with special emphasis on comparisons between Michigan and the other Great Lakes states:

Table 20 is based on the view that open competition and deviations do have a net impact on workers' compensation costs, and produce what are termed "low adjusted manual rates."

Columns 1 and 2 of Table 20 present the average cost of adjusted manual rates on January 1, 1984 for 24 and 44 classifications using national payroll distributions. Column 3 presents the averages for 24 manufacturing classes using national payroll distribution. Column 4 presents the average adjusted manual rates based on the 56 classifications in Divisions A, B, and C, and column 5 shows the rates based on the 71 classes in Divisions A to D.

The results in Table 20 can be interpreted as the percentage of the payroll expended on workers' compensation insurance by employers in 47 jurisdictions (including the District of Columbia) as of January 1, 1984. The results in column 2 of Table 20 are the most reliable and useful....

Table 28 provides information in the adjusted manual rates for the 44 classes of employers in Divisions A and B. This combination of employers was selected because it is the largest combination for which a historical record is available from 1958 to 1984. The Michigan data are shown in line (1), and indicate that Michigan employers expended an amount equivalent to 0.450 percent of payroll on workers' compensation insurance in 1958. This percentage increased through time until 1978, when Michigan employers expended 1.890 percent of payroll on insurance premiums. From 1978 to 1984, the cost of insurance as a percentage of payroll dropped, to a figure of 1.799 if high adjusted manual rates are used or to 1.283 percent if low adjusted manual rates are used.

The performance of Michigan workers' compensation costs relative to those in other states can also be traced with the data in Table 28. The average

Table 20. Interstate Variations in Average Costs of Low Adjusted Manual Rates for Classes in Each Division of Table 3, Weighted by National Payroll Distributions

Jurisdiction	24 Classes In Division A	44 Classes In Divisions A and B	24 Manufacturing Classes In Divisions A,B,&C	56 Classes In Divisions A,B,&C	71 Classes In Divisions A,B,C,&D
Alabama	0.838	0.848	1.964	0.909	1.064
Alaska	2.131	2.027	3.619	2.110	2.354
Arizona	0.924	0.995	2.382	1.075	1.275
Arkansas	0.775	0.819	1.972	0.887	1.042
California	1.752	1.936	4.293	2.068	2.412
Colorado	0.937	0.999	2.423	1.076	1.237
Connecticut	1.581	1.644	3.419	1.712	2.092
Delaware	0.968	1.023	3.547	1.183	-----
DC	1.938	1.915	4.293	2.045	2.363
Florida	1.475	1.552	3.010	1.608	1.842
Georgia	0.598	0.617	1.641	0.678	0.778
Hawaii	3.386	3.647	7.491	3.384	4.411
Idaho	1.197	1.228	2.694	1.319	1.538
Illinois	0.851	0.846	1.958	0.910	1.067
Indiana	0.324	0.340	0.690	0.359	0.416
Iowa	0.799	0.801	1.462	0.836	0.971
Kansas	0.734	0.772	1.746	0.828	0.985
Kentucky	0.553	0.579	1.493	0.636	0.750
Louisiana	0.934	0.970	2.333	1.054	1.252
Maine	1.500	1.570	3.425	1.659	-----
Maryland	1.633	1.651	3.130	1.712	1.984
Massachusetts	1.388	1.467	3.499	1.577	1.889
Michigan	1.239	1.283	3.477	1.402	1.638
Minnesota	0.933	0.980	2.824	1.097	1.275
Mississippi	0.842	0.854	1.908	0.911	1.067
Missouri	0.608	0.646	1.487	0.696	0.822
Montana	1.449	1.478	3.081	1.572	-----
Nebraska	0.715	0.736	1.574	0.772	0.901
New Hampshire	1.328	1.374	3.430	1.504	1.829
New Jersey	1.154	1.231	2.857	1.322	1.515
New Mexico	1.833	1.881	3.677	1.982	2.265
New York	1.055	1.079	2.709	1.169	1.351
North Carolina	0.512	0.524	0.988	0.544	0.644
Ohio	1.476	1.521	2.863	1.576	1.758
Oklahoma	1.317	1.348	3.316	1.476	1.725
Oregon	1.580	1.615	3.516	1.725	-----
Pennsylvania	1.217	1.235	2.491	1.284	-----
Rhode Island	0.893	0.976	2.945	1.090	1.246
South Carolina	0.961	0.972	1.811	1.011	1.196
South Dakota	0.678	0.694	1.382	0.735	0.876
Tennessee	0.694	0.732	1.768	0.794	0.980
Texas	1.520	1.581	3.994	1.736	2.024
Utah	0.638	0.664	1.619	0.720	0.825
Vermont	0.798	0.812	1.657	0.854	0.973
Virginia	0.854	0.850	1.286	0.861	1.017
West Virginia	1.951	1.855	2.955	1.926	2.174
Wisconsin	0.802	0.846	1.993	0.910	1.092

TABLE 28

Workers' Compensation Costs in Michigan Relative to National Average and Other Great Lakes States Average, 1958-1984: Adjusted Manual Rates for 44 Classes in Divisions A and B of Table 3

	1958	1962	1965	1972	1975	1978	1984H	1984L
(1) Michigan	.450	.694	.715	.914	1.238	1.890	1.799	1.283
(2) U.S. Average (28 states)	.618	.711	.791	.783	1.019	1.420	1.433	1.334
(3) Ratio Michigan to U.S. ((1)/(2))	.728	.976	.904	1.167	1.215	1.331	1.255	.962
(4) Seven Other Great Lakes States Average	.514	.577	.600	.648	.871	1.275	1.112	.978
(5) Ratio Michigan to Seven Great Lakes States ((1)/(4))	.875	1.203	1.192	1.410	1.421	1.482	1.618	1.312
(6) Six Other Great Lakes States Average (sans Indiana)	.534	.613	.634	.692	.947	1.408	1.241	1.085
(7) Ratio Michigan to Six Great Lakes States ((1)/(6))	.843	1.132	1.128	1.321	1.307	1.342	1.450	1.182

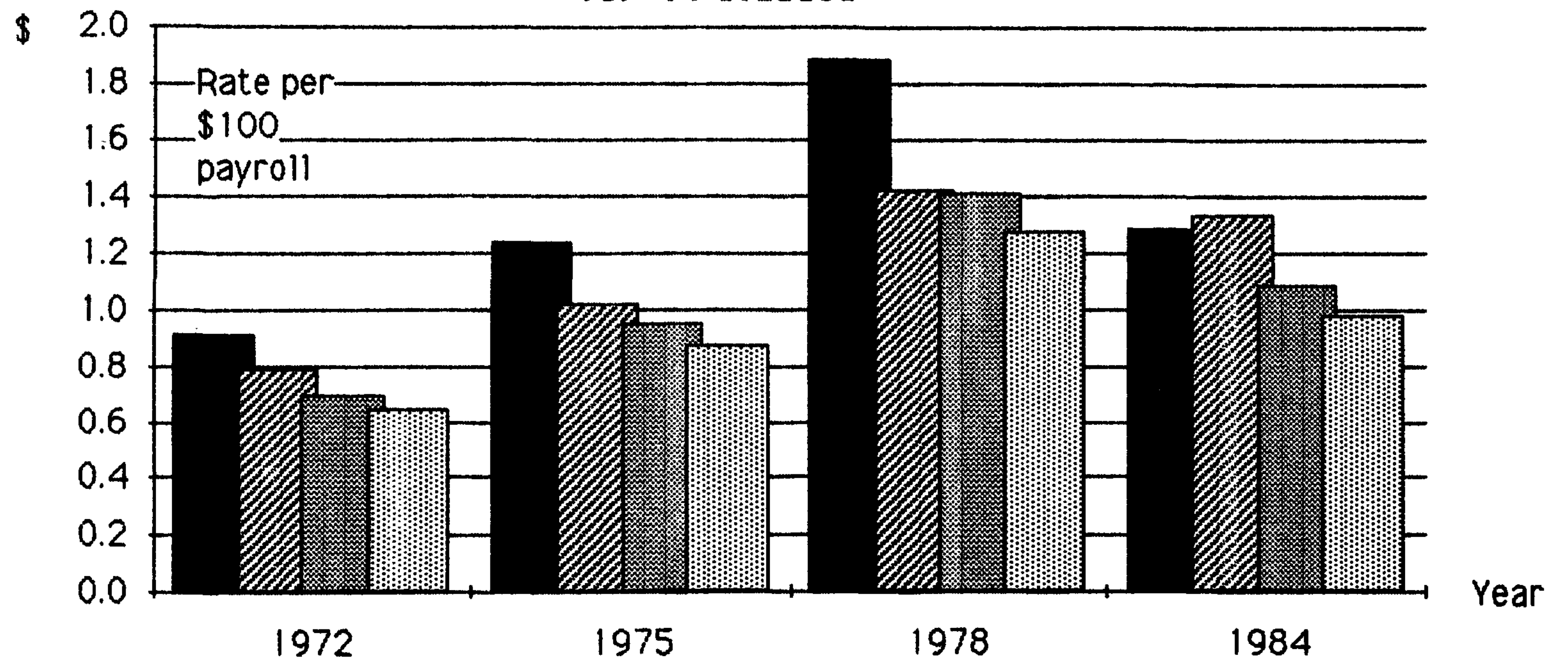
Average for Seven Other Great Lakes States is a six states average for 1958-1965;
Average for six other Great Lakes States is a five states average for 1958-1965; New York data not available prior to 1972.

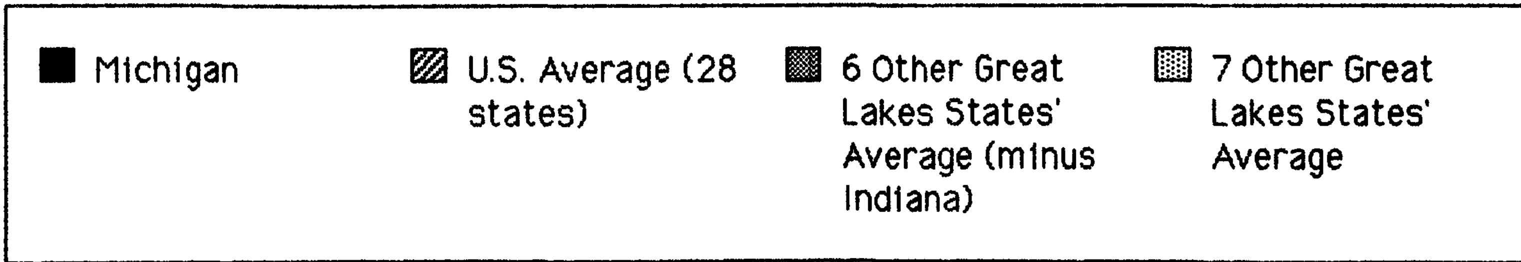
cost for the 44 types of employers in 28 states are presented in line (2); this number of states is used because it is the largest combination of states with data available for the 1958 to 1984 period. This series also shows a continuing increase through time in the employers' costs of workers' compensation. Indeed, if the high adjusted manual rates are used, costs increased every year nationally from 1958 to 1984. The Michigan performance relative to the national (28 states) average is reported in line 3. From 1958 to 1965, Michigan employers were spending less on workers' compensation insurance than were employers elsewhere. However, Michigan costs increased more rapidly than the national average from 1965 until 1978, when Michigan costs were 33.1 percent above the national average. By 1984, the high adjusted manual rates were only 25.5 percent above the national average. Of course, these are simulated high adjusted manual rates, which indicate what Michigan employers would have been paying in 1984 if open competition had not been introduced into the state. Our best estimate of what Michigan employers were actually paying in 1984 is represented by the low adjusted manual rates, and the data indicate that **as of 1984 the employers in Michigan were paying about four percent less than the national average figure for workers' compensation insurance.**

The experience of the other Great Lakes states is presented in Table 28 in line (4). The seven other states that bound the Great Lakes are Illinois, Indiana, Minnesota, New York (for which data are only available since 1972), Ohio, Pennsylvania, and Wisconsin. From 1958 through 1984, the other Great Lakes states on average have always had workers' compensation costs below the national average, as can be seen by comparing lines (2) and (4). As a result, the Michigan performance relative to the other Great Lakes states (shown in line (5)) or to the others exclusive of Indiana (shown in line (7)) is less favorable than Michigan's performance relative to the national average (shown in line (3)). From 1962 to 1984, Michigan costs have always been above the average in the other Great Lakes states. From 1978 to the high adjusted manual rates in 1984, Michigan's costs ratio increased, indicating that without open competition the Michigan cost disadvantage relative to the Great Lakes states would have worsened. However, the impact of open competition that is reflected in the 1984 low adjusted manual rates indicates that Michigan employers improved their relative costs compared to the other Great Lakes states from 1978 to 1984. In 1984, Michigan employers expended 31.2 percent more than did comparable employers in the other Great Lakes states, down from a 48.2 percent cost disadvantage in 1978.... [The respective figures were 18.2 percent and 34.2 percent, with the exclusion of Indiana.]

The rationale for excluding Indiana from certain comparisons is that Indiana is the only Great Lakes state that has made inadequate benefits a pronounced feature of its workers' compensation program. For example, as of January 1, 1984, the maximum weekly benefit for total disability in Indiana was $156.00, which meant that the most an injured worker could receive in Indiana was below the poverty level for a family of four. No other Great Lakes state could match this record. [**Note by St. Antoine**: Michigan must try

Workers' Compensation Costs in Michigan Relative to National Average and Other Great Lakes States* Average, 1972-1984: Adjusted Manual Rates for 44 Classes





*Great Lakes States include Michigan, Illinois, Indiana, Ohio, Wisconsin, Minnesota, Pennsylvania, and New York

to disengage itself from its fixation on the workers' compensation costs of Indiana, despite that state's unfortunate geographical proximity. As Table 20 documents, Indiana has simply opted out of Twentieth Century public policy in its slighting of the injured worker. Its expenditures are dead last by a wide margin among all the fifty states. Alabama and Mississippi are prodigal by comparison. If and when federal standards are mandated in workers' compensation, no state will have a greater claim to responsibility than Indiana.]

* * *

2. Self-insured operations. Dr. H. Allan Hunt took primary responsibility in the Burton-Hunt collaboration for analyzing recent developments in the experience of self-insured employers under the Michigan workers' compensation system. His portion of the report is as follows:

It is not a simple matter to measure the workers' compensation costs of self-insured employers in a way that makes them directly comparable to the cost of workers' compensation insurance coverage purchased from commercial insurance carriers. The major difference is that self-insured employers are generally operating on roughly a pay-as-you-go basis. Commercial insurance on the other hand is usually prepaid. In workers' compensation insurance, with its long-tailed distribution of claims, there is an enormous difference between payments in one year to all existing claims and pre-funding potential lifetime payments to all claims arising in one year. The former is the pay-as-you-go option while the latter is prepaid.

There are other, less obvious differences which prevent direct comparisons between the cost of self-insurance and commercial insurance coverage. The cost of administration is frequently not measured by self-insurers in a way that makes it easy to include with the cost of benefit payments. Litigation costs may be hidden in other budgets and not identified as related to workers' compensation in any way. In addition, commercial insurance carriers generally perform other services for employers, such as loss-control programs, safety consulting services, and others. These may or may not be performed in self-insured firms, but it is highly unlikely that the cost of such services will be measured comparably in the two sectors.

Despite these difficulties in making direct comparisons, it is important to make some attempt to determine the experience of self-insured employers in Michigan as well as those with commercial insurance. In recent years, approximately 40 percent of all workers' compensation benefit payments in Michigan have been made by self-insured employers. Clearly, the experience of such a large group of employers cannot be ignored. This is especially true because there is reason to believe that the 1980 and 1981 reforms may have impacted large, high-wage employers differently than smaller, low-wage employers. Changes in maximum benefit levels, minimum benefit provisions, and benefit coordination would be likely to have differential effects across industries with varying wage and benefit levels. In addition, there would be

no reason to expect the deregulation of the insurance market to have any effect on the costs of self-insured employers.

Letters were sent to a select group of large self-insured employers in Michigan with a request for data on their workers' compensation costs. Specific items were suggested, with emphasis on annual benefit payments and litigation experience. These employers were asked to submit data that would facilitate analysis of cost trends from 1978 through 1983 and that would permit interstate cost comparisons where that was relevant for the firm.

The most surprising result of this informal non-random survey was the great difficulty encountered by self-insureds in responding. This was not due to a lack of cooperation, but reflected the inability of the firms to report their data in the simple format requested. Inconsistencies between firms' practices and gaps in the data were very serious. Reasonably comparable benefit payment data were obtained from seven large self-insured firms with major operations in the State of Michigan, including the Big Three auto producers. While these data cannot in any sense be regarded as generalizable to all self-insureds, they should be sufficient to indicate whether the changes in workers' compensation insurance costs in Michigan are confirmed in the benefit cost trends experienced by some notable self-insured employers in the state.

Table III-1 presents summary results for the workers' compensation benefit payments per $100 of payroll for the Big Three auto producers and for four other self-insureds. The Big Three benefit payments are reported separately for Michigan operations and all non-Michigan self-insured operations. Individual firm's costs were weighted by the relevant payroll to arrive at the summary figures. Before proceeding to a discussion of the findings in Table III-1, it is important to point out some limitations of the analysis.

First, annual benefit payments do not adequately measure the cost of workers' compensation programs for these firms. As indicated earlier, there are serious problems in determining such measurements in different self-insured firms. Thus, the choice was made to stick to the simplest facts that could be collected reliably, namely, annual benefit payments. Clearly, annual benefit payments seriously understate the total cost of workers' compensation coverage for these self-insured employers. The cost of administration, Second Injury fund and other assessment costs, litigation expenses, in-plant medical treatment costs, and many others are not included in the benefit cost measurement used here. Annual benefit payments also do not include any reserve for claims incurred but not reported or even reserves for future payments on known cases.

There is another problem with comparing the Big Three costs in Michigan with their costs elsewhere. Since a large proportion of managerial and professional staff is employed in Michigan, workers' compensation costs in Michigan are understated relative to the other states. This is because the

Michigan payroll figures include a higher proportion of employees who are both well compensated and unlikely to suffer a compensable accident. Unfortunately, complete data were not available to make a correction for this factor, but partial reports indicate that the Michigan costs are probably understated by from 40 to 80 percent relative to other states. There is no particular reason to expect this bias to change over time, however, so it should not distort the comparisons of costs over the years 1978 to 1983.

TABLE III-1

WORKERS' COMPENSATION BENEFIT COSTS PER $100 PAYROLL

SELECTED SELF-INSURERS

Year	Big Three		Other Self-Insureds
	Michigan Operations	Non-Michigan Operations	Michigan Operations
1978	$0.86	$0.44	$0.52
1979	0.95	0.55	0.56
1980	1.36	0.67	0.61
1981	1.18	0.64	0.60
1982	1.23	0.72	0.58
1983	0.98	0.66	0.55

Table III-1 shows that the general trend of workers' compensation costs for these self-insured employers in Michigan has been downward since 1980. **Annual benefit payments relative to payroll by non-auto self-insureds have declined by 10 percent since 1980 while the auto producers have realized a 28 percent reduction over the same period.** The reduction for auto employers was particularly marked in 1983. This may reflect the coordination of benefits and other new provisions of the law, but it is interesting to note that there has been a marked reduction in the number of claims as well. It may also be a consequence of distortions introduced by the 1982 figure. The 1982 costs for the Big Three showed a slight increase over 1981. Presumably this reflected the recession and consequent layoffs in the auto industry. Both the payroll figures and the number of claims illustrate strong sensitivity to

employment levels in the industry. If 1982 was artificially high, it would make the 1983 drop look more impressive than it actually was.

The other interesting comparison in Table III-1 is between the Michigan and non-Michigan operations of the Big Three auto producers. Recalling the earlier caution about likely understatement of the Michigan costs due to the inclusion of more white-collar workers in Michigan payrolls, the comparisons are still revealing. Michigan operations show a much higher benefit cost level than other states in the Big Three's experience. However, the good news for Michigan is that the ratio of Michigan costs to non-Michigan costs has declined from roughly twice as high in 1980 to one and one-half times as high in 1983. This reflects the fact that non-Michigan costs do not show the same downward trend but seem to bounce around more from year to year.

This analysis is certainly not definitive, but it does indicate improvement in Michigan's workers' compensation cost problem for self-insurers. Since the deregulation of workers' compensation insurance in 1983 would not be expected to impact the benefit costs of the self-insureds, it is apparent the earlier changes in the law have resulted in some cost reductions in the self-insured sector. The number of litigated claims appears to be down and retiree claims in the auto industry have been reduced. The trend in the number of redemptions is clearly downward over the last two years both in the insured and the self-insured sectors. On the basis of the evidence presented in Table III-1, a beginning has been made.

* * *

3. Claims filings. Another way to forecast the likely future direction of workers' compensation costs is to observe the long-range trends in claims filings. As Table III-2 shows, there was a generally steady increase in the number of cases opened and the number of contested claims from the early 1970s right through the early 1980s. Since then, however, there has been a rapid and dramatic decline. From a high of 145,459 cases opened in 1982, the figure dropped to 83,591 in 1984, or a fall of 42.5 percent in a mere two years. Contested cases went from a peak figure of 44,054 in 1981 to only 23,103 in 1984, or a decline of 47.6 percent in just three years. In each instance that brought the total figures back to below the level of 1971. In view of the delays in processing contested cases, which often involve more serious and longer-lasting disabilities, the current lower filing rates foreshadow even greater savings for the future. It is also good news that the rate of contested claims has fallen below the 30 percent mark, which means that once again almost three-quarters of all claims are being paid voluntarily.

TABLE III-2

WORKERS' COMPENSATION BUREAU: ANNUAL CASELOAD STATISTICS

	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984*
Cases opened (Form 101)	83,972	89,577	97,486	102,254	95,156	95,857	103,436	122,064	137,955	136,996	129,640	145,459	85,568	83,591
% change from previous year	____	+6.67	+8.83	+4.89	-6.94	+0.74	+7.91	+18.01	+13.02	-0.70	-5.37	+12.20	-41.17	-2.31
Contested cases received (Form 104)	23,769	26,336	25,982	28,107	28,776	29,681	29,782	30,636	37,865	40,232	44,054	32,674	28,605	23,103
% change from previous year	____	+10.80	-1.34	+8.18	+2.38	+3.14	+0.34	+2.87	+23.60	+6.25	+9.50	-25.83	-12.45	-19.23
% of contested cases to cases opened	28.31	29.40	26.65	27.49	30.24	30.96	28.79	25.10	27.45	29.37	33.98	22.46	33.43	27.64

Office of Strategy
10/16/84
(Percentages by St. Antoine)

*Projection based on actual data for first 9 months of 1984.

B. Benefits: Interstate Comparisons and Evaluation of Adequacy

In addition to the Burton-Hunt comparative study of workers' compensation costs, Professor Burton and an associate provided a companion paper, entitled, "Workers' Compensation Benefits in Michigan and the Other Great Lakes States." Although permanent disabilities of one kind or another account for only about one-quarter of the total number of cases in the workers' compensation system, they account for approximately two-thirds of all cash benefits paid injured workers, both nationally and in Michigan. (Medical benefits for various classes of permanently disabled workers range between one-fifth and one-third of the benefits provided them; medical expenses constitute about one-quarter of all workers' compensation payments.) In view of the great financial impact of permanent disabilities, therefore, Professor Burton concentrated most of his attention upon them.

1. Comparative benefits in Michigan and other Great Lakes states. The last year for which comprehensive data are available concerning both benefits and costs under workers' compensation is 1978. Comparing Michigan and the other Great Lake states as of that year, Professor Burton has this to say in the draft version of his report:

Table B25 presents the sum of the average cost of indemnity benefits and medical benefits for each type of claim, as well as claim frequency. Death cases, corrected for employment, are most frequent in Michigan, and least frequent in Indiana and New York. The average cost of death benefits, considering both the indemnity and medical benefits, is least expensive in Indiana, and most expensive in Minnesota. Death benefits in Michigan are well below the Great Lakes average.

The frequency of permanent total cases per 100,000 workers was greatest in Michigan, and lowest in Indiana and New York. The average cost of indemnity and medical benefits for permanent total disability was least expensive in Indiana and Michigan, and most expensive in Minnesota.

The rate of major permanent partial disability cases was highest in Michigan and Illinois, and lowest in Pennsylvania, Indiana, and New York. The average cost of indemnity and medical benefits for major permanent partial cases was below the Great Lakes average in Indiana and Wisconsin, approximately equal to the average in Illinois, Michigan, and New York, and above the average in Minnesota and Pennsylvania.

Minor permanent partial disability cases per 100,000 workers were least frequent in Pennsylvania and Indiana, and most frequent in Illinois. The average cost of minor permanent partial cases, including both indemnity and medical benefits, was below the Great Lakes average in New York, Michigan, Indiana, and Wisconsin. The average cost was well above the Great Lakes average in Minnesota.

Table B25

Claim Frequency and Average Costs of Indemnity and Medical Benefits by Type of Claim, and Average Benefit per Worker, 1978[1], Seven States

	Death		Permanent Total		Major Permanent Partial		Minor Permanent Partial		Temporary Total		Medical Only		Average Benefits per Worker[4]
	Frequency[2]	Cost[3] (dollars)	Frequency[2]	Cost[3] (dollars)	Frequency[2]	Cost[3] (dollars)	Frequency[2]	Cost[3] (dollars)	Frequency[2]	Cost[3] (dollars)	Frequency[2]	Cost[3] (dollars)	(dollars)
SEVEN STATE AVERAGE	8	125,247	10	200,023	130	44,458	389	6,065	2,025	2,203	11,972	86	166.32
IL	9	129,736	6	149,516	231	43,420	888	6,024	1,910	1,788	11,791	94	219.67
IN	6	46,836	1	76,086	61	28,456	171	5,897	1,520	1,355	12,841	78	61.63
MI	10	58,731	21	96,494	274	43,890	341	5,621	2,172	2,272	14,295	107	230.21
MN	8	214,740	17	427,821	122	58,351	384	9,255	2,400	2,831	11,604	86	274.56
NY	6	161,787	1	150,539	76	43,350	420	4,872	1,237	2,892	7,496	74	105.94
PA[5]	7	127,331	18	208,294	39	68,429	139	9,821	1,912	2,487	---	---	144.59
WI	7	60,797	5	286,068	109	37,209	381	5,981	3,027	1,079	13,805	75	124.92

Sources: Claim frequency from National Council on Compensation Insurance, Annual Statistical Bulletin; 1982 ed., Exhibit O; 1983 ed., Exhibit N as adapted by authors. Average costs source cited in Table B23.

Notes: [1]See Note 2, Table B1.
[2]The frequency is the number of cases per 100,000 man/years.
[3]The cost is the sum of the average costs of indemnity and medical benefits for the type of cases shown.
[4]The average benefit per worker is the product of the claim frequency and the average cost per claim, summed across the cases shown, divided by 100,000.
[5]Medical benefit data are not available for Pennsylania. The average cost figure for each type of case for Pennsylvania is the sum of the average indemnity benefit for Pennsylvania and the average medical benefit for the seven-states. To calculate the average benefit per worker in Pennsylvania the seven-state average medical - only claim frequency and benefit were used.

Temporary total disability cases, corrected for employment, were least frequent in New York, Indiana, Illinois, and Pennsylvania, and most frequent in Michigan, Minnesota, and Wisconsin. The average cost of a temporary total case was below the Great Lakes average in Wisconsin, Indiana, and Illinois. The average cost in Michigan was approximately equal to the Great Lakes average, while Pennsylvania, Minnesota, and New York were above average in cost.

Medical benefit only cases were least frequent in New York and most frequent in Michigan. The average cost of medical only claims was lowest in New York and Wisconsin, and highest in Michigan.

Table B25 also reports the average benefit per worker per year, including all types of cash (indemnity) and medical benefits. The average benefit is lowest in Indiana, and highest in Minnesota. Indiana, New York, Wisconsin, and Pennsylvania are below the Great Lakes average, and Illinois, Michigan, and Minnesota are above the average.

Table B26 presents the average benefit per worker data from Table B25, and compares it to an estimate of employers' average yearly insurance premiums per worker, a figure of the type developed in the comparison study (the **Michigan Employers' Costs Study**). The average yearly net cost of insurance as of July 1, 1978, for the 45 types of employers in the Great Lakes states on average, was $148.51 per employee. The net cost of insurance in Indiana was $52.78 (36 percent of the seven-state average), while the net cost in Michigan was $227.24 (153 percent of the seven-state average). Wisconsin and Pennsylvania also had a net cost of insurance which was below the seven-state average, Illinois was within about seven percent of the average, while Minnesota and New York were more than 30 percent above the average.

The benefit and cost data presented in Table B26 may be compared in a rough way, although one must do so with some trepidation. The data do illustrate some interesting aspects of the benefits and costs of workers' compensation on a relative basis, across the seven Great Lakes states. Wisconsin, as might be expected, clearly has the most favorable relationship between benefits paid to workers and insurance costs to employers of the seven states. New York, on the other hand, clearly has the least favorable relationship. Illinois and Minnesota are also relatively higher than the seven-state average, Indiana and Pennsylvania slightly above the average, and Michigan somewhat below the average. Given the nature of the data, an exact judgment is impossible about whether Michigan employers as of 1978 were receiving an appropriate value for their insurance dollars, but the rough judgment is that they were. In essence, the high costs of workers' compensation insurance in Michigan as of 1978 compared to other Great Lakes states appear largely to be explained by the high benefits received by Michigan workers compared to benefits in these other states.

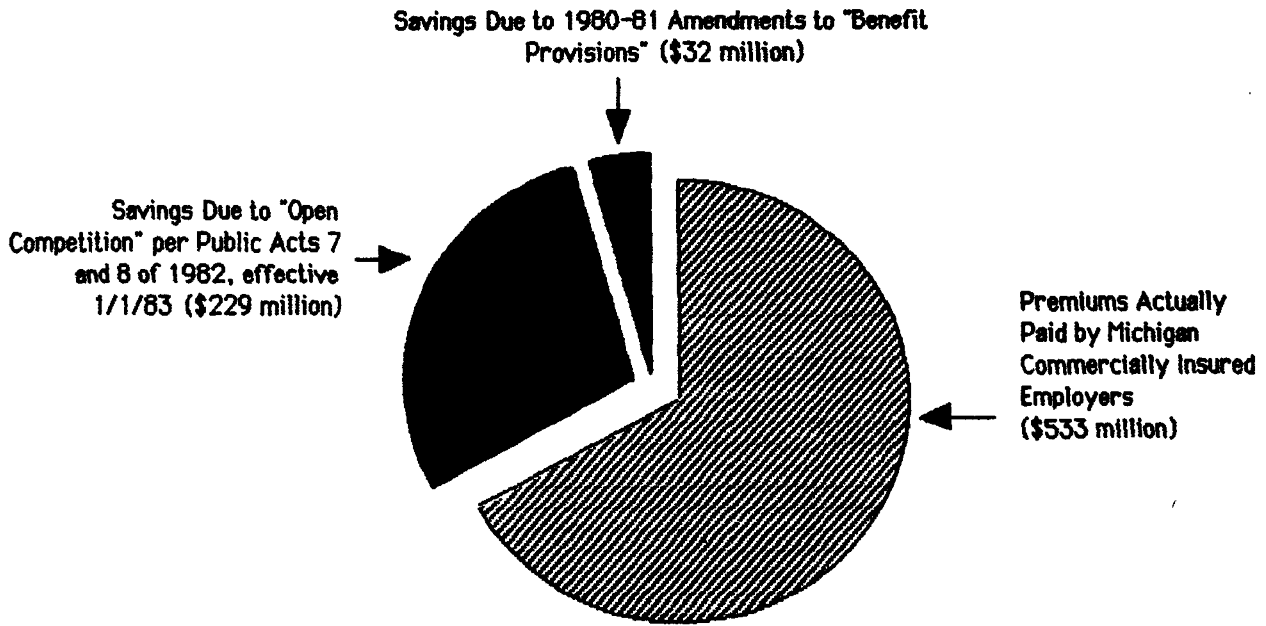
Table B26
Average Benefit per Worker, Employers' Net Cost of Insurance, and Benefit/Cost Ratio, 1978[1], Seven States

	Average Benefit per Worker[2]		Net Cost[3]		Benefit/Cost Ratio[4]
	(dollars)	Benefit Relative to 7-state Average (Percentages)	(dollars)	Cost Relative to 7-state Average (Percentages)	
Seven-State Average	166.32	100.00	148.51	100.00	1.12
IL	219.67	132.08	159.28	107.25	1.38
IN	61.63	37.06	52.78	35.34	1.17
MI	230.21	138.41	227.24	153.01	1.01
MN	274.56	165.08	194.12	130.71	1.41
NY	105.94	63.70	199.89	134.60	0.53
PA	144.59	86.93	123.86	83.40	1.17
WI	124.92	75.11	82.26	55.39	1.52

Source: Average Benefit data from Table B25; Net Cost data from Martin W. Elson and John F. Burton, Jr., "Workers' Compensation Insurance: Recent Trends in Employers Costs," Monthly Labor Review, March 1981, Table 1.

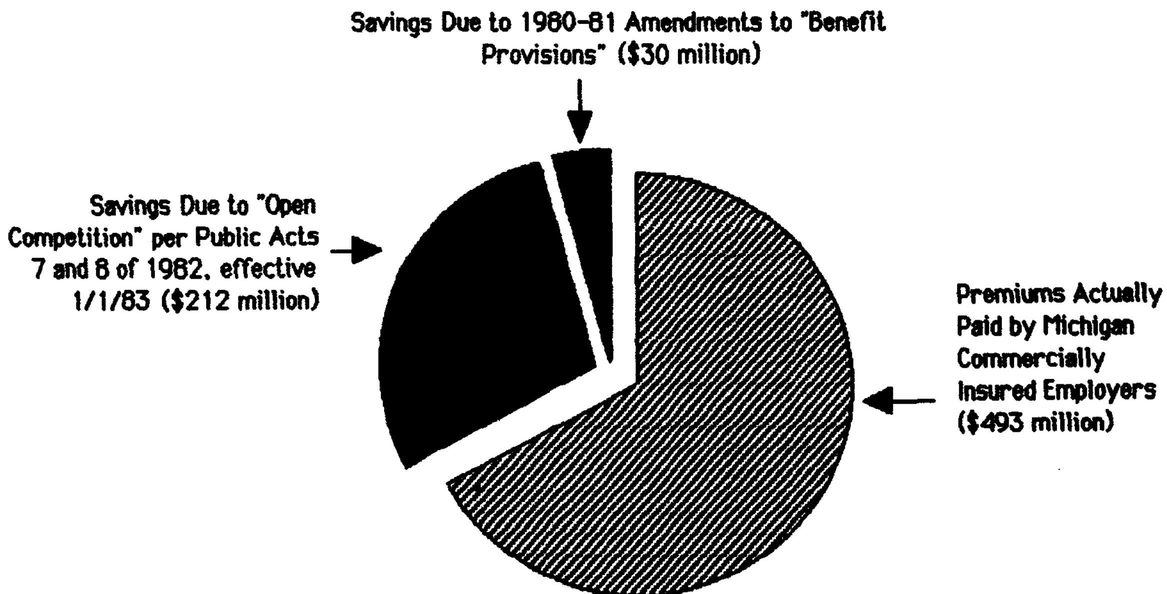
Notes: [1]See Note 2, Table B1.
[2]See Note 4, Table B25.
[3]Net cost is the average weekly insurance premium per worker, multiplied by 52.
[4]The Benefit/Cost ratio is the Average Benefit per Worker, divided by the Net Cost.

1983 Projected and Actual Premiums and Savings



Total Projected Premiums Without Recent Changes..............................	$794 million
Actual Premiums Paid..	- $533 million
TOTAL SAVINGS...	**$261 million**

1984 Projected and Actual Premiums and Savings



Total Projected Premiums Without Recent Changes..............................	$735 million
Actual Premiums Paid..	- $493 million
TOTAL SAVINGS...	**$242 million**

* * *

Turning to the period since 1978, Professor Burton reports some significant changes in Michigan:

Although it is too early to provide a definitive assessment of the impact of the 1980 and 1981 amendments to the Michigan workers' compensation law, the data are consistent with the view that the amendments are having significant effects on several aspects of the program. Permanent partial cases as a percentage of all cases have declined about 30 percent in recent years (Table B19), while attorney involvement (Table B20) and lump-summing [redemptions] (Table B21) appear to have declined even more sharply. There is no clear evidence that the amendments have affected the relative importance of permanent total disability cases (Table B19) or the proportion of cases accounted for by workers over age 50 (Table B22). The latter finding has some relevance for the retiree "problem" in Michigan; some feel that a disproportionate share of benefits accrue to workers who have already reached their normal retirement ages....

One conclusion that seems appropriate in light of the data in the two studies is this: Given that the comparison between benefits and costs in Michigan as of 1978 suggested that Michigan employers were receiving an appropriate value, and given the evidence that the net impact of open competition has been to reduce insurance costs about 30 percent below what they otherwise would have been in 1984, then as of 1984, Michigan employers are probably receiving a favorable benefits/costs ratio for workers' compensation compared to employers in most other states.

* * *

In round figures, Professor Burton estimates that the 1980 and 1981 legislative reforms reduced benefit costs in Michigan on the order of 6.2 percent in 1983 and 1984. That would have amounted to a saving for insured employers of about $32 million in 1983 and about $30 million in 1984. Since self-insurers in Michigan provide approximately 40 percent of all benefits, the savings for them would have been about $21 million in 1983 and about $20 million in 1984. If one adds in the cost savings previously discussed attributable to open competition, one could fairly conclude that **the business community in Michigan has been saved well over one-half billion dollars in workers' compensation costs in the last two years alone.**

2. Benefit levels. During my extensive round of interviews with representatives of organized labor, the business community, individual employees, and other interested parties, there was surprisingly little emphasis upon the issue of benefit levels as such. In addition to the full payment of medical expenses, of course, the current standard for compensation, as set by the 1980 amendment, is 80 percent of an employee's after-tax wages, with a maximum of 90 percent of the State's average weekly wage. The figure for each new calendar year is determined on the basis of

Table B19
Permanent Total and Permanent Partial Injuries as Percentage of Claims, Accident Years 1979-1983

Permanent Total

Valuation Date	1979	1980	1981	1982	1983	1979-81	1982-83	Ratio: 1982-83 to 1979-81
6-month	0.39	0.36	0.20	0.24	0.35	0.32	0.30	.92
18-month	0.47	0.38	0.24	0.27	---	0.36	0.27	.75
30-month	0.46	0.43	0.35	---	---	0.41	---	---

Permanent Partial

Valuation Date	1979	1980	1981	1982	1983	1979-81	1982-83	Ratio: 1982-83 to 1979-81
6-month	7.51	7.22	7.14	5.86	4.77	7.29	5.32	.73
18-month	10.91	10.46	11.11	7.38	---	10.83	7.38	.68
30-month	11.85	11.33	11.77	---	---	11.65	---	---

Source: National Council on Compensation Insurance, "Detail Claim Call - State of Michigan (Accident Year 1979-1983)."

Table B20
Attorney Involvement Percentage, All Injury Types and Permanent Partial Injuries, Accident Years 1979-1983

All Injuries

Valuation Date	1979	1980	1981	1982	1983	1979-81	1982-83	Ratio: 1982-83 to 1979-81
6-month	17.26	17.49	15.10	11.37	6.29	16.62	8.83	.53
18-month	20.52	21.49	17.93	13.33	---	19.98	13.33	.67
30-month	22.02	22.20	18.47	---	---	20.90	---	---

Permanent Partial

Valuation Date	1979	1980	1981	1982	1983	1979-81	1982-83	Ratio: 1982-83 to 1979-81
6-month	71.69	64.92	56.35	50.41	20.91	64.32	35.66	.55
18-month	70.14	66.39	59.54	51.43	---	65.36	51.43	.79
30-month	71.36	66.88	60.32	---	---	66.19	---	---

Source: See Table B19.

Table B21
Lump Summing Percentage, All Injuries and Permanent Partial Injuries, Accident Years 1979-1983

All Injuries

Valuation Date	1979	1980	1981	1982	1983	1979-81	1982-83	Ratio: 1982-83 to 1979-81
6-month	7.28	6.30	4.73	2.90	2.21	6.10	2.56	.42
18-month	15.89	14.87	10.90	4.91	---	13.89	4.91	.35
30-month	16.91	15.58	11.27	---	---	14.59	---	---

Permanent Partial

Valuation Date	1979	1980	1981	1982	1983	1979-81	1982-83	Ratio: 1982-83 to 1979-81
6-month	22.09	21.79	14.72	13.64	7.27	19.53	10.46	.54
18-month	46.46	43.47	37.71	22.86	---	42.55	22.86	.54
30-month	46.39	43.35	37.23	---	---	42.32	---	---

Source: See Table B19.

Table B22
Percentage of Claims by Age Interval 50 and over
All Injuries and Permanent Partial Injuries, Accident Years 1979-1983

All Injuries

Valuation Date	1979	1980	1981	1982	1983	1979-81	1982-83	Ratio: 1982-83 to 1979-81
6-month	19.42	21.50	19.09	19.46	17.66	20.00	18.56	.93
18-month	19.49	21.52	19.06	19.44	---	20.02	19.44	.97
30-month	19.47	21.53	19.06	---	---	20.02	---	---

Permanent Partial

Valuation Date	1979	1980	1981	1982	1983	1979-81	1982-83	Ratio: 1982-83 to 1979-81
6-month	27.51	29.63	25.38	23.14	25.45	27.51	24.30	.88
18-month	26.08	29.03	25.00	20.72	---	26.70	20.72	.78
30-month	25.71	28.79	25.16	---	---	26.55	---	---

Source: See Table B19.

the prior year's average wage. The maximum in Michigan for 1984 is $334.00 per week. That represents a substantial improvement over the pre-1980 era, when Michigan's maximum was two-thirds of the State's weekly wage, resulting in a maximum benefit that was the second lowest (after Indiana) among our neighboring states.

Nonetheless, the National Commission on State Workmen's Compensation Laws recommended in 1972 that the maximum weekly benefit for temporary total disability should be at least 100 percent of a state's average weekly wage as of July 1, 1975, and at least 200 percent of it as of July 1, 1981. At present 30 states and the Federal Longshoreman's and Harborworkers' Act meet or surpass the 100 percent standard. These jurisdictions include the Great Lakes states of Illinois, Minnesota, Ohio, Pennsylvania, and Wisconsin.

The inevitable effect of Michigan's lower cap is that a substantial percentage of high-wage earners (for example, virtually all Big Three employees) will actually have less than 80 percent of their spendable income replaced. Yet Michigan's status as a high-wage jurisdiction still means that its maximum weekly benefits compare favorably with most of the other Great Lakes states:

State	Maximum Weekly Benefits	
Illinois	$463.44	(133.33% SAWW)
Indiana	156.00	
Michigan	334.00	(90% SAWW)
Minnesota	313.00	(100% SAWW)
New York	255.00	
Ohio	335.00	(100% SAWW)
Pennsylvania	320.00	(100% SAWW)
Wisconsin	305.00	(100% SAWW)

Furthermore, Michigan's current maximum incorporates the results of a dramatic increase from $181.00 (with no dependents) in 1981 to $307.00 in 1982, a 70 percent increase in maximum benefits in a single year. Wholly apart from the question of maxima, the previous figures provided by Professor Burton indicated that Michigan is second only to Minnesota in the average benefits provided for disabled workers. Finally, the state has only recently emerged from a serious economic recession. For all these reasons, I join in the earlier recommendation of the Director of the Bureau of Workers' Disability Compensation that no change be made in the basic benefits formula at this time. **Report of the Director of the Bureau of Workers' Disability Compensation Upon the First Bi-Annual Study of the Adequacy of Weekly Benefits Paid Under the Workers' Disability Compensation Act** (Aug. 12, 1983).

The Bureau Director's report as a whole is a thoughtful, comprehensive document, and deserves the closest reading. Perhaps its most telling contribution is the demonstration of the ravages of inflation upon the compensation due the long-term disabled employee. I therefore endorse the general thrust of the concluding recommendations (**id**).:

> The results of this study demonstrate what is known to most persons involved in workers' compensation which is, long term totally disabled employees have economic problems attributable to fixing the weekly compensation rate at the year of injury. Legislation creating the supplemental fund has addressed this problem and the Bureau recommends that the Legislature continue to consider legislation that will address the economic problems of long term totally disabled employees who do not qualify for the inflationary protection available to totally and permanently disabled employees.

C. General Observations

Although it is still too early for final judgments, all the preliminary indications are that Michigan's workers' compensation system has undergone a major transformation since 1980. **Current insurance costs are probably down about 30 percent as a result of open competition. Benefit reductions are producing additional savings on the order of 6.2 percent.** The business community may be gaining by substantially more than $250 million a year. Insurance rates adjusted to reflect the actual net cost to employers have now declined to a level at or below the national average. Although they still remain about 18 percent higher than the average of the rest of the Great Lakes states (excluding Indiana), the margin has greatly narrowed in the last few years. **Claims for workers' compensation have dropped by more than 40 percent just since 1982, and contested claims have dropped by almost 50 percent since 1981.** At the same time, maximum weekly benefit levels were substantially increased, effective in 1982, and special supplementary benefits were provided to offset the adverse effect of inflation on long-term disabled employees who were injured prior to December 31, 1979. Overall, Michigan seems to have retained its position as a high-benefit compensation state.

On the basis of all this, I draw one fundamental conclusion: It is entirely too soon to seek further major amendments affecting the substantive rights of employers or employees under Michigan's Worker's Disability Compensation Act. Much has been accomplished, especially for the business community, but in certain important respects for workers as well. Just how much, however, we cannot yet say with any certainty. Prudence would counsel a pause for reflection while the outlines of what has already been wrought grow clearer.

It would certainly be a mistake to engage in any further substantial cutting of employee benefits at this time. On the other hand, I would

recommend against any haste to restore the benefits eliminated in 1980 and 1981, until we have a far better notion of their exact economic impact on both employer and employee. Specifically, the relief provided small businesses employing temporary, or part-time, or low-wage help should be allowed to stand for now. There is much to be said for abolishing the "fictional 40-hour work week" and for absolving any given employer from having to pay a "minimum weekly benefit" that might well be greater than the wages actually earned. But the general exclusion of even the more readily quantifiable forms of fringe benefits from the calculation of an employee's average weekly wage is a question that should someday be revisited. In addition, it can be said that in most states having weekly minimum payments, the amount is so small as to be meaningless (the Great Lakes states of Illinois, Minnesota, Ohio, and Pennsylvania are among the exceptions). But in a more propitious economic climate, the State of Michigan should reexamine how long-term disabled workers can be provided with a decent minimum weekly benefit.

Similarly, I am satisfied that the "coordination of benefits" provisions in the 1980 and 1981 amendments should remain in the statute, probably permanently. The principle of avoiding duplicative payments under workers' compensation and other income maintenance programs, such as private pensions and Social Security, was endorsed by the National Commission on State Workmen's Compensation Laws, although the National Commission would have preferred not to reduce the workers' compensation payments (**Report** at 57-58, 65-66). As will be discussed in more detail later, the coordination arrangements have also served to check, if not eradicate, one of the most criticized aspects of Michigan's workers' compensation system, namely, the payment of disability benefits to retired workers who almost by definition are suffering no wage loss. As I understand it, organized labor is not so much opposed to the concept of coordination of benefits as to its application even in situations where noncoordination would not have resulted in a worker's receiving more than he would have earned if working. There is some merit in this view, but it is offset by the long-standing notion that income replacement should not be total lest it prove a disincentive to work, and that in any event an unemployed person will be spared certain daily expenses incurred by an active worker. Concededly, the impact of inflation may cut against this argument, but that I believe is a problem which ought to be addressed directly.

Many of these issues lend themselves best to cool, deliberate, unhurried inquiry, away from the immediate pressures of statutory drafting. They are prime candidates for consideration by a continuing bipartisan advisory body of interested parties, of the sort I shall discuss later in this report.

IV. DISABILITY AND OCCUPATIONAL DISEASES

A. Disability and the Effects of Subsequent Employment

1. **Definitional problems.** Over the past decade one of the fiercest controversies concerning workers' compensation has centered on the definition of "disability." Before the 1981 amendments, the statute contained no definition of "disability" specifically applicable to personal injuries. For many years, however, a definition of "disability" had appeared in Chapter 4 of the Act, which deals with occupational disease. Section 418.401 of MCL defines "disability" as the "state of being disabled from earning full wages at the work in which the employee was last subject to the conditions resulting in disability."

In the absence of an express statutory definition for "disability" in the case of personal injury, the Michigan courts developed one which became almost unique in American law. The starting point was a long-existing provision which declared that an employee's wage loss should be based on "the proportionate extent of the impairment of the employee's earning capacity in the employments covered by this act **in which the employee was working at the time of the personal injury**" (emphasis supplied). MCL § 418.371(1). Although this section dealt directly only with the basis of determining wage loss, not the definition of disability, the courts concluded in effect that disability should be defined as "inability to do the work the claimant was doing at the time of injury." See 2 A. Larson, **Workmen's Compensation Law** § 57.22; Kaarto v. Calumet & Hecla, Inc., 367 Mich. 128 (1962); Tury v. General Motors Corp., 80 Mich. App. 379 (1978), **leave denied**, 402 Mich. 908 (1978). By contrast, compensable disability is more commonly defined as "inability, as the result of work-connected injury, to perform or obtain work **suitable to claimant's qualifications and training**" (emphasis supplied). 2 A. Larson, **supra** § 57.22, p. 10-103. (For an effort to incorporate this more standard definition of "disability" into Michigan law, see S.B. 1178, 78th Mich. Leg. Reg. Sess., § 401(a)(1975).)

In the words of the country's preeminent legal authority on workers' compensation, Professor Arthur Larson, the Michigan approach led to interpretations of total disability which amounted to "sheer freakishness." **Id.**, p. 10-118. Depending on the circumstances, either the employer or the employee could be the victim. Thus, in one case, a motor tester who had suffered a broken arm was considered totally disabled because he could not continue to work as a motor tester, even though he was earning just as much in the equally skilled and closely related job of motor inspector. Geis v. Packard Motor Car Co., 214 Mich. 646 (1921). On the other hand, a skilled coal miner who had suffered burns on his hands and face in a mine explosion was regarded as having no permanent disability at all, despite being left with serious sensitivity to extreme temperatures. The reason was that the miner was able to resume work in the relatively constant temperature of the

mine. When the region's mines later closed for economic reasons, the injured miner discovered that he could not work as a common laborer, since he could not stand the summer heat or winter cold. The Michigan Supreme Court concluded, reluctantly, that he was not entitled to workers' compensation because he was not impaired in "the employment in which he was working at the time of the injury." Kaarto v. Calumet & Hecla, Inc., 367 Mich. 128 (1962).

Michigan's emphasis upon the particular employment in which an employee was working at the time of injury led to an important distinction between the treatment of skilled and unskilled workers. If a skilled worker could not resume his former job, like the motor tester in **Geis, supra**, he would be totally disabled, even though he was entirely capable of performing equally skilled and equally well-paid work. At the same time, if he could return to his former duties, like the burned coal miner in **Kaarto, supra**, then he was not disabled at all, even though he was physically impaired in a way that would prevent him from performing a variety of other jobs within his pre-injury capabilities. On the other hand, an unskilled worker is at least partially disabled if a work-related injury limits in any way his or her capacity to compete in the general field of common labor. It is **not** critical whether an unskilled worker can return to his own particular job. See, **e.g.**, Adair v. Metropolitan Building Co., 38 Mich. App. 393 (1972). The practical effect, at least prior to the 1981 amendments, was that a skilled worker was usually totally disabled, if disabled at all, while an unskilled worker with a permanent impairment was ordinarily just partially disabled (unable to perform **some** job in the field of common labor), but not totally disabled (unable to perform **any** job as a common laborer). For a fuller discussion of these distinctions, see E. Welch, **Worker's Compensation in Michigan** §§ 8.02-8.06, pp. 78-84 (1984).

The possibility that an employee having a statutory disability but getting equal pay in a substitute job could obtain a "double dip" by securing workers' compensation benefits in addition to his new income (**Geis, supra**) was laid to rest in 1927 when the State Legislature added what is now the last sentence of MCL § 418.371(1): "The compensation payable, when added to the employee's wage earning capacity after the personal injury in the same or other employments, shall not exceed the employee's average weekly earnings at the time of the injury." This provision did not, however, change the basic definition of "disability"; it simply provided for an offset of compensation benefits to the extent of substitute earnings in a new job.

By Public Act 200 of 1981, the Legislature finally provided a definition of "disability" to cover personal injuries. "Disability" was defined as a "limitation of an employee's wage earning capacity in the employee's **general field of employment** resulting from a personal injury or work related disease" (emphasis supplied). The provision adds: "The establishment of disability does not create a presumption of wage loss." MCL § 418.301(4). As yet we have no definitive interpretations of this new section by the Workers' Compensation Appeal Board or the courts. One of the possible effects of the phraseology, "limitation of...wage earning capacity in the employee's general

field of employment," might be to obliterate some of the more artificial distinctions between disabilities incurred by skilled and unskilled workers, as discussed above. That would be a salutary result. But for all the talk about "tightening up" the definition of "disability," I doubt that the new 1981 definition of disability as such will have much impact on the typical compensation case. Indeed, as pointed out in a most perceptive article by former Appeal Board Chairman Michael J. Gillman, the real focus of Public Act 200 shifted from the definition of disability to the so-called "favored work" process, that is, the effect on benefit entitlement resulting from a disabled employee's subsequent employment in another job. See Gillman, "The Rise and Fall of Reasonableness: Favored Employment in Michigan Workers' Compensation," 1 Cooley L. Rev. 177, 205-06 (1982). We shall deal with the Legislature's treatment of subsequent employment shortly.

Before turning to the more significant aspects of Public Act 200, we should understand why the importance of the exact scope of "disability" in the Michigan compensation system has probably been much exaggerated. There are, to speak rather broadly, two principal theories of disability compensation in this country. One is the "physical impairment" theory and the other is the "wage loss" theory. An impairment jurisdiction will attempt to measure the extent of any disability in terms of a certain percentage of a "whole" healthy person. This may be done by resort to a predetermined "schedule," under which the loss of a hand is fixed as a 30 percent disability and the loss of vision in one eye as a 25 percent disability. Or else there may be an ad hoc determination on the basis of medical testimony, for example, that a back injury in a particular case constitutes a 20 percent or a 40 percent disability. These percentages are then translated into a certain number of weeks of compensation, on the basis that the "whole" person represents so many total weeks, that is, 600, 1,000, or whatever. Advantages of the physical impairment theory include the grant of some economic "balm" to every injured worker, regardless of whether he or she suffers any loss of earnings, and the certainty of the amount of the employee's benefits and the employer's liability, once the percentage of disability is set. Disadvantages include the enormous difficulty of fixing the percentage of disability in cases of unscheduled injuries, and the incapacity of the physical impairment theory to reflect accurately the widely varying economic impact of particular injuries on particular people. The loss of the little finger of a left hand may mean almost nothing to the livelihood of a practicing attorney, for example, but be absolutely devastating to a concert pianist.

The "wage loss" theory, which has enjoyed a resurgence of support in recent years and of which Michigan has long been regarded as a prime exponent, operates quite differently. See generally 2 A. Larson, **Workmen's Compensation Law** § 57.14(g)-(j). The central idea is that each injured worker will be treated individually, and will receive, in addition to necessary medical expenses, a percentage of his or her actual wage loss (or, more precisely, loss of earning capacity), however short or long that loss may continue. The key advantage of this approach, of course, is that it

adapts much more readily to the widely varying circumstances of given cases. The lawyer who has lost the little finger on his left hand will receive little or nothing; the concert pianist with the same injury will be entitled to benefits until reasonable alternative employment is made available. That very advantage is also the main disadvantage; the duration of entitlement may be quite uncertain at the time of an award, and the employer faces the potential of life-long liability. In practice this element of uncertainty has led many employees and employers to settle or compromise claims by so-called "redemptions," discussed elsewhere in this report. Redemptions usually consist of lump-sum settlements, but they may also be "structured" to provide for fixed payments over a fixed period of time. In any event, their effect is to make the Michigan wage-loss system function much more like an impairment-rating system by standardizing the amounts paid for typical classes of injury.

The most important point to be gleaned from all this analysis is that **in a wage-loss system, such as Michigan's, once "disability" is established, the extent of disability makes little or no difference.** As long as the disability continues, however slight it may seem in terms of physical impairment, full compensation benefits will at least theoretically be due from the employer. Inability to earn wages in fact will presumptively be the measure of the loss of wage earning capacity. Whether an employee is technically "totally disabled" or "partially disabled" is unimportant as a practical matter. In either case he or she will receive full benefits under Michigan law if substitute employment is not proffered.

There are several significant qualifications to this rule. First, as mentioned earlier, MCL § 418.371(1) (supplemented now by § 418.301(5)(b)) provides for an offset against any earnings by the employee in other work. (Section 418.301(5)(b) also seems to limit all employees, whether "totally" or "partially" diabled, to 80 percent of the difference in after-tax wages in the pre-injury and post-injury jobs; formerly, § 418.361(1) so limited only workers with a "partial" incapacity. "Totally" disabled workers could receive 100 percent of the difference.) Second, an employee cannot receive wage loss benefits while he refuses, "without good and reasonable cause," to accept a "bona fide offer of reasonable employment" from his previous employer, another employer, or the Michigan Employment Security Commission. MCL § 418.301(5)(a). Finally, as we shall explore more thoroughly later, any subsequent employment of substantial duration may result in establishing a new "wage earning capacity," with significant effects upon a worker's entitlement to continuing compensation.

The notion that a disability of any degree will create the possibility of life-long benefits will undoubtedly be viewed by the injured worker as no more than his fair entitlement. If his continuing incapacity, or even recurrence of incapacity, to match his wage level at the time of injury can be traced back to that initial injury, why should not his entitlement to compensation parallel that loss of earnings or of earning capacity? On the other hand, what the employer sees is an employee with only a moderate

physical impairment who is hardly worse off, in the sense of employability, than many other fellow unemployed workers in a recessionary or underemploying economy. In essence, the employer sees the workers' compensation system being transformed into a specialized high-benefit unemployment compensation program.

The sad fact, as I see it, is that both the employee and the employer are right, from their particular perspectives. The Michigan system should seem entirely fair to all parties in periods of relatively full employment. Either the case law or the new statutory definition of "disability" may or may not be rather generous in sweeping injured workers within the coverage of the system. But such workers lose their entitlement to benefits if they unreasonably refuse bona fide offers of alternative employment, and the compensation due them is reduced proportionately by their earnings in any employment. The rub comes when that other employment is not available, or is available only intermittently.

My conclusion is that the solution to the problem probably does not lie in further tinkering at this time with the new statutory definition of "disability." If I could write on a clean slate, I would prefer to see the Michigan definition brought even closer into the mainstream of American law by declaring that "disability" means a "limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease." That would simply substitute Professor Larson's classic formulation of "work suitable to claimant's qualifications and training" for the "employee's general field of employment" as contained in Public Act 200 of 1981. At least that might serve to reassure those who believe that the State's definition of "disability" is a major flaw in our compensation system. But it would probably be of small practical consequence. Moreover, the current statutory language was the product of a hard-fought legislative battle, with give and take on all sides. There is something to be said for letting the contending parties rest with their respective gains and losses, at least until we have a considerably clearer picture of just what those may be. While it has been suggested in certain reputable quarters that the Legislature was actually doing no more than codifying the case law on "disability," I am satisfied that the phrase "**general** field of employment" (emphasis supplied) should at least rid us of such sillier constructions of the former law as **Kaarto** (the burned miner case).

The only way to have a dramatic impact upon eligibility for wage loss benefits by a change in the definition of "disability" would appear to be through the adoption of the sort of extremely strict definition employed in Social Security disability determinations. There it is provided that

> an individual...shall be determined under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience,

> engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. 42 U.S.C. § 423(d)(2)(A).

But that definition was designed for a program whose purpose was to provide benefits for injured workers expected to die or remain disabled for at least twelve months; its harshness is totally inconsistent with the conception of disability under the workers' compensation laws of this country generally; and I cite it only to indicate the lengths to which one would have to go to impose significant further limitations on eligibility for benefits under a wage loss system simply through a redefinition of "disability."

One could also redraw the boundaries of compensation entitlement by redefining disability in such a way as to import modified notions of causation, aggravation of preexisting condition, apportionment of liability as between work-related and nonwork-related activities, and so on. But that would be to load down the concept of "disability" with a pile of baggage that is really quite foreign to its proper function. The problems of causation, aggravation, and the rest are quite genuine ones, but they deserve to be treated on their own merits, and not smuggled into a consideration of "disability." The Legislature was on sounder ground in 1981 when it expressed its apparent disapproval of such grosser excesses as **Geis** and **Kaarto**, defined "disability" in fairly general terms, and left it to the process of case-by-case interpretation to shape the contours of the term more precisely.

To summarize, **the choice may lie between a more restrictive definition of "disability" and the retention of the sensible, individualized, and ultimately fairer wage-loss theory of workers' compensation.** The inherent superiority of the wage-loss principle should not be sacrificed to some superficially appealing and expedient gains that might be derived from greater emphasis on a physical impairment concept. To my mind, attention would better be directed to the quite practical problem that so engaged the energies of the 1981 Legislature, namely, the consequences of a disabled employee's subsequent employment and loss of that employment while still disabled.

2. Effect of subsequent employment. It is now well accepted that a partially disabled employee cannot remain idle when work is available that is reasonable in light of his or her existing capacity. That is often known as the "favored work" doctrine. Former Appeal Board Chairman Michael Gillman summarized the law in Michigan as it stood before the 1981 legislative amendments in the following terms:

> [A] partially disabled employee may be offered work which fits his reduced wage-earning capacity. The burden of proving with adequate specificity the nature of the work, and the capacity of

the worker to perform it is initially upon the employer. The offer must be reasonable in all aspects, with that determination a fact-finding to be made by the administrative agencies. Upon such showing, the burden shifts to plaintiff to either accept the offered work or explain a refusal. Such refusals are then likewise tested as to reasonableness under all the circumstances, a fact-finding determination of the agencies. As a matter of law, refusal to perform because the employee's bargaining unit is on strike bars benefits. As does a discharge from such favored work resulting from the employee's act of moral turpitude or predicated upon "just cause." **Factual** elements in determination of the employer or employee's reasonableness, but specifically not dispositive as a matter of law, include: (1) employee's place of residence, (2) date of job offer, (3) medical opinions on employee's capacity, (4) offers of non-union employment, (5) location of the job offered, (6) extent of other on-going rehabilitation efforts. Arguably, "moral turpitude" and "just cause" for discharge will likewise be factual determinations protected from judicial invasion by Article VI, Section 28 of the Michigan Constitution of 1963. Gillman, "The Rise and Fall of Reasonableness: Favored Employment in Michigan Workers' Compensation," 1 Cooley L. Rev. 177, 211 (1982).

There were several other significant elements in the favored work doctrine, as Mr. Gillman indicates elsewhere in his article. For example, an unreasonable refusal of favored work did not result in a permanent **forfeiture** of all future benefits, but only in the **suspension** of the right to compensation during the period of the refusal. **Id.** at 201. Furthermore, an unreasonable refusal to take favored work paying a lower wage than the employee's average weekly wage at the time of injury did not result in the loss of all right to compensation; the worker remained entitled to benefits based upon the difference between his wages at the time of injury and the lesser rate of the job he refused. **Id.** at 196, citing Sims v. J. A. Utley Co., 1955 WCABO 642, and Howard v. Eberhard Foods, Inc., 1981 WCABO 1004. In effect, the employee was treated just as if he had taken the job at the lesser wage, which also would have proportionately reduced (but not eliminated) his entitlement to benefits.

There is a knottier problem about the effect of subsequent employment. If the employee accepts the proffered favored work, and then proves incapable of performing it, he or she is obviously entitled to continuing benefits. Similarly, it has been held that if the favored work terminates for reasons beyond the employee's control, such as a plant shutdown or nonwork-related health problems, benefits should also be resumed. **E.g.**, Powell v. Casco Nelmor Corp., 406 Mich. 332 (1979); Bower v. Whitehall Leather Co., 412 Mich. 172 (1981). Nonetheless, it can be argued that under Michigan law the key to compensation benefits is the loss of "wage earning **capacity**," not the loss of wages as such, and that an employee's successful handling of a new position for any substantial period of time has in effect established a **new** wage

earning capacity. Professor Arthur Larson deals with the problem in these terms:

> On the one hand, if the intervening job had continued only a few days, it would seem unconscionable to deny compensation. On the other hand, if a worker has become established in a new line of work, there obviously must be a limit beyond which he cannot reach back and claim disability because of the impossibility of going back to his original disabling job. These cases will probably have to be solved by asking whether the duration and presumable permanence of the new job was sufficient to justify the conclusion that claimant had become established in a new line of work for which he had demonstrated his fitness and with whose economic prospects his fortunes would thereafter have to rise and fall. 2 A. Larson, **Workmen's Compensation Law** § 57.62, pp. 10-164.132 - 164.133.

What is at stake, fundamentally, has been alluded to previously. The workers' compensation law is designed to provide benefits for workers who have lost the **capacity** for gainful employment as a result of work-related injuries. It is not a premium form of unemployment compensation. Once an employee has truly established a new wage earning capacity through post-injury employment, the only continuing loss of **capacity** is the difference (if any) between his new earnings level and his earnings level at the time of the injury. The employee can properly be considered as a newly reconstituted economic unit. Under this analysis, termination of his subsequent employment is then primarily a matter for relief under the usual unemployment compensation provisions.

In a long series of cases, the Michigan courts have wrestled with the question of when a post-injury employment does or does not establish a new wage earning capacity. The closest they seem to have come to articulating a rational standard for distinguishing the two situations is to say that if an employee accepts "favored work" in the sense of a temporary position of limited demands as a concession to his disability, he has not acquired a new wage earning capacity, while if he accepts a "recognized regular employment, with the ordinary conditions of permanency," he has established such a new capacity. See, **e.g.**, Markey v. SS. Peter & Paul's Parish, 281 Mich. 292, 299-300 (1937); Pulley v. Detroit Engineering & Machine Co., 378 Mich. 418 (1966); Powell v. Casco Nelmor Corp., **supra** (dissenting opinion).

Complications arose, however, when the term "favored work" was apparently extended to almost any kind of subsequent employment undertaken by a disabled worker. That left little if any logical basis for distinguishing between employment establishing and not establishing a new wage earning capacity by an examination of the nature of the work itself. Indeed, one knowledgeable practitioner-commentator has suggested that all the actual holdings of the Michigan cases on this point can be reconciled by ignoring the nature of the work and concentrating instead on the reason for its termination. If the

employee was responsible for interrupting it, he would be treated as having established a new wage earning capacity; otherwise, not. E. Welch, **Worker's Compensation in Michigan** § 10.14, pp. 116-18 (1984).

The Legislature came to grips with the problem of favored work or post-injury employment in Public Act 200 of 1981 in provisions now found in MCL § 418.301(5) - (9):

> Sec. 301. (1) An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. In the case of death resulting from the personal injury to the employee, compensation shall be paid to the employee's dependents as provided in this act. Time of injury or date of injury as used in this act in the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death.
>
> (2) Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof.
>
> (3) An employee going to or from his or her work, while on the premises where the employee's work is to be performed, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment. Notwithstanding this presumption, an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act. Any cause of action brought for such an injury is not subject to section 131.
>
> (4) As used in this chapter, "disability" means a limitation of an employee's wage earning capacity in the employee's general field of employment resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss.
>
> (5) If disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows:
>
> (a) If an employee receives a bona fide offer of reasonable employment from previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal.
>
> (b) If an employee is employed and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage which the injured employee is able to earn after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 355.
>
> (c) If an employee is employed and the average weekly wage of the employee is equal to or more than the average weekly wage the employee received before the date of injury, the employee is not entitled to any wage loss benefits under this act for the duration of such employment.
>
> (d) If the employee, after having been employed pursuant to this subsection for 100 weeks or more loses his or her job through no fault of the employee, the employee shall receive compensation under this act pursuant to the following:
>
> (i) If after exhaustion of unemployment benefit eligibility of an employee, an administrative law judge determines for any employee covered under subdivision (d), that the employments since the time of injury have not established a new wage earning capacity, the employee shall receive compensation based upon his or her wage at the original date of injury. There is a presumption of wage earning capacity established for employments totalling 250 weeks or more.
>
> (ii) The employee must still be disabled as determined pursuant to subsection (4). If the employee is still disabled, he or she shall be entitled to wage loss benefits based on the difference between the normal and customary wages paid to those persons performing the same or similar employment, as determined at the time of termination of the employment of the employee, and the wages paid at the time of the injury.
>
> (iii) If the employee becomes reemployed and the employee is still disabled, he or she shall then receive wage loss benefits as provided in subdivision (b).
>
> (e) If the employee, after having been employed pursuant to this subsection for less than 100 weeks loses his or her job for whatever reason, the employee shall receive compensation based upon his or her wage at the original date of injury.
>
> (6) A carrier shall notify the Michigan employment security commission of the name of any injured employee who is unemployed and to which the carrier is paying benefits under this act.
>
> (7) The Michigan employment security commission shall give priority to finding employment for those persons whose names are supplied to the commission under subsection (6).
>
> (8) The Michigan employment security commission shall notify the bureau in writing of the name of any employee who refuses any bona fide offer of reasonable employment. Upon notification to the bureau, the bureau shall notify the carrier who shall terminate the benefits of the employee pursuant to subsection (5)(a).
>
> (9) "Reasonable employment", as used in this section, means work that is within the employee's capacity to perform that poses no clear and proximate threat to that employee's health and safety, and that is within a reasonable distance from that employee's residence. The employee's capacity to perform shall not be limited to jobs in his or her general field of employment.

Provisions that are generally parallel to the above were added to Chapter 4 of the Act, covering occupational diseases, by Public Act 199 of 1981; these are now found in MCL § 418.401(3) - (7).

Former Appeal Board Chairman Michael Gillman provides a comprehensive and highly critical analysis of this new legislation in his article, "The Rise and Fall of Reasonableness: Favored Employment in Michigan Workers' Compensation," 1 Cooley L. Rev. 177-214 (1982). Mr. Gillman objects that the new amendments draw harsh and arbitrary lines between different groups of employees engaged in favored work; that they ignore subtle and salutary refinements in the rules established by the preexisting case law, sometimes to the detriment of employers and sometimes to the detriment of employees; and that the amendments are inherently contradictory and confusing. **Id.** at 204-10. Mr. Gillman recommends that Public Act 199 and 200 be repealed and the case law reinstituted, with some minor modifications. **Id.** at 210-14. There is much merit to the Gillman critique. But he may fail to take adequate account of the underlying problem recognized by Professor Larson, and dealt with in rather fumbling fashion by the Michigan courts for nearly half a century. **After an employee has undertaken a "recognized regular employment, with the ordinary conditions of permanency," and has performed it for a certain period of time, it may be only fair to treat him or her as having acquired a new "wage earning capacity," which now must govern future benefit entitlement in the event of the termination of that subsequent employment.** There is some heavy-handedness in the legislative methodology, but the idea of linking certain fixed time periods with the establishment of a new wage earning capacity (at least presumptively) may have more to commend it than the courts' apparent approach of letting everything turn on the employee's responsibility for the termination of the post-injury work.

The 1981 amendments retain the framework of the judicially developed favored work doctrine, but make numerous changes in it, some minor but a number quite substantial. For example, MCL § 418.301(5)(a) enunciates the basic concept that an employee must have a reasonable cause for rejecting a bona fide offer of reasonable employment, or else he or she will lose the right to wage loss benefits during the period of the refusal. The amendment adds the quite acceptable but practically rather insignificant element that the offer may come from another employer or through the Michigan Employment Security Commission, as well as from the employee's own previous employer. Another change is more important. At least literally, the section disqualifies an employee who unjustifiably rejects a good offer from "**any** wage loss benefits" during the period of the refusal, while the case law would still entitle him or her to benefits based upon the difference between the wages at the time of injury and the wages that could have been received in the subsequent employment. Thus, under Appeal Board precedent, a worker making $200 a week prior to injury who declines a reasonable job offer at $150 a week would still have been entitled to benefits based upon a $50 a week wage loss. The new statutory language would seem to preclude any entitlement.

By far the most troubling of the new provisions is MCL § 418.301(d) and (e). If a disabled employee obtains subsequent employment for less than 100 weeks and then loses his or her job "for whatever reason," the employee is entitled to compensation based on "his or her wage at the original date of injury" (subsection (e)). That seems to create a conclusive presumption against the establishment of a new wage earning capacity for the employee whose post-injury job lasts less than 100 weeks. It is more favorable to the employee than the pre-amendment case law, because it makes it irrelevant whether the job is terminated by the employee voluntarily, because of his fault, or for reasons beyond the employee's control. (Inexplicably, the parallel provision in MCL § 418.401(3)(e), applicable to occupational diseases, provides that for terminations in less than 100 weeks, benefits based on the original wage will only be paid if the subsequent job is lost "through no fault of the employee." This inconsistency was probably the result of legislative inadvertence. It should be remedied, because it introduces one more unnecessary basis for litigation over whether a particular disability falls within the coverage of Chapter 3 (personal injury) or Chapter 4 (occupational diseases). In neither instance is it clear whether the "100 weeks" must be consecutive or may be cumulative.)

If the employment lasts 250 weeks or longer, there is a presumption that a new wage earning capacity has been established (subsection (d)(i)). For employments lasting at least 100 weeks but less than 250 weeks, a more elaborate procedure is established. Subsections (d)(i) and (d)(ii) seem to apply to two different situations. Both require that the job be lost "through no fault of the employee" (subsection (d)). Both seem to assume the "exhaustion of unemployment benefit eligibility," which sounds like an absolute prerequisite to any compensation benefits, although it would appear fairer merely to offset the unemployment benefits. **Cf.** MCL § 418.358. Then, if an administrative law judge determines that the employee has not established a new wage earning capacity, compensation will be paid "based upon his or her wage at the original date of injury" (subsection (d)(i)). Subsection (d)(ii), on the other hand, would apparently apply to those situations where the administrative law judge does not make such a determination, that is to say, where a new wage earning capacity **has** been established. If the employee is still disabled, he is entitled to wage loss benefits, but only on the basis of the **difference** between the "normal and customary wages" paid at the time of termination and the wages paid at the time of the initial injury.

Unfortunately, the relationship between subsections (d)(i) and (d)(ii) is sufficiently confusing that as astute an interpreter as Michael Gillman believes that even an employee who has not established a new wage earning capacity is only entitled to compensation **"based upon the difference between the wage at time of injury** and 'normal and customary wages paid to those persons performing the same or similar employment' as he was performing at the time he was terminated. In effect, for benefit purposes, he is deemed to be still working!" Gillman, **supra**, 1 Cooley L. Rev. at 208-09 (emphasis in the original). While the Gillman analysis is certainly not inconceivable, he

himself stresses that it would lead to "incredible" results, and I think there are several reasons for not attributing such a scheme to the Legislature.

First, if subsections (d)(i) and (d)(ii) both apply to the same situation, namely, where an administrative law judge has determined that an employee has **not** established a new wage earning capacity, this means that the Legislature has left totally uncovered the situation where the employee **has** established such a new capacity. Second, interpreting the provisions as I have suggested above would be much more in conformity with the prior case law, and the Legislature is always presumed to have acted in light of existing precedent. Third, subsection (d)(iii), which is also applicable to the employee who has worked for 100 weeks or more, states that if such employee becomes **reemployed** while still disabled, he or she shall then receive benefits "as provided in subdivision (b)." Subsection 5(b) in turn provides for the standard payment based upon the differential between the employee's wage before injury and the wage the employee is able to earn afterwards. That would mean, under the Gillman reading, that the **reemployed** worker could be getting almost exactly the same differential compensation benefits under subsection (d)(iii) as an **unemployed** worker who had **not** established a new wage earning capacity under subsections (d)(i) and (d)(ii). If it can be avoided, such an incongruity should not be regarded as the intent of the Legislature. Finally, the authoritative and contemporaneous analysis by the Senate Analysis Section, dated January 7, 1982, quite plainly regards the employee terminated after 100 or more weeks who has **not** established a new wage earning capacity as entitled to "compensation based on his or her average weekly wage at the time of the injury" (p. 3). It is only the 100-plus week employee about whom such a determination has not been made, that is, one who **has** presumably established a new wage earning capacity, who is relegated to differential benefits (**id.**)

Superficially, subsection 5(e) might seem to give the employee terminated from a post-injury job lasting less than 100 weeks a considerable, and perhaps unjustified, advantage over similarly situated employees under the preexisting case law since subsection 5(e) applies when the job is lost "for whatever reason." But at least this could not cover a voluntary quit, because that would conflict with the obvious purpose of subsection (5)(a), which suspends benefits during any period in which an employee is refusing without good cause a bona fide offer of reasonable employment. Beyond that, the more favorable treatment accorded the 100-minus week employee under Public Act 200 of 1981 can fairly regarded as a pragmatic legislative trade-off to counterbalance the less favorable treatment accorded employees terminated after 100 or more weeks.

As indicated earlier, MCL § 418.301, as amended by Public Act 200 of 1981, has not yet received any extensive interpretation by the Workers' Compensation Appeal Board or by the courts. If interpreted reasonably, and in light of the preexisting case law on favored work and the establishment of a new wage earning capacity, the new amendments on the effect of subsequent

employment could provide the basis for a decent balance between employer and employee interests, and for greater predictability of result in any given case. For two years after undertaking a new job, a disabled employee would be better off than under the former case law. For the next three years he or she would be in about the same position. After approximately five years, the employee would be presumed, at least in the absence of unusual circumstances, to have established a new wage earning capacity, and to be subject to the same economic vicissitudes affecting all other fellow workers. **While the statute could well stand technical amendments to ensure clarification of some of the more obvious drafting lapses, the underlying rationale for the new provisions is sufficiently defensible to merit a trial by experience.** This is especially true if it would help avoid still another bitter confrontation between strong opposing forces, which will inevitably divide the Legislature and divert it from other vital tasks in the workers' compensation area and elsewhere as well.

B. Occupational Diseases

1. **In general.** Only a scant two pages were devoted to "work-connected diseases" in the **Report of the National Commission on State Workmen's Compensation Laws** in 1972. **Id.** at 50-51. The former Chairman, Professor John F. Burton, Jr., of Cornell has since commented that it is "unimaginable" that the subject would be handled in such a "facile fashion" during the 1980s. Among the reasons are the increasing awareness of the magnitude of the problem of occupational diseases, and the difficulty of dealing with them through the workers' compensation system. There is no doubt about the significance of claims based upon an allegation of occupational disease. A recent study of some 1200 litigated cases in the Michigan system disclosed that 25.6% involved a claim of occupational disease only, while an additional 32.7% involved claims of both occupational disease and personal injury. H. A. Hunt, **Workers' Compensation System in Michigan** 106-08 (1982). Thus, almost 60% of all the litigated cases asserted an element of occupational disease. In light of the inherent difficulties presented by such claims, as will be discussed in more detail shortly, we might fairly conclude that the relatively greater attention paid to occupational disease in recent years is one of the principal causes of the current high rate of contested cases.

In an early decision under the Michigan workers' compensation law, Adams v. Acme White Lead & Color Works, 182 Mich. 157 (1914), the Supreme Court interpreted the coverage formula's "personal injury" requirement restrictively, limiting it to disabilities resulting from an "accident," an unexpected, fortuitous event. Occupational diseases were expressly declared noncompensable. The Legislature eventually responded, first in 1937 by providing compensation for 31 "scheduled" diseases, and then in 1943 by eliminating the schedule and defining "personal injury" to include "a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of the employer and which arises out of and in the course of employment." The provision is now MCL § 418.401(2)(b), which goes on to state:

> An ordinary disease of life to which the public is generally exposed outside of the employment is not compensable. **Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof.** A hernia to be compensable must be clearly recent in origin and result from a strain arising out of and in the course of the employment and be promptly reported to the employer. (Emphasis supplied.)

The boldface language was added by Public Act 357 of 1980, and took effect January 1, 1982. The 1972 National Commission formally recommended "that the 'arising of and in the course of the employment' test be used to determine coverage of injuries and diseases. **Report** at 50. The same approach was adopted in the Model Act drafted by the Council of State Governments, which Professor Arthur Larson declares had the "full concurrence of some of the country's most experienced representatives of business, labor, insurance, medicine, law, and administration." In this respect the language in MCL § 418.401, "due to causes and conditions which are characteristic of and peculiar to the business of the employer," is plainly more restrictive than the recommendations of the National Commission or the Council of State Governments.

The term "disability" as used in Chapter 4, dealing with occupational diseases, is defined as "the state of being disabled from earning full wages at the work in which the employee was last subject to the conditions resulting in disability." MCL § 418.401(1). Everything here seems to turn on the employee's capacity to return to the former job, much like the case of the skilled worker suffering from a personal injury prior to the 1981 amendments.

Most of the provisions of Chapter 3 of the Michigan Act apply equally to personal injuries and occupational diseases. Whether the special limitations of Chapter 4 are also applicable, however, can be highly significant in any given case. One experienced practitioner has suggested that there are at least nine potential differences if an "occupational disease" is involved, including the effect of a misrepresentation concerning a prior condition, apportionment of liability between employers, apportionment with a nonoccupational disease, the date of injury, the responsibility of the last employer, the time for giving notice, and the effect of leaving a subsequent employment. E. Welch, **Workers' Compensation in Michigan** § 9.01, p. 90 (1984). Unfortunately, there is considerable vagueness about what exactly constitutes an occupational disease, as Welch's summary indicates (**id.**,

§ 9.03, p. 92):

1. The fact that a disability arose over a period of time does not make it an occupational disease.

2. If the disability was caused by a single-event trauma, it is almost surely **not** an occupational disease.

3. Orthopedic problems tend not to be occupational diseases, but there are exceptions.

4. Lung problems tend to be occupational diseases.

In view of this confusing and troublesome overlap between personal injuries and occupational diseases, it would be advisable to prune away the special provisions and duplicative language of Chapter 4 as far as possible, retaining only those particular limitations that can truly be justified by the peculiar nature of occupational diseases.

2. Comparative analysis. At my request, Professor Lawrence Joseph of Hofstra University School of Law prepared a comprehensive study of the special coverage problems posed by occupational diseases, with emphasis upon a comparison of the law of Michigan and that of its neighboring Great Lakes states. The following is a selected portion of his concluding analysis:

Disabling injuries or diseases suffered by employees may be placed, analytically, on a spectrum measuring the extent of employment contribution to the disability. At one end of the spectrum are disabling bodily injuries clearly caused by an employment "accident" in a restrictive "accidental" sense. An example would be an injury to an employee's hand from the machine at which he works. At the same end of the spectrum would be a disabling "disease" suffered by an employee after an acute exposure to a toxic substance, in the course of employment, which results in illness within a few minutes or a few hours. These types of injuries or diseases -- in which effect follows closely, immediately, and clearly from an employment cause -- are indisputably covered under any act's definition of "accident," "injury," or "disease." These types of injuries or diseases, moreover, do not present factual causation problems. At the other end of the spectrum are diseases "ordinary" or "common" to employees and nonemployees that are, in a more-probable-than-not sense, not employment related. These diseases may be appropriately categorized as "ordinary diseases of life." An example would be Parkinson's disease. These types of diseases are excluded from the compensation system under any act's definitions of "accident," "injury," or "disease."

Most contested cases on coverage issues involve disabilities that exist between the analytical extremes on the spectrum. These contested cases -- which, technically, have been categorized as "injuries" or "diseases" -- involve disabilities that may involve employment and nonemployment causes.

There are, basically, two types of disabilities caused by employment and nonemployment factors. The first type includes, for example, heart and cardiovascular, back, mental, hernia, and certain respiratory and cancerous disabilities. These disabilities have been usually catergorized as "injuries." The second type of disability caused by employment and nonemployment factors includes silicosis, asbestos, coal miners' pneumoconiosis, and other "toxic substance" related -- often cancerous -- disabilities. These disabilities are usually categorized as "diseases."...

(a) Multiple causation injury cases. The coverage of injuries of multiple, unknown etiology -- especially heart and cardiovascular and mental injuries -- has proven problematic since the inception of workers' compensation systems. The source of the problems is the multiple factor causation that underlies these injuries. Most courts, including the Michigan Supreme Court, utilized the "personal injury" or "personal injury by accident" concepts to limit recovery, as a threshold matter of law, in multiple causation injury cases. The courts, first, centered their analysis on whether the result of the injury was, factually, "accidental." This approach limited recovery to injury cases that factually involved an unusual, unexpected traumatic external event which occurred at a definite, ascertainable time. This approach was immediately, and correctly, perceived by dissenting judges as arbitrarily restrictive; the existence of an external, traumatic event that occurred at a definite time in a multiple causation injury does not factually ensure a causal connection to the employment. Accordingly, courts began to adopt an interpretation of "injury" or "injury by accident" that encompassed a fact situation in which the **result** of the injury was unexpected, even if it developed gradually over a period of time. This approach was adopted by the Michigan Supreme Court in its landmark multiple causation injury cases -- **Sheppard** [348 Mich. 577 (1957)], a back injury, **Coombe** [348 Mich. 635 (1957)], a cardiovascular injury case -- and affirmed in **Carter** [361 Mich. 577 (1960)], a mental disability case. The Court's elaborate technical reasoning in these opinions is bottomed on the implicit premise that the essential coverage issue in multiple injury cases is not whether the injury was "accidental" but, instead, whether the employment aggravated -- in a more-probable-than-not factual sense -- the claimant's personal predisposition to the injury. The Court held that this issue should be addressed in the technical context of the arise-out-of-employment inquiry. The Wisconsin Supreme Court adopted basically the same substantive approach as the Michigan Court. In Minnesota and Pennsylvania, the supreme courts adopted the **Sheppard** and **Coombe** analysis after their respective state legislatures deleted the "accident" requirement. The Illinois and Indiana supreme courts rejected the "accident" concept to include injuries in which the result, as well as the cause, was unexpected. The Ohio Legislature statutorily extended the definition of "accident" in the Ohio Act to include an unexpected result.

The Illinois, Indiana, and Ohio supreme courts, however, nevertheless still require that an injury occur, factually, at a specific time; a claimant in a multiple injury case must show that his injury involved a "specific

incident." This restrictive approach clearly reflects a policy choice. The existence of a specifically identifiable employment "incident" -- whether the cause or the result of an employment stimulus -- does not medically ensure a causal connection between the injury and the employment. The Illinois, Indiana, and Ohio courts, therefore, have chosen, as a matter of policy, to restrict coverage in multiple causation inquiry cases to injuries that occur at a definable, "specific" time. The effect on recovery of this approach is potentially underinclusive: a claimant who may have suffered an employment related injury in a multiple causation injury case is denied compensation, as a matter of law, if his injury did not factually arise from a definable, specific event.

If the policy threshold is satisfied in Illinois, Indiana, and Ohio, a claimant must still satisfy the factual issue whether the employment aggravated his injury in a more-probable-than-not factual sense. This factual issue is the basic coverage inquiry in Michigan, Minnesota, Wisconsin, and Pennsylvania. However, the arise-out-of-employment inquiry in multiple causation inquiry cases also is inherently bottomed on arbitrary, evaluative, and policy-based decisionmaking. In Michigan, since **Sheppard**, **Coombe**, and **Carter**, the most visible and controversial opinions on coverage issues have involved multiple causation injury cases. The evaluative nature of the arise-out-of inquiry in multiple causation injury cases is exemplified in the **Deziel** [403 Mich. 1 (1978)], **Kostamo** [405 Mich. 105 (1979)], **Derwinski** [407 Mich. 469 (1979)], **Dressler** [402 Mich. 243 (1978)] and **Miklik** [415 Mich. 364 (1982)] opinions. It is also apparent in the 1980 amendments to Sections 301 and 401, which statutorily define coverage for mental and heart and cardiovascular disabilities.

The issue in **Deziel** centered on the standard to determine whether a mental disability arose-out-of the employment. The Court in **Deziel**, in effect, stated a specific factual causation standard for mental disability cases. The Court justified its "subjective" causation standard on the grounds that mental disabilities may be caused, medically, by a claimant's subjective perception of reality. The Court did not recognize that a mental disability also may be caused by an employee's external employment, or nonemployment realities, and -- in every multiple causation injury case -- that it is impossible medically to quantify or qualify the degree of employment, nonemployment, or personal causal contribution to the disability.

The central issue in **Kostamo** involved the standard of factual proof in heart or cardiovascular related disability cases. The Court, in **Kostamo**, in effect, disregarded the factual record of the triers of fact and imposed, as it did in **Deziel**, a specific factual causation standard. The Court directed the triers of fact also to consider "lay testimony" on the causation issue. The Court did not recognize that neither lay testimony nor medical testimony can ensure a causal connection to the employment in heart and cardiovascular cases.

In **Deziel** and **Kostamo**, the Court failed to recognize that the arise-out-of inquiry in multiple causation cases inherently involves an evaluation decision because an aggravate-accelerate arise-out-of standard is impossible to prove in a more-probable-than-not factual case. Thus, in **Deziel** and in **Kostamo**, the Court created and endorsed standards that, in turn, created overinclusive classes of claimants: under the **Deziel** "subjective causal nexus" standard or the **Kostamo** "lay testimony" standard some claimants may receive compensation who may not be entitled to benefits because their employment did not aggravate their disability in a more-probable-than-not sense.

Sections 301(2) and 401(2)(b), the provisions that statutorily define coverage for mental and heart and cardiovascular disabilities, are intended to rectify the potentially overinclusive effect of **Deziel** and **Kostamo.** However, analytically, neither statutory provision eliminates the underlying evaluative process in mental, heart, and cardiovascular disability cases. In mental disability cases, neither the factual finding that the disability arose from an "actual event" of employment and not an "unfounded perception" of an actual event of employment, nor the requirement that the employment aggravated the disability "in a significant manner" factually ensures, or can factually ensure, that the mental disability is employment-related. The requirement that heart and cardiovascular disabilities be aggravated by the employment "in a significant manner" also does not ensure a causal relation to the employment. The same analysis applies to the language defining compensation for disabling herniae in Section 401(2)(b). It also applies to the statutory standard for "emotional stress" injuries in the Wisconsin Act. **Analytically, any attempt to define employment causal relation for a disabling injury that involves multiple causation necessarily includes the potential for underinclusive or overinclusive administrative and appellate decisionmaking.** (This analytical reality is, arguably, the underlying reason for Section 405 of the Michigan Act, which provides presumptive coverage, as a matter of policy, in policemen and firemen heart and respiratory cases.)

The **Derwinski, Dressler**, and **Miklik** opinions reveal a different, yet equally troublesome substantive dimension to multiple causation cases. The substantive differences between Chapter 3 and Chapter 4 of the Act encourage claimants or employees to categorize a multiple caused disability as an "injury" or a "disease." However, the technical categorization between an "injury" or a "disease" in a multiple causation case is ultimately artificial: it is, medically, equally plausible to argue that a back and heart related disability is an "injury" under Chapter 3 -- brought on by a "single event" -- or a "disease" under Section 401. A trier or appellate court, therefore, must confront the threshold technical determination whether the disability is an "injury" or a "disease." This inquiry is, in actuality, an arbitrary, evaluative decision.

The difficult, yet apparent conclusion is that workers' compensation systems cannot deal effectively with cases involving "injuries" that result

from multiple, complex, indeterminable etiology.

(b) Multiple causation disease cases. In 1941, In **Adams v. Acme White Lead & Color Works,** the Michigan Supreme Court expressly excluded "occupational diseases" from coverage under the Worker's Compensation Act. The Court's approach was not atypical: courts generally perceived the workers' compensation system as a system to provide compensation for "accidental" injuries. By the late 1930s, it had become apparent that the system, as interpreted by the courts, had become grossly unfair and discriminatory toward claimants who suffered disabling diseases which may have been caused, or at least substantially aggravated, by employment. Consequently, state legislatures enacted statutory compensation schemes for disabling occupational diseases.

The coverage standards in occupational disease schemes have reflected, since their initial enactment, a legislative awareness that most occupational diseases present complex etiological issues which, in turn, present coverage and liability problems for the compensation system. The general legislative policy underlying statutory schemes for compensating occupational diseases has been restrictive. Each state act varies in its types and degrees of restrictions. The statutory barriers to recovery are formidable.

The primary restriction is definitional; every Great Lake state, except Wisconsin, requires that a disease be "characteristic of " or "peculiar to" the employee's occupation. The required employment risk is further defined by excluding from coverage an occupational disease which might also be characterized, generally, as an "ordinary disease of life." This definition has been limited even further in certain states by statutory language that narrowly defines the required causal relationship between a disease and the employment in occupational disease cases. See, **e.g.**, Minnesota Workers' Compensation Act, Section 176.11(15); Illinois Workers' Occupational Disease Act, Section 1(d); Indiana Workmen's Occupational Disease Act, Section 10.

Another type of restriction requires that an employee be exposed to a disease hazard for a specified length of time as a condition to recovery. See, **e.g.**, Minnesota Workers' Compensation Act, Section 176.66(10); Wisconsin Workers' Compensation Act, Section 102.565; Ohio Workers' Compensation Act, Section 68; Pennsylvania Workmen's Compensation Act, Section 411(2), Section 413; Pennsylvania Occupational Disease Act, Section 1401. Restrictions are often applied to specific occupational diseases as a matter of legislative policy. See, **e.g.**, Wisconsin Worker's Compensation Act, Section 102.555 (occupational deafness, 90-day total exposure to noisy employment); Illinois Workers' Compensation Act, Section 8(16) (loss of hearing, "sufficient exposure" to defined noise levels); Illinois Workers' Occupational Disease Act, Section 1(d) (silicosis and asbestos, 60-day exposure); Indiana Workmen's Occupational Disease Act (silicosis and asbestos, 60-day exposure); Pennsylvania Workmen's Compensation Act, Section 27(1) (silicosis from silicon dioxide dust, asbestosis, tuberculosis and hepatitis, heart and lung disease suffered by fire fighters after four years of service, byssinosis,

and coal-related silicosis, at least one year exposure to the hazard of the disease claimed); Pennsylvania Workmen's Compensation Act, Section 412, Pennsylvania Occupational Disease Act, Section 1401(a) (silicosis, anthraco silicosis, coal worker's pneumoconiosis or asbestosis, two year aggregate employment in Pennsylvania and exposure to hazard of the disease claimed during ten year period preceding the disability); Pennsylvania Occupational Disease Act, Section 1401(g) (silicosis, anthraco silicosis, coal worker's pneumoconiosis, asbestosis "or any occupational disease which developed to the point of disablement only after an exposure of five or more years," six-month exposure required to impose liability on last employer). However, the extent or degree of exposure to a hazard does not medically provide a measurement of the causal relationship between the hazard and the disease. These policy restrictions are, therefore, inherently arbitrary in their effect on recovery.

A third type of restriction is contained in provisions that define the time limitations during which a disease claim must be brought. Each Great Lake state system distinguishes between time limitations for "injuries" or "accidents" and "diseases." In "injury" or "accident" cases, the time of the injury or accident, generally, prescribes the time during which a claim may be brought. (In Michigan, under Section 301(1), the date of injury in a case in which the injury is "not attributable to a single event" is the last day of work in the employment that caused the injury.) In "disease" cases, two basic approaches have developed. The first approach, adopted by the Michigan Legislature in Section 441, establishes a time period during which to bring a claim after actual or constructive knowledge of the disability. See also Minnesota Workers' Compensation Act, Section 176.151; Wisconsin Worker's Compensation Act, Section 102.17(4). The second approach bars recovery unless the disability or death occurs within a specific time period after the last exposure to a hazardous substance. See, **e.g.**, Illinois Workers' Occupational Disease Act, Section 1(f); Indiana Workmen's Occupational Disease Act, Section 9(f); Ohio Workers' Compensation Act, Section 68; Pennsylvania Workmen's Compensation Act, Section 411,; Pennsylvania Occupational Disease Act, Section 1401. The latter approach creates inherently arbitrary results because the latency period between exposure to a disease and manifestation of a disease may, and can, take years.

A fourth type of restriction imposes an absolute maximum limit in recovery for specified diseases. See **e.g.**, Wisconsin Worker's Compensation Act, Section 102.565 ($13,000 maximum for compensable "toxic or hazardous substance" claims, all other claims against the employer barred); Pennsylvania Occupational Disease Act, Section 1401(2) ($12,750 maximum liability, $75 per month thereafter, for compensable silicosis, anthraco-silicosis, coal worker's pneumoconiosis or asbestosis claims). A similar restriction -- exemplified by the special Dust Disease, PBB and Logging Industry Fund in Chapter 5 of the Michigan Act -- provides a statutory recovery limit for a specified disease, combined with additional compensation to be paid from a special fund. These schemes, inherently and clearly, reflect restrictive policy decisions.

The substantive effect of the various restrictive statutory measures that have been enacted to deal with the multiple causation dimension of occupational diseases is clear: the statutory restrictions have an underinclusive effect on recovery. Thus, claimants who may in fact suffer diseases caused by their employment most probably will be precluded from receiving compensation under "occupational disease" coverage standards as a result of statutory policy-based limitations on coverage and liability.

* * *

3. **Commentary.** The central message conveyed by Professor Joseph is that **multiple causation occupational disease cases present an inherently intractable problem. Whatever legislative (or judicial) rules are devised will still leave open the possibility in any given case that a deserving claimant will be excluded or that a nondeserving one will be included.** For a society which likes to think all things are perfectable, that may be a hard lesson to accept. Nonetheless, I believe it contains much wisdom.

In my judgment, the provisions of Public Act 357 of 1980, which amended both MCL §§ 418.301(2) and 418.401(2)(b) to provide that "mental disabilities and conditions of the aging process" are compensable only if aggravated or accelerated by the employment "in a significant manner," provide ample legislative direction to the agency and the courts for a commonsensical determination of compensability. Any effort to draw sharper demarcation lines at this time would seem premature, and could lead to arbitrary standards hurtful of one interest or another.

From time to time the workers' compensation system has been savaged for awarding benefits in what appear to be dubious circumstances. Often there is involved a difficult factual question of causality, for example, whether the mental stress of a particular job contributed to bringing on a fatal heart attack. See, **e.g.**, 1B A. Larson, **Workmen's Compensation Law** § 38.65, p. 7-202 n. 57.6 (citing numerous cases awarding compensation for heart attacks resulting from stress, overwork, etc.). This is a problem for almost every workers' compensation system in the country, and Michigan holds no copyright on headline-making sensations. Frequently the true story is garbled in the telling. Occasionally a decision-maker is simply wrong. What is important to realize is that fallible minds will inevitably err, one way or another, and that any system should be judged by its overall performance, not by the aberrational case.

There is one quirky, probably unintended, result of the 1980 amendments which should be addressed. Previously, MCL § 418.435 provided that in the case of an occupational disease, the last employer held liable could seek apportionment from previous employers where the worker had been exposed to the same deleterious conditions. Perhaps believing that this added unnecessarily to the length and cost of litigation, the Legislature repealed the apportionment provision. That leaves the last employer liable for all compensation, which for most cases may be a sensible solution.

Unfortunately, the current version of MCL § 418.435 could mean that the last employer would be responsible for a claimant's total compensation, even though the exposure there was for so short a time that it did not result in an aggravation of the employee's condition. See, **e.g.**, Hudson v. Jackson Plating Co., 105 Mich. App. 572 (1981). Surely it would be preferable to impose liability on the last employer whose establishment's environment contributed to the worker's disease.

C. "Sunset" Provisions

Public Acts 199 and 200 of 1981, amending respectively MCL §§ 418.401 and 418.301, contain the following provision in Section 3 of both acts: "This **amendatory act** shall expire December 31, 1984." (Emphasis supplied.) Act 199 amended the provisions of the statute dealing with occupational disease. Even more important, Act 200 amended the provisions dealing with compensation generally, the provisions which trigger the operation of all the rest of the statute covering "a personal injury arising out of and in the course of employment." Without MCL § 418.301 and the language just quoted, the rest of the Worker's Disability Compensation Act becomes meaningless. Since Article 4, Section 25 of the Michigan Constitution (1963) prohibits "blind" amendments, the whole of MCL § 418.301, including the critical triggering clause, was incorporated in the amendatory act. That has led to the question: If Act 200 expires on December 31, 1984, without extension or replacement, does that also terminate the triggering language of MCL § 418.301, thus terminating the Worker's Disability Compensation Act in its entirety?

The intent of the Legislature is of course the key to any statutory construction. Workers' compensation is one of the key social programs of the Twentieth Century. It exists in every state of this country, every province of Canada, and nearly all of Western Europe. That the Legislature of a progressive state like Michigan would allow such a basic piece of legislation to expire simply because of the lapse of some relatively technical amendments, without any express declaration of such a momentous purport, quite boggles the mind. In my considered judgment, so startling a result is beyond rational contemplation. Insofar as the language of Acts 199 and 200 addresses the matter, Section 3 of each statute merely states that the "**amendatory** act" -- not "the Worker's Disability Compensation Act" -- shall expire on December 31. The latter could easily have been specified had that been intended. Also, significantly, there is no phraseology in Acts 199 and 200 **repealing** the preexisting provisions of MCL §§ 418.301 and 418.401.

Nonetheless, some persons have been troubled by "black letter" rules quoted in a number of decisions to the effect that when an amendatory act repeats an old section, "the old section is deemed stricken from the law, and the provisions carried over have their force from the new act, not the former." See, **e.g.**, People v. Lowell, 250 Mich. 349, 355 (1930); Lahti v. Fosterling, 357 Mich. 578 (1954); Detroit Club v. State of Michigan, 309 Mich. 721 (1944); Kalamazoo Education Association v. Kalamazoo School, 406

Mich. 554 (1979). **Cf.** 1963-64 Att'y Gen. Rep. 417. In all these instances, however, the quoted principle was applied so as to eliminate preexisting penalties against citizens (**Lowell**), increase workers' compensation benefits (**Lahti**), extend a private organization's right to sue the State (**Detroit Club**), allow a union the use of new unfair labor practice enforcement procedures (**Kalamazoo**), or enlarge a Governor's powers of appointment (**Att'y Gen. Rep.**). In stark contrast, what is at stake here is the very existence of one of our most fundamental pieces of remedial legislation. It is unthinkable that the precedents cited earlier, whose function was to promote the underlying policies of the statutes involved, should be twisted so as to destroy a cornerstone of modern social legislation.

That position is confirmed by the current edition of the standard treatise on the subject. As stated in **Sands' Sutherland Statutory Construction** (4th ed.) § 22.33:

> Provisions of the original act which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law.... The provisions of the original act or section reenacted by the amendment are held to have been law since they were first enacted and the provisions introduced by the amendment are considered to have been enacted at the time the amendment took effect.

See also Wade v. Farrell, 270 Mich. 562, 567 (1935): "[U]nder settled rules of statutory construction appellant's assertion of a right to relief under the amendatory act cannot be sustained.

> "'When a statute continues a former statute law, that law common to both acts dates from its first adoption, and only such provisions of the old act as are left out of the new one are gone, and only new provisions are new laws. When an act is amended "so as to read as follows" the part of the original act which remains unchanged is considered as having continued in force as the law from the time of its original enactment and the new portion as having become the law only at the time of the amendment.' 25 R.C.L. p. 907."

There are few American decisions directly on point with regard to the effect on the underlying statute of the expiration of an amendment. One of the closest is Eager v. City of Hackensack, 191 A. 555, 556 (N.J. Sup. Ct. 1937), **aff'd**, 196 A. 739 (N.J. 1938). The amendatory act contained four sections, one of which was a reproduction of its predecessor plus some new language. The last section provided that the amendatory act would become inoperative after July 1, 1934. The court held that "the statute in its entirety was meant to have only temporary effect and that upon its lapse prior law revived with full force." The analogy in the case of Public Acts 200 and 199 would simply be the restoration of the **status quo ante**, the statute as it existed before the amendments were passed. Potentially

devastating consequences, including the return of the feast-or-famine rule of tort law, militate against any other result.

V. MEDICAL AND VOCATIONAL REHABILITATION

Professor Solomon Axelrod, of the University of Michigan School of Public Health, is one of the country's foremost authorities on the medical aspects of workers' compensation. He was kind enough to provide me, as a **pro bono** contribution to my project, with the following appraisal of the extraordinarily important effort to contain medical costs in the rehabilitation of injured workers. With some minor editing by myself, this is what Professor Axelrod had to say:

A. Medical Care Cost Containment

1. **Background.** Medical care is an important component of workers' compensation in Michigan, accounting for about one-fourth of all expenditures in recent years.

Eligibility for medical benefits conforms to requirements of eligibility for cash benefits ("lost time cases"). In addition, medical benefits are provided for employees with work-related illnesses and injuries who are not entitled to cash benefits because the duration of their lost time is less than seven days ("non-compensable medical cases"). Only about a quarter of all reported cases are "lost time cases," but because of their relative severity — about 20 percent receive hospital care -- "lost time cases" account for about 80 percent of all medical expenditures.

The Act requires that the employer or the employer's insurance carrier furnish an employee injured in the course of employment reasonable medical, surgical, and hospital services, drugs, "or other attendance or treatment recognized by the laws of this state as legal, when they are needed." Dental service, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus, and other applicances necessary to cure, so far as reasonably possible, and relief from the effects of the injury, are specifically cited. Appliances such as corsets, splints, braces, walkers, and wheelchairs are also included. The injured worker is entitled to vocational rehabilitation services which include retraining and job placement necessary to restore useful employment. Vocational rehabilitation is limited to 52 weeks except by special review.

Medical benefits are provided in a wide variety of settings -- a private physician's office, an industrial clinic, a hospital emergency room or inpatient facility — by providers who are designated by the employer or the employer's insurance carrier and who are reimbursed for their services by them. After ten days from the inception of medical care, the employee may change the designated source of care and select a provider of his own choosing.

There are estimated to be about 800 entities, private insurance carriers, and self-insurers, involved in making arrangements for medical care under workers' compensation in Michigan. Most of them, about 70 percent, are self-insurers; the rest are private insurance carriers. There is a high degree of concentration in this arena both with respect to the number of employees covered, the number receiving medical benefits, and the amounts paid out for claims. For example, in 1981, the ten highest ranking private insurance carriers paid out about 38 percent of total medical benefit expenditures; the ten highest ranking self-insurers, about 31 percent.

Medical benefit expenditures in 1981 were estimated to be about $139 million, a figure which may be understated by as much as $50 million. Slightly over half of these expenditures (54%) were made by private insurance carriers; slightly less than half (46%), by self-insurers. Costs per case receiving medical benefits vary widely depending on type of insurance and cash compensation status. Thus, in 1981, available data indicate that average cost per case varied as shown below:

Type of Insurance	Average Cost/Case
Self-insured	$ 54.43
Private carrier	434.36
Compensation status	
Non-compensable	29.13
Compensable	1,569.08

Administrative responsibility for the medical care aspects of workers' compensation resided in the Bureau of Workers' Disability Compensation, Michigan Department of Labor until 1981, when the 1969 Compensation Act was amended. The 1981 amendments to the Act mandated medical care cost containment responsibilities. MCL § 418.315. Statutory authority for implementing these responsibilities was transferred to the Department of Management and Budget, Office of Health and Medical Affairs, by Executive Reorganization Order No. 2-1982.

Until such time as new regulations are put in place, information bearing on the medical care component of workers' compensation is derived from two required reports, Employer's Basic Report of Injury, Form 100, and a semi-annual report on the total number of cases receiving medical benefits and the total amount spent on such cases, Form 109.

An annual report, **Compensable Occupational Injury and Illness Report**, is published by the Bureau of Safety and Regulation, Michigan Department of Labor. It is based on an analysis of the Form 100 reports. A federal-state cooperative Supplementary Data System (SDS) furnishes data on reported cases in regard to injury and illness characteristics, their nature and sources, parts of body affected, and types of accident or exposure. This report provides information for the development of educational and training

materials for employers and employees and should assist them in the planning of accident and disease prevention activities. The number of reported compensable injury and illness cases has been declining in Michigan during the past few years.

For information on medical care in workers' compensation, Form 109 is relied on. This semi-annual report, as indicated above, provides limited medical care information, **i.e.**, aggregate data on the number of cases reported to the self-insured employer and the private insurance carrier, and the amount paid out for medical benefits both for cases which received weekly compensation, and for those on which weekly compensation was not payable. Other information, crucial to an understanding of how this third-party payor system works, and needed for its evaluation in cost containment terms, is not available from the program at this time. Such basic information as number of **claims** submitted (in contrast to number of **cases**), number of services rendered, and billed charges, **by type of provider** would have to be obtained from bills submitted by health care providers to carriers for reimbursement, on a total or sample basis. Although some carriers use a standard government billing form such as required by Medicare, no uniform billing form is required, nor is there a requirement for the provider to use a standard diagnostic code.

Administration of workers' compensation medical benefits can be characterized as exhibiting a "hands-off" posture on the part of the Bureau. Surveillance of the appropriateness of the type and volume of services rendered and the charges for them is left to the approximately 800 entities involved in making arrangements for medical care. Some of them, usually the larger private insurance carriers, use "fee screens" to assess the reasonableness of billed charges. Others have no written guidelines or "fee screens" by which to assess the appropriate charge for a service and their claims review personnel use their "common sense and experience" in making such judgments. Under these circumstances, flagrant discrepancies in charges and numbers of services rendered may be detected, but for the most part the providers' self-determined fees are accepted as reasonable and the hospital's billed charges are paid.

2. The 1981 amendments. The 1981 amendments included a number of provisions bearing on the administration of medical benefits under workers' compensation. Briefly summarized, they were as follows (MCL § 418.315):

All fees or charges for medical services shall be subject to rules promulgated by the Bureau.

The rules shall establish schedules of maximum charges for each service, subject to annual revision.

The facility or provider shall be paid its usual or customary charge for each service or the maximum charge established by the Bureau, whichever is less.

The rules shall be promulgated not later than one year after the effective date of this subsection [March 31, 1982] and sent to the Legislature for review.

Section 418.315 also provided for the appointment of an Advisory Committee to assist the Bureau in establishing a schedule of maximum charges. The Bureau was further directed to review health care facilities for compliance with established charges and to create a system for utilization review.

As previously mentioned, an Executive Order in 1982 transferred responsibilities for carrying out these responsibilities from the Department of Labor, Bureau of Workers' Disability Compensation, to the Department of Management and Budget, Office of Health and Medical Affairs. A 25-member Health Care Cost Advisory Committee was appointed in early 1983. this committee has been meeting since then to assist in the development of proposed fee schedules and utilization review procedures. The development of a fee schedule which was to have been promulgated no later than April 1, 1982, after being approved by the Joint Legislative Administrative Committee, has been delayed by lack of consensus in the Advisory Committee. The scope and specifics of the proposed utilization review procedures have also been subjected to far-reaching differences of opinion and their promulgation has likewise been delayed.

In brief, rules have been proposed for the establishment of maximum charges for medical benefits, a utilization review process, and a reporting system to permit surveillance of costs and volume of medical benefits provided.

3. **Issues in cost containment.** Although both the overall cost of workers' compensation insurance in Michigan and the number of reported compensable cases have been declining since 1981, there is no reason to assume that medical benefit costs have undergone commensurate reductions. In a period when medical care costs have been increasing at more than twice the rate of inflation, and in the face of what is essentially an open-ended, inadequately controlled third-party payment system, it can reasonably be argued that in fact this is not the case.

In the absence of mechanisms to limit costs or reduce the use of medical services such as fee schedules and utilization review procedures, medical care costs under workers' compensation are subject to the same inflationary forces that affect all medical care costs. **It is therefore important that the cost containment measures mandated in the 1981 amendments be implemented promptly.**

Medical care cost containment must, of course, be balanced against an equally important objective — to ensure that injured workers receive the best medical care possible to maximize recovery from injury. To achieve this goal, consideration should be given to the creation of a professionally

staffed medical unit, such as the Medical Services Division of the Ontario Workers' Compensation Board, to provide professional surveillance over the quality of the care and the medical aspects of vocational rehabilitation.

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B. Vocational Rehabilitation

Perhaps the greatest tragedy of the workers' compensation system is that it does not put every injured worker back to work. No amount of money can compensate for that. Every self-respecting human being wishes to be self-supporting. That obviously means that any humane system for dealing with employee disabilities must establish as a first priority the restoration of the worker to a full-fledged position in the work force. The medical and vocational rehabilitation of injured workers is espoused by everyone as a primary goal of the workers' compensation system, but in practice it is sadly neglected. Professor Axelrod arranged for Eugenia S. Carpenter, a Research Scientist at the University of Michigan School of Public Health, to assess the existing system of vocational rehabilitation in this State and to make such recommendations for improvement as she thought appropriate. A summary of Ms. Carpenter's study follows:

1. **Summary.** Restoring the employability of the worker has always been a goal of the workers' compensation program. Nevertheless, medical and physical rehabilitation has tended to take precedence over vocational rehabilitation during most of the history of the program. Even today, there is a perception that vocational rehabilitation is an underutilized component of the workers' compensation program.

Section 319 of the Michigan Worker's Disability Compensation Act provides that an injured worker "who is unable to perform work for which he has previous training or experience...shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him to useful employment." The statute entitles a worker to up to 52 weeks of vocational rehabilitation services, and an additional 52 weeks or portion thereof may be authorized by special order of the Director of the Bureau of Workers' Disability Compensation, Department of Labor, if deemed necessary to restore employability.

The statute is predicated on the assumption that vocational services will be voluntarily offered by the employer or carrier and accepted by the injured employee. If this does not occur, the Director may, at the request of the employee, or the employer, or the carrier, or on his own motion, refer the employee to appropriate vocational rehabilitation for evaluation of rehabilitation potential. It is important to note that a worker is not entitled to vocational rehabilitation services while his claim is being contested. In the case of a redemption, the worker waives all rights to rehabilitation services under the workers' compensation program.

Over the past five years, an average of about 3,000 vocational rehabilitation cases have been opened annually. They represented between two and four percent of cases opened for payment in each year. On the average, some 2,700 vocational rehabilitation cases were closed annually between 1980 and 1984. The average success rate during this period, that is, the percentage of workers who returned to work for the same or a new employer or redeemed under an approved self-employment plan, was about 27 percent. By far the majority of successful rehabilitations involved returning to work for the same employer. Vocational rehabilitation experts estimate that the proportion of injured workers who are feasible candidates for vocational rehabilitation services ranges between 0.5 and 5 percent. The Michigan Bureau's Vocational Rehabilitation Division (VRD) staff (three persons) estimates the potential to be between 3 and 5 percent of compensable injury cases. On the average, about 90 percent of injured workers return to work within 120 days and about 94 percent of compensable cases are off compensation within 180 days.

The literature on workers' compensation, the experience of Michigan and other states, and the opinions of experts in the field have identified a number of barriers and disincentives to the realization of the full potential of vocational rehabilitation as a tool to restore injured workers to gainful employment. Some of the problems may be overcome by administrative and statutory changes. Others are not easily solved and may be an inevitable part of the complexity inherent in any system to compensate workers who are injured or disabled in the course of employment. Problems include: lack of understanding of or support for VR services on the part of employers, carriers, and injured workers; skewed economic incentives; the litigious nature of the workers' compensation system; the redemption process; abuses in the provision of VR services; and lack of adequate program evaluation.

* * *

2. **Recommendations.** Ms. Carpenter made a series of specific proposals for improving the vocational rehabilitation program. After careful review, I adopt these recommendations as my own, with one significant modification. Ms. Carpenter would prohibit outright the waiver of rehabilitation rights in cases of benefit redemptions or settlements. In keeping with the language of the National Commission on State Workmen's Compensation Laws (**Report**, Recommendation 6.17, p. 110), I simply say that the Bureau should be "particularly reluctant" to approve such waivers. With that qualification, the recommendations and the justifications for them are as follows:

(a) A system of utilization review for rehabilitation services, analogous to that mandated for medical care under Section 315 of the Act, should be developed and implemented.

Justification: Allegations about abuses by providers of VR services cannot be dealt with adequately until standards for the level and quality of services are developed and applied. The difficulty of accomplishing that

goal is acknowledged. Unlike medical care, standards for appropriateness of vocational rehabilitation services are virtually nonexistent. Nevertheless, until agreement can be reached on criteria for judging whether services are in excess of what are needed, or conversely, inadequate to a client's needs, no effective monitoring of rehabilitation services will be possible. Although difficult to accomplish, the task of defining professionally acceptable standards is one that experts in the field of rehabilitation could assist the state agency in developing. Authorizing legislation would be required to implement this recommendation.

The sentinel effect of a monitoring system cannot be overemphasized. The results of the Vocational Rehabilitation Division's monitoring system in encouraging a sharp rise in voluntary employer referrals to rehabilitation is an outstanding example.

(b) A companion system to establish standard reimbursement levels for rehabilitation services covering both public and private providers should be authorized through amendments to the Act.

Justification: There are no controls at present on the amounts that may be charged for VR services. While some employers and insurance carriers have a perception that these services are too costly, there are no standards for judging whether and by how much costs are excessive. In support of cost containment and restraint, studies in California indicate that the least expensive rehabilitation plans offer the greatest opportunity to return a worker to employment.

The difficulties of establishing reimbursement standards are at least as great as those surrounding utilization review. The experience of the Office of Health and Medical Affairs in developing a system of fee schedules for medical care under Section 315 may provide some guidance in approaches to the problem, including identifying those to be avoided. Because the notion of setting levels for payment for rehabilitation is **terra nova**, there may be greater opportunities for innovative approaches, including perhaps a DRG-type approach to classifying clients for purposes of levels of payment to rehabilitation providers. A fee-for-service system lends itself to abuses and tends to have an escalating effect on outlays for services, judging by the experience of the medical care sector.

(c) Statutory changes should be sought to clarify the authority of the BWCD to approve rehabilitation facilities; approval should be tied to minimally acceptable levels of performance as determined under the utilization review criteria recommended above.

Justification: The decentralization and pluralistic system for providing rehabilitation services needs tighter controls and monitoring, according to a majority of both insurance carriers and rehabilitation facilities responding to a voluntary survey conducted in Michigan in 1984. Monitoring and quality control will be most effective if they focus on the process and outcome of

services provided, rather than on inputs, as is more usual with traditional licensing programs.

(d) Efforts to reduce the time lag in referring potential candidates to vocational rehabilitation need to be increased. These could include requiring employers to notify injured workers of their rights to VR services; encouraging physicians and hospitals to initiate vocational evaluation early in the treatment program through cooperative educational efforts of the medical and rehabilitation communities; including a requirement for vocational rehabilitation evaluation in all work injury cases as a part of the concurrent review standards being developed by Blue Cross/Blue Shield of Michigan.

Justification: Though program experience overwhelmingly demonstrates the critical effect of timing in initiating successful rehabilitation, there continues to be evidence that opportunities to return injured workers to gainful employment are lost because delays in referral exacerbate psychological and other impediments to the process. [**Note by St. Antoine:** Minnesota has been accused by some of "storm trooper" tactics in its promotion of "mandatory" rehabilitation. But Steve Keefe, Minnesota's tireless, crusading director of workers' compensation, has a powerful reply: "You've got to catch disabled workers early. After they start spending time (up to five years in some systems) trying to persuade everyone how disabled they are, they **will** be disabled."]

(e) Rehabilitation services should be made available to workers whose cases are in litigation, and the Bureau should be particularly reluctant to permit the waiver of rights to rehabilitation in cases of benefit redemptions.

Justification: Evidence from studies in Michigan and other states show high levels of unemployment, low incomes, and dependency among former workers' compensation claimants. In most of these cases, little effort had been made to provide vocational rehabilitation, often because the cases were litigated or settled by a lump-sum payment. Society as well as these individuals bear the cost of this waste of human potential.

(f) Some portion of the newly established Redemption Fund should be earmarked to support data collection, analysis, and program evaluation in vocational rehabilitation of workers' compensation claimants.

Justification: Formulating and implementing good public policy depends upon adequate information. Resources to collect and analyze program data are necessary to ensure efficient and equitable operation of the system. A longitudinal follow-up of a sample of claimants, including successful and unsuccessful rehabilitations, redemptions, and litigated cases, could provide the basis for a rigorous assessment of the cost effectiveness of different approaches to the rehabilitation of injured and disabled workers. Without data from longitudinal follow-up of a representative sample of all types of

cases, cost-effectiveness analysis of VR services cannot be performed. Similarly, assessing administrative efficiency and identifying obstacles to effective program implementation require adequate informational resources.

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VI. SPECIAL PROBLEMS

A. Exclusivity and Third-Party Actions

In recent years a number of Michigan companies have become alarmed that a linchpin of the workers' compensation system, namely, the immunity of employers against employee suits or third-party actions based upon tort theories, was breaking down. Professor Arthur Larson, the country's acknowledged authority on workers' compensation law, agreed to provide a comparative analysis of Michigan law and the law of the neighboring Great Lakes states on this subject. From Professor Larson's full report, I reproduce those portions in which he describes the problem and sets forth his conclusions:

The exclusiveness of the compensation remedy is a universal and accepted feature of American compensation law. It lies at the heart of the well-known quid pro quo, under which the employer enjoys tort immunity in exchange for accepting absolute liability for all work-connected injuries. The last state to give the employee an option to sue his employer in tort, New Hampshire, abolished that option in 1947. Since then, no frontal assault of any seriousness has been made on the exclusiveness principle in this country.

In recent years, however, selective attacks on exclusiveness have been pressed on a number of fronts. The trend for a time seemed to be toward a breakdown of exclusiveness. Most recently, however, the trend has been not only halted but reversed. One must hasten to add, however, that there has been no let-up in the vigor and variety of attempts to penetrate exclusivity.

If the various features of Michigan compensation law bearing most relevantly on exclusiveness of remedy and third party issues are appraised from the point of view of hospitality toward employers and carriers, the conclusion is that on all counts, with one questionable exception, Michigan law is at least as favorable as that of its neighbors, and that on some counts it is more favorable.

The basic statutory provision is as inclusive as any as to kinds of suits and plaintiffs barred. MCL § 418.131.

As to nonphysical injury, Michigan, unlike Indiana, Ohio, and Pennsylvania, has not yet opened the door to suits based on deceit as a "second injury" independent of the first compensable injury, although it has not rejected that possibility either. It has generated a number of cases on discrimination, humiliation, and emotional distress, but always carefully limiting suit to kinds of injury not covered by the Act. It has produced one case [**Broaddus**, 84 Mich. App. 593 (1978)], which, as it stands, goes further than any case on record in recognizing a tort remedy for harassment in the form of delayed or terminated benefits, so long as the damages are

nonphysical; but the value of the case as precedent is drawn into question by its apparent ignorance of a penalty provisions enacted shortly before the decision. MCL § 418.801(2).

As to retaliation [against employees filing workers' compensation claims], Michigan, in common with Indiana, Minnesota, Ohio, and Wisconsin, recognizes a private cause of action.

The dual-capacity doctrine [e.g., treating a company as products manufacturer rather than employer] has been clearly rejected in Michigan, as it has in all the Great Lakes states dealing with the issue, except Ohio.

On the insurer as a suable third party, Michigan's statute is one of the most comprehensive in its protection of carriers and other agencies making safety inspections.

Coemployees are immune from suit in Michigan. Only Minnesota among the neighboring group permits such suits. Michigan has also produced the most extreme decision to be found anywhere immunizing corporate officers and stockholders.

Michigan, like all other states but Ohio, has held the line on refusing to accept gross negligence or even deliberate violation of safety statutes as "intentional injury," or to accept mere conclusory use of the word "intentional" in pleadings. Ohio accepts both.

Finally, on the third party's action over against the employer, Michigan rejects both contribution and indemnity actions, as do Ohio and Wisconsin. But in Minnesota and Illinois an employer who has paid compensation is still vulnerable to a contribution suit by the third party in proportion to his fault, limited to the amount of compensation in Minnesota, but unlimited in Illinois.

The areas, then, in which Michigan is most conspicuously more protective of employers are: in relation to dual capacity and the stretching of "intentional," Michigan is markedly more favorable to employers than Ohio; and in relation to third party actions over, Michigan is much more favorable to employers than Minnesota or Illinois.

* * *

B. Compromises or "Redemptions"

Under the Michigan "wage loss" theory, one might expect that the standard award would require the payment of weekly benefits during the period of an employee's disability and continuing lack of work. In fact, as shown in Table VI-1, **more than half the total dispositions in contested workers' compensation cases have consisted for many years of compromises or so-called "redemptions," usually in the form of lump-sum settlements.** Typically, a redemption terminates all further employer liability for income maintenance, medical benefits, and vocational rehabilitation. The practical effect is to transform the Michigan wage loss system, in many cases, into a modified impairment rating system.

TABLE VI-1

REDEMPTIONS AS PERCENTAGE OF DISPOSITIONS

	1968	1972	1975	1978	1981	1984*
Total Dispositions ("Decisions" & Redemptions)	16,305	25,848	24,807	32,018	41,801	30,797
Redemptions Granted	9,119	15,186	14,708	19,964	26,657	16,752
Redemptions as % of Dispositions	55.9%	58.8%	59.3%	62.4%	63.8%	54.4%

*Projection based on actual data for first 9 months of 1984.

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There is much to be said against redemptions as a matter of principle. The seriously injured worker may be bedazzled by a settlement offer for the seemingly munificent sum of $50,000 or more, which might enable the realization of a life-long dream to open a small business. The risk, of course, is that a year later the business will be bankrupt, the funds exhausted, and the worker and his family on welfare. On the other hand, the possibility of securing a small redemption in the $1,000-$2,000 range, which an employer may be willing to pay simply to avoid the cost of litigation, may be a lure to the filing of dubious or unmeritorious claims. Some persons are also troubled by the arrangement whereby attorneys' fees are paid from the accrued amount of an award or a lump-sum settlement, which could lead to a potential conflict of interest in a lawyer's counseling a claimant-client on

the advisability of accepting a redemption. For such reasons, a number of jurisdictions prohibit redemptions, and an amendment adopted in 1981 would have forbidden them in Michigan, effective January 1, 1984. Before the ban went into effect, however, it was repealed, and Public Act 151 of 1983 established a new and stricter system for Bureau approval of proposed redemptions. MCL §§ 418.835-836.

Despite their various deficiencies, redemptions are likely to be favored in many cases by every party directly involved. For the employer it means converting an uncertain liability of indefinite duration into a fixed and final obligation. For the employee and his or her attorney, it can mean a substantial amount of cash on the spot. To many the certainty of that immediate recovery may well outweigh the prospects of much more (but possibly nothing) after a long wait. Moreover, one cannot dismiss the notion that a sizable check in hand provides a sort of psychological "balm" to the injured worker aggrieved by the damage done him by "the system." And of course there is a disquieting element of paternalism in telling disabled employees that they cannot settle their claims even if they wish to. Finally, and not insignificantly, the administrative burdens of the beleaguered Bureau are considerably eased through the pressure valve of redemptions.

The National Commission on State Workmen's Compensation Law was obviously troubled by the competing arguments concerning compromises or redemptions, and came up with the following recommendations (**Report** at 110):

> R6.17. We recommend that the workmen's compensation agency permit compromise and release agreements only rarely and only after a conference or hearing before the workmen's compensation agency and approval by the agency.
>
> R6.17. We recommend that the agency be particularly reluctant to permit compromise and release agreements which terminate medical and rehabilitation benefits.

Given the enormous backlog of cases which now confronts the Michigan workers' compensation system (to be discussed more fully in the next section), I conclude, somewhat reluctantly, that **it is unfeasible at this time to consider further stringent restrictions on, or the outright prohibition of, the practice of redemptions.** I am also encouraged by my experience sitting in on redemption hearings for one day in Detroit. Even allowing for some differences in approach that might have been caused by the presence of an outsider, I was impressed by the conscientiousness of the ALJs (administrative law judges) in examining proposed agreements and in explaining their consequences to the claimants. I was further impressed by the efforts that were made to promote so-called "structured" settlements, in which the claimant would receive a lump sum up front but then be guaranteed a series of periodic payments over time. The past year has also seen a modest but promising decline of 15 percent in the rate of redemptions. This whole area has enough potential for abuse, however, that it calls for continuing

surveillance.

C. Retirees

For many years the most hotly discussed topic concerning the Michigan workers' compensation system was the so-called "retiree problem." It was almost unique to this State. Its legal underpinning was the notion developed by the Workers' Compensation Appeal Board, with some support from the judiciary (cf. Evans v. United States Rubber Co., 379 Mich. 457 (1967)), that a retired worker, even one who had voluntarily retired and gone on a company-funded pension, could still be suffering from a loss of wage earning capacity. If the retiree could demonstrate that he or she had incurred a disability caused by pre-retirement job activity or working environment (a bad back from 30 years on the assembly line or a dust disease from 30 years in a foundry), the retiree was entitled to workers' compensation. It should be emphasized that in many of these cases the disability was undoubtedly genuine, at least in the physical impairment sense, and such an employee would unquestionably be eligible for medical benefits. The fighting issue was whether he was also entitled to recover for wage loss. Theoretically, of course, wage loss was not impossible, since a number of retirees, especially in inflationary times, might well have planned on some extra earnings from parttime employment. Nonetheless, for a "Big Three" automobile manufacturer (the most common target of this practice), it was plainly provoking, not to mention costly, to see workers take early retirement and walk out of a plant one day and then proceed to file their workers' compensation claims the next.

In 1973 the Big Three (General Motors, Ford, and Chrysler) paid out $51 million in wage loss benefits, of which $24 million, or 47 percent, went to retirees. For Michigan employers as a whole, out of a total of $191 million in wage loss benefits, $45 million, or 24 percent, went to retirees. With such a large part of the compensation dollar going to persons who were no longer part of the active work force, it was inevitable that reforms would be demanded. Public Act 357 of 1980 added MCL § 418.373, which provides that an employee receiving an employer-funded nondisability pension is presumed not to have a loss of earning capacity. This presumption may be rebutted only by evidence "that the employee is unable, because of a work related disability, to perform work suitable to the employee's qualifications, including training or experience." This is a very stiff requirement, both because the rebuttal is phrased in terms of **disability** rather than continuing participation in the labor market, and because the definition of disability for this purpose is about as drastic as the Social Security definition of disability. As one experienced practitioner puts it: "Presumably, this means the retiree must prove disability from **all** work for which he or she is qualified." (Emphasis in the original.) E. Welch, **Worker's Compensation in Michigan** § 8.10, p. 87. It should be noted, however, that MCL § 418.373(2) makes the new definition of disability applicable only to wage loss benefits, and thus does not limit a retired employee's right to medical benefits. In addition to the presumption against loss of earning capacity, Public Act 203 of 1981 imposed

still another restriction upon a retiree's former capacity to recover workers' compensation benefits as well as pension benefits. Under MCL § 418.354, a new scheme for coordination of benefits is created. Essentially, in the case of periodic compensation for total disability or partial disability, or for compensation under a redemption arrangement, there will be a deduction from the amounts due under workers' compensation to take account of employer contributions to benefits being received under old age Social Security, a self-insurance plan, a wage continuation plan, a disability insurance policy, or a pension or retirement plan. The effect, of course, was a sharp reduction in the attractiveness of workers' compensation benefits to retired workers.

The diminished appeal of workers' compensation to retirees is dramatically reflected in the following tables showing the decline in filings by employees and former employees of the Big Three in the last few years:

TABLE VI-2

CHRYSLER: CONTESTED CASE CLAIMS FILED BY RETIREES

HOURLY EMPLOYEES

	Number of Contested Case Claims Received by Chrysler	Number of Claims Filed By Retirees	% of Claims Filed by Retirees
1978	3,715	1,762	47.4%
1979	3,047	1,242	40.8%
1980	3,970	1,174	29.6%
1981	5,587	1,668	29.9%
1982	3,052	1,238	40.6%
1983	2,582	816	31.6%
1984	1,217*	NA	NA

* Projection based on actual data for first 10 months of 1984.

TABLE VI-3

FORD: CONTESTED CASE CLAIMS FILED BY RETIREES

	Number of Contested Cased Closed by Ford	Number of Cases Filed by Retirees	% of Cases Filed by Retirees
1978	4,749	1,720	36.2%
1979	5,207	1,660	31.9%
1980	4,775	1,574	33.0%
1981	4,786	1,691	35.3%
1982	3,955	1,336	33.8%
1983	3,854	1,291	33.5%

TABLE VI-4

GENERAL MOTORS: CONTESTED CASE CLAIMS FILED BY RETIREES

	Number of Contested Cased Closed by GM	Number of Cases Filed by Retirees	% of Cases Filed by Retirees
1978	3,777	1,961	51.9%
1979	4,199	1,964	47.7%
1980	4,652	1,853	39.8%
1981	4,717	2,024	42.9%
1982	4,302	1,715	39.9%
1983	3,465	1,136	32.8%
1984*	3,337	839	25.1%

*Projected from actual data for first 10 months of 1984.

If the retiree problem cannot be said to be "solved," the above data on case filings and closings indicate that the combined effect of the presumption against lost earnings and the coordination of benefits requirement, both of which provisions went into effect only in 1982, have had a striking impact in reducing the incidence of the phenomenon. Retiree claims will never fall to zero. There will always be cases when a retiree is entitled to medical benefits or when he or she is prevented from any feasible kind of post-retirement parttime employment by a total disability under the new, strict definition. But in my judgment, no further legislation regarding retirees is called for at this time.

D. Insurance and the Accident Fund

I am not an actuary or an expert on the arcane world of insurance. Partly for these reasons, partly because insurance issues were being pursued so vigorously elsewhere in the Administration during the period of this project, and partly because there were so many other matters to investigate,

I did not regard the structures and procedures for insuring workers' compensation in Michigan as a major topic for inquiry. Nonetheless, a few matters were brought to my attention that deserve at least to be flagged.

A Michigan employer has three options for fulfilling its obligation to provide workers' compensation protection. It may obtain coverage through a private insurance carrier, or through the State Accident Fund, or through a Bureau-approved method of self-insurance, either individual or group. Each method presents its own separate set of issues.

1. **Private insurance.** From time to time various persons have looked longingly toward the seemingly high benefits and low costs of our neighbor to the south, Ohio, and have proposed establishing a state monopoly like Ohio's over the insurance of workers' compensation, thus eliminating coverage by private carriers. Perhaps the most intensive study into the possible transmutation of a competitive state fund into an exclusive state fund has been performed by Professor John F. Burton, Jr. of Cornell. He focused on a particular jurisdiction, Pennsylvania, where such a proposal was extant, and on Ohio, which was an obvious reference point for Pennsylvania because the states are contiguous and have similar benefit levels, with Ohio having the largest exclusive state fund. J. Burton with A. Krueger, **Interstate Variations in the Employers' Costs of Workers' Compensation, with Particular Reference to Ohio and Pennsylvania** (1984). Burton concluded (**id.** at 100-01):

> The difference in costs between the two jurisdictions is relatively small, particularly in comparison to the general magnitude of interstate differences in the employers' costs of workers' compensation. This finding should give pause to anyone who would argue that a change in the insurance arrangements in either of these states will lead to a significant reduction in the costs of workers' compensation. The similarity in costs in Ohio and Pennsylvania, and the considerable differences among other jurisdictions appear to be much more influenced by factors such as relative levels of benefits than by the particular form of insurance arrangement used to provide these benefits.

History is entitled to some deference in assessing schemes to restructure a multimillion dollar industry. For many years private carriers have accounted for more than half of all the workers' compensation benefits provided in this State. Proponents of fundamental change should bear the burden of persuasion. As the Burton-Hunt studies discussed in Part III of this report indicate, the insurance industry in Michigan has demonstrated a remarkable capacity in the last three years to adjust to new mandates and ultimately to open competition. **Much more evidence is needed than currently exists to justify basic structural changes in insurance arrangements.**

Representatives of small business have expressed concern that single-person employers often encounter great difficulty in obtaining workers' compensation coverage, which may be necessary in order for them to

bid on government contracts. Others find themselves caught between the standard insurance classifications, and thus unable to qualify. These and similar technical problems should be resolved.

2. Accident Fund. The proper role and function of the State Accident Fund have long been a matter of debate. Some would like to see it serve as a comparative cost yardstick in the manner of the original Tennessee Valley Authority; others believe that its unique responsibility is to be the insurer of last resort; and still others feel that the Accident Fund has become indistinguishable from private carriers (or is it group self-insureds?), and thus has lost its very reason for being. In any event, the Accident Fund looms less large in Michigan than competitive state funds elsewhere. Its share of the premium market has shrunk in recent years from 6-7 percent to only about 3-4 percent. Almost everyone close to the Fund, even if disagreeing about its exact role, seems in accord that a more aggressive sales policy is in order.

3. Self-Insurers. Traditionally about 40 percent of all Michigan workers' compensation benefits are handled through self-insurance. This is a far higher proportion than in most other jurisdictions, probably resulting from the prominence of the Big Three in this State. With the approval of the Bureau Director, an employer may be either a self-insurer or a member of a group of self-insurers. There are currently about 600 individual self-insured employers in this State, and about three dozen self-insured groups. (Altogether, there are about 225,000 employers subject to the Worker's Disability Compensation Act, and about 250 insurance companies authorized to write workers' compensation in the State.)

A Self-Insurers' Security Fund has been established to pay benefits to disabled workers when a self-insured employer becomes insolvent. MCL §§ 418.501, 502, and 537. Grave doubts have been raised about the capacity of the Fund to meet its statutory obligations in the event of the insolvency of a major company or public utility. At one time those might have been dismissed as merely speculative fears, but unfortunately recent years lend them much more credence. **The Bureau should be directed to study the adequacy of the Self-Insurers' Security Fund and to report its findings to the Legislature.**

E. Legal Representation and Attorneys' Fees

Labor organizations have urged that union agents be allowed to represent claimants in workers' compensation proceedings before the ALJs. That is an understandable proposal, and I sympathize with the effort to reduce the formality and expense of the entire compensation process. There appear to be serious legal and practical difficulties, however, in implementing this suggestion. Workers' compensation practice has become highly complex and technical, and the formal representation of claimants in trial hearings before ALJs is quite possibly the "practice of law." It could therefore be subject to the exclusive regulation of the Supreme Court of Michigan under

the State Constitution. See, **e.g.**, 3 A. Larson, **Workmen's Compensation Law** § 83.15; 3 **Michigan Law and Practice**, Attorneys & Counselors § 3 (West 1979); 5 **Callaghan's Michigan Civil Jurisprudence**, Constitutional Law § 73 (1980). Guidance on this question may be provided by consolidated cases involving representation before the Michigan Employment Security Commission, which are now pending in the State Supreme Court. **E.g.**, State Bar of Michigan v. Galloway, No. 71983.

In point of fact, the specialized expertise needed to handle workers' compensation cases effectively is beyond the ken of most practicing lawyers. In introducing a text designed to enlighten his less knowledgeable colleagues, one recognized specialist remarked: "Most worker's compensation litigation is handled by a very small number of attorneys, who are sometimes accused of having a 'club' or operating a 'closed bar.'" E. Welch, **Worker's Compensation in Michigan** xi (1984). Having struggled to educate myself in the intricacies of the subject, I do not find the demand for expertise exaggerated or artificial. Nonetheless, a number of states permit lay representation, including California, Connecticut, New York, Oregon, Texas, Washington, and Wisconsin.

At any rate, it would be highly desirable to emphasize to claimants at the earlier, more informal processing stages, handled by the Bureau's consultants (often in a mediating role) that legal representation is not always necessary for a favorable result. Regrettably, many workers retain a lawyer who files a formal application for a hearing before the employer is even notified of the injury or claim.

Most claimants' attorneys in workers' compensation cases operate on a contingent fee basis. If the claimant loses, the lawyer gets nothing. If the claimant wins, the lawyer is paid in accordance with a schedule of maximum attorney fees prescribed by the Bureau Director in Rule 14 of the Bureau's Administrative Rules. In practice the maximum is usually the fee. For example, if a case is tried and goes to a final Bureau order, the lawyer is entitled to charge 30 percent of the balance of the accrued compensation, after deducting his expenses. If a case is redeemed before trial, the lawyer may get 15 percent of the first $25,000 of the settlement and 10 percent of the balance. If the case is tried to completion but then redeemed before a final Bureau order, the lawyer is entitled to 20 percent. Vagaries are introduced into the system because there are certain types of hearings for which the lawyer gets nothing, and others (for example, an employer's petition to stop ongoing payments on the ground the employee is no longer disabled) for which the attorney is theoretically entitled to a recovery, but where there will be no funds from which to obtain it. The career claimant's attorney must simply hope that these gains and losses balance out over time. **I lack sufficient facts to make a considered judgment about the adequacy (or otherwise) of the current maximum fee schedule for plaintiffs' lawyers, but do not feel it is inappropriate to leave the matter in the hands of the Bureau's professionals.** I note, however, that (1) the existing schedule on its face seems generally in line with the differently calculated schedules of

other states, and (2) the Bureau should be expressly authorized to limit the length of time for which benefit accrual will be the basis of setting attorneys' fees. The latter step would eliminate any appearance of a temptation to lawyers to delay the proceedings so as to increase the amount accrued at the time of an award.

One statutory inconsistency has emerged as a result of the 1981 amendments. MCL § 418.858 indicates that the maximum should be based on the benefit amount "after coordination," while § 418.354(16) states flatly that fees are to be based on the "uncoordinated" benefit amount. This discrepancy should be rectified. Theoretically, it might be contended that only the coordinated benefits result in a net gain for the worker, and thus only they should be the basis of attorneys' fees. Generally, I think this is correct, but the establishment of entitlement to workers' compensation may also have substantial tax implications for the employee and may ensure long-term benefits in the event of a continuing disability. The Bureau should be authorized to take these factors into account in drawing up its schedule of attorneys' fees. At the same time the Bureau should not automatically award maximum fees in every given case.

VII. ADMINISTRATIVE PROCEDURES

A. Decisions and Appeals

1. De novo review and Appeal Board backlog. At present there is a two-tier structure for decision-making in contested cases within the Michigan workers' compensation system. Hearings are conducted by a single person whose official title is hearing referee, but who is informally and almost universally known as an administrative law judge ("ALJ"). For the past several years there have been approximately thirty ALJs, about equally divided between Detroit and the rest of the State. Ten additional ALJs have recently been appointed. ALJs are Civil Service personnel appointed by the Director of the Bureau of Workers' Disability Compensation.

Hearings before the ALJ are relatively formal, although they do not adhere strictly to the rules of evidence. The proceedings are stenographically reported, but a transcript is not prepared unless there is an appeal from the ALJ's decision. The ALJ issues a short-form award granting or denying benefits. Ordinarily there is no statement of reasons for the decision. For the past two decades the average time from application to hearing has ranged from about a year to fifteen months. The Bureau's "long range performance objective" is to process 90 percent of all contested cases within 270 days. A claimant granted benefits is entitled to 70 percent of the weekly amount awarded, pending review of the ALJ's decision.

Parties aggrieved by an ALJ's decision have a right of appeal to the Workers' Compensation Appeal Board. The Appeal Board in its discretion may hear the parties and allow them to submit additional evidence. In practice it almost invariably considers the case on the basis of the written record of the hearing before the ALJ and briefs submitted by the parties. The Appeal Board must announce in writing its finding of fact and conclusions of law. MCL § 418.859. In essence, this entitles the parties to a trial "de novo" (meaning anew) before the Appeal Board, albeit on the record rather than in person. From a final order of the Appeal Board discretionary judicial review is available in the Court of Appeals and the Supreme Court. In the absence of fraud, however, the findings of fact by the Appeal Board are conclusive and only questions of law are reviewable by the courts.

In the last two decades the membership of the Appeal Board has grown from five to seven (1965) to eleven (1973) to fifteen (1978). Of the current total membership of fifteen, five are designated as representatives of employee interests, five as representative of employer interests, and five as representative of the general public. Members are appointed by the Governor, with the advice and consent of the Senate, for a term of four years.

Table VII-1 sets forth the annual case load of the Workers' Compensation Bureau since 1968. The most significant fact revealed by these figures is that the rising tide of claims and contested cases, which continued right

TABLE VII-1

WORKERS' COMPENSATION BUREAU: ANNUAL CASELOAD STATISTICS

	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984*
REPORTS OF INJURY (Form 100)	59,483	63,581	71,981	72,437	69,045	69,204	69,847	62,786	70,397	76,934	85,078	97,088	88,307	77,203	66,676	67,450	74,032
CASES OPENED FOR PAYMENT (Form 101)	71,634	82,487	84,543	83,972	89,577	97,486	102,254	95,156	95,857	103,436	122,064	137,955	136,996	129,640	145,459	85,568	83,591
CASES CLOSED ('Payment Stopped') (Form 102)	68,963	77,273	78,830	77,748	82,402	89,594	94,324	86,312	86,358	101,723	114,439	128,175	127,057	120,458	104,751	93,906	96,720
CONTESTED CASES RCVD (Form 104)	20,451	22,347	21,563	23,769	26,336	25,982	28,107	28,776	29,681	29,782	30,636	37,865	40,232	44,054	32,674	28,605	23,103
'DECISIONS':	7,186	7,535	8,524	9,766	10,662	12,071	11,364	10,099	10,567	10,320	12,054	14,468	16,956	15,144	13,289	15,264	14,045
(Stipulated)	206	89	57	93	82	112	130	104	186	207	240	205	424	412	261	392	481
(Granted)	891	930	1,054	1,295	1,459	1,259	1,224	1,395	1,439	1,203	1,496	1,591	1,984	1,518	1,614	1,905	1,637
(Denied)	238	238	295	305	433	403	407	564	536	444	596	687	902	817	1,015	1,273	1,220
(Withdrawn/Dismiss)	4,937	5,190	6,106	7,076	7,714	9,229	7,720	6,437	6,760	6,706	8,356	10,547	11,330	10,255	9,012	9,899	8,883
(Voluntary Payment)	914	1,088	1,012	997	974	1,068	1,883	1,599	1,646	1,760	1,366	1,438	2,316	2,150	1,387	1,795	1,824
REDEMPTIONS GRANTED:	9,119	11,272	12,741	15,317	15,186	15,789	17,284	14,708	19,371	19,659	19,964	20,223	25,976	26,657	21,295	26,508	16,752
(With Form 104)	--	--	--	13,634	13,354	13,940	14,942	12,541	16,962	17,295	17,269	17,060	23,626	24,217	19,366	24,188	15,033
(Without Form 104)	--	--	--	1,683	1,832	1,849	2,342	2,167	2,409	2,364	2,695	3,163	2,350	2,440	1,929	2,320	1,719
REDEMPTIONS AS % OF DISPOSITIONS	55.9%	59.9%	62.3%	61.1%	58.8%	56.7%	60.3%	59.3%	64.7%	65.6%	62.4%	58.3%	60.5%	63.8%	61.6%	63.4%	54.4%
TOTAL DISPOSITIONS ('Decisions' & Redemptions)	16,305	18,807	20,265	25,083	25,848	27,860	28,648	24,807	29,938	29,979	32,018	34,691	42,932	41,801	34,584	41,772	30,797
REDEMPTION DENIED	145	129	84	199	219	254	269	247	243	297	280	354	147	162	98	63	42
BACKLOG OF CONTESTED CASES AS OF JANUARY 1	13,567	18,108	21,983	21,716	21,587	23,349	22,795	24,118	29,775	31,416	32,858	32,847	35,423	34,440	37,288	39,087	30,493 **
CHANGE FROM PRIOR JANUARY 1	N/A	4,541	3,875	(267)	(129)	1,762	(554)	1,323	5,657	1,641	1,442	(11)	2,576	(983)	2,848	1,799	(3,931)

*Projection based on actual data for first 9 months of 1984.
**Backlog of pending contested cases as of 10/1/84.

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TABLE VII-2

TRENDS IN WORKERS' COMPENSATION CASELOADS FOR 5-YEAR PERIODS FROM 1970-1985

	[January '70-January '75]		[January '75-January '80]		[January '80-January '85**]	
	% Change	(Change in Volume)	% Change	(Change in Volume)	% Change	(Change in Volume)
REPORTS OF INJURY*: (Form 100)	9.9%	(+ 6,266)	39.0%	(+27,241)	-23.7%	(-23,056)
CASES OPENED FOR PAYMENT: (Form 101)	24.0%	(+19,767)	34.9%	(+35,701)	-39.4%	(-54,364)
CASES CLOSED ('PAYMENT STOPPED'): (Form 102)	22.0%	(+17,051)	35.9%	(+33,851)	-24.5%	(-31,447)
CONTESTED CASES RCVD (Form 104)	25.8%	(+ 5,760)	34.7%	(+ 9,758)	-39.0%	(-14,762)
DISPOSITIONS: ('Decisions' and Redemptions)	52.3%	(+ 9,841)	21.1%	(+ 6,043)	-11.2%	(- 3,894)
REDEMPTIONS GRANTED:	53.3%	(+ 6,012)	17.0%	(+ 2,939)	-17.2%	(- 3,471)
BACKLOG OF PENDING CONTESTED CASES:	9.7%	(+2,135)	46.9%	(+11,305)	-13.9%	(- 4,930)

*Not all claims for compensation arise from an official 'Report of Injury' (Form 100).
**Estimate of year-end totals for 1984 is a projection using actual data from first nine months.

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TABLE VII-3

Percentage of Decisions Appealed to Appeal Board: 1968-84

	Decisions by Admin. Law Judges			Appeals Received by	
	Benefits Granted	Benefits Denied	Total	W.C. Appeal Board	% Appealed*
1968	891	238	1,129	694	61.5
1969	930	238	1,168	990	84.8
1970	1,054	295	1,349	1,131	83.8
1971	1,295	305	1,600	1,035	64.7
1972	1,459	433	1,892	1,285	67.9
1973	1,259	403	1,662	1,231	74.1
1974	1,224	407	1,631	1,215	74.5
1975	1,395	564	1,959	1,548	79.0
1976	1,439	536	1,975	1,450	73.4
1977	1,203	444	1,647	1,376	83.5
1978	1,496	596	2,092	1,629	77.9
1979	1,591	687	2,278	1,926	84.5
1980	1,984	902	2,886	2,337	81.0
1981	1,510	817	2,327	1,979	85.0
1982	1,614	1,015	2,629	2,229	84.8
1983	1,905	1,273	3,178	2,576	81.0
1984**	1,637	1,220	2,857	2,188	76.6

*Percentage of decisions appealed must be viewed as approximate because some decisions will be rendered in one calendar year, but appealed in the following calendar year.

**Projection based on actual data for first 9 months of 1984. This is a conservative estimate because a recent shortage of clerical staff at the Appeal Board has resulted in fewer appeals being acknowledged as "Received" by the Board.

Appeals of Decisions Over 5-Year Periods

	Total Decisions	Appeals Received	% Appealed
1970-74	8,134	5,897	72.5
1975-79	9,951	7,929	79.7
1980-84	13,877	11,309	81.5

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through the early '80s, has at last begun to ebb. The backlog of pending contested cases is also now declining. A summary of the trends over five-year periods since 1970 is contained in Table VII-2. Perhaps the most important conclusion to be drawn from these data is that the addition of the ten new ALJs may well result in bringing the case-load problem at the trial stage under control. The Bureau's announced aim is to have ALJs decide 90 percent of all contested cases within nine months of the application for hearing. I consider that feasible and reasonably satisfactory. Four to six months should be the target in the more ordinary case. At least I see no reason at this time for major structural changes at the ALJ level.

The situation at the Appeal Board is very different. Table VII-3 indicates the number and percentages of ALJ decisions being carried to the Appeal Board. As can be seen, **during the past decade between 75 and 85 percent of all ALJ awards were appealed.** That alone is a distressing commentary on the lack of finality in decision-making at what should be a much more dispositive step in the administrative process. Even worse, as Table VII-4 reveals, **the accelerating rate and number of appeals in recent years have caused the Board's backlog to mushroom from a mere 2,000 cases in 1976 to almost 7,000 as of November 1984.** That is the equivalent of about five or six years' output by the Appeal Board. Such delay in any administrative system is simply intolerable. It is hurtful financially and even psychologically to both employees and employers whose rights and liabilities remain in a state of suspension and uncertainty for many months. Long delays are also hurtful to the system itself. Confidence in it is eroded, and additional administrative expenses are imposed on the Bureau and the parties.

TABLE VII-4

Decisions, Affirmances, and Backlog of Appeal Board,

1975-1984

	Decisions	Affirmances	% Affirmances	Backlog
1975	---	---	77	2104
1976	704	545	77	2081
1977	---	---	--	2219
1978	607	422	70	2695
1979	685	483	71	3220
1980	839	586	70	4042
1981	1047	715	68	4294
1982	1072	761	71	4773
1983	614	474	77	5977
1984	---	---	--	6800+*

* November 1984 estimate

The extraordinarily high rate of appeals, especially in recent years, and the corresponding build-up in case backlog at the Appeal Board, have several causes. First, the very notion of de novo review, which means in essence that a whole fresh look is taken at both the facts and the law by the appellate body, is an open invitation to disappointed litigants and their lawyers to seek to retry the case from scratch. Second, whenever the law seems unsettled, there will be a natural tendency to pursue clarification by appeal to higher authority. Uncertainty in the law can be created by major substantive changes in the statute itself, such as occurred in 1980 and 1981. Uncertainty can also result from the failure of a key decision-maker to speak with a single voice. The current fifteen-member Appeal Board sits in rotating panels of three persons each. This undoubtedly constitutes a fractionating element in the appellate process, and the effect is to encourage losers below to seek review.

The degree of consistency between the thinking of the ALJs and the Appeal Board is reflected in the affirmance rate of ALJ decisions by the Board (see Table VII-4). Since 1970 that has ranged from a high of 84 percent in 1971 (when there were seven Appeal Board members) to 77 percent in the mid '70s (when there were eleven Board members) to 68-71 percent in the late '70s and early '80s (when there were fifteen members). It should be noted, however, that the affirmance rate returned to a healthier 77 percent in 1983. Over the years the Appeal Board has reversed ALJs on questions of law about one-third of the time but has reversed them on issues of fact only about one-sixth of the time.

De novo review makes most sense when an administrative agency that is handling a relatively light case load, especially an agency in its formative years, is attempting to have every decision in its entirety be the product of "the agency." In such a context the hearing officer is essentially the compiler of the agency's official record rather than a true decision-maker. When an agency has matured and has established a large body of precedent, however, and particularly when it has become overburdened with work, **it is fair to ask whether de novo review is any longer a luxury that can be afforded, or a procedure that is needed.**

It is true that de novo review of initial determinations at the trial level remains the norm of the country's workers' compensation systems -- most of which are also struggling with serious substantive and administrative problems. But there is prestigious authority for a different model. For example, Congress in 1972 amended the Federal Longshoremen's and Harbor Workers' Compensation Act to provide that "findings of fact in the [ALJ's] decision under review by the [Benefits Review] Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b)(3). A similar approach is followed in three states, Pennsylvania, Florida, and Arizona. 3 A. Larson, **Workmen's Compensation Law** § 80.12(c). In addition, some states, notably Wisconsin, defer to the hearing referee's findings of fact when witnesses' credibility is at issue. **Id.** § 80.12(d).

A major study entitled **Social Security Hearings and Appeals** was published by Professor Jerry L. Mashaw of Yale Law School and associates in 1978. It concentrated on ALJ determinations in Social Security disability cases and subsequent review by the Appeals Council. Under existing regulations, the ALJ's findings of fact were to stand if supported by substantial evidence. De novo review was permitted, however, upon the submission of "new and material" evidence. The authors commented (p. 103):

> We can discover no persuasive basis for this provision. If the claimant has new and material evidence, he should be permitted to petition to reopen the hearing. The decisions as to whether to reopen the case and how the case is affected by the new evidence could then be rendered by the person most familiar with the case, the ALJ....
>
> **The only rationale for de novo review is that the reviewer is in a better position than the original decider.** As previously stated, there is no reason to believe that the Appeals Council can perform this function better than ALJs. (Emphasis supplied.)

Although the provisions of the Michigan Administrative Procedures Act dealing with contested cases do not apply to hearings and appeals in the workers' compensation system, the elimination of de novo review by the Appeal Board would be compatible with the APA. Thus, section 81(3) provides: "On appeal from or review of a proposal of decision the agency, **except as it may limit the issue upon notice or by rule**, shall have all the powers which it would have if it had presided at the hearing." MCL § 24.281(3) (emphasis supplied). A number of State agencies have in fact opted to proceed in the usual case on the basis of the record before the hearing referee, without granting full de novo review. These include the Employment Security Commission (in practice; cf. Michigan Administrative Code, R 421.1303 (1979)), the Public Service Commission (e.g., Consumers Power Co., PSC Case No. U-6923, Jan. 20, 1982, regarding interlocutory appeals), licensing boards under the Public Health Code (MCL § 333.16233(4)) and the Occupational Code (MCL §§ 339.513(1), 339.514(1), and the Tax Tribunal (in practice).

It can be argued that eliminating de novo review and sharpening the distinction between the responsibilities of the ALJs and the Appeal Board would further increase the legalistic nature of what ideally should be a simple administrative process, in keeping with the original "no-fault" concept of workers' compensation. Regrettable or not, however, the reality is that at least in contested cases, workers' compensation law and practice is an immensely complicated affair, navigable only by skilled specialists, for the most part legally trained. We would be well advised to accept that reality and to work within its constraints. Here that means, specifically, creating an administrative structure where particular functions are performed at particular levels, and where we abandon the extravagance of duplication of effort. The primary responsibility of the Appeal Board should be the orderly

development of a coherent, uniform body of law.

2. Recommendation of substantial evidence review. Drawing upon the analogous standards for decision and review contained in the Administrative Procedures Act, therefore, **I would recommend that findings of fact by ALJs in workers' compensation proceedings be conclusive if "supported by competent, material, and substantial evidence on the whole record."** See, e.g., MCL §§ 24.285, 24.306. Errors of law, of course, would still remain entirely subject to correction at the Appeal Board level. In my judgment, the "substantial evidence" standard would nonetheless allow the Appeal Board to remedy any serious misstep by an ALJ in assessing the evidence and making factual findings. The great advantage is that the Appeal Board would not be required to take the time in every case to familiarize itself with the whole record and to prepare its independent findings of fact. Instead, it could focus on the appealing party's contentions that particular findings were not supported by substantial evidence, thus confining its perusal of the record to those portions that the parties said supported their respective positions.

Currently ALJs do not prepare written findings of facts and conclusions of law in the ordinary case. Nonetheless, if they have performed their function in a rational manner, they have gone through the process mentally. It should take only a slight amount of additional time to spell out their findings and conclusions in short, numbered paragraphs. It is imperative that the inordinate delay that has plagued the Appeal Board not be transferred to the ALJ stage. To prevent that will require self-restraint by the ALJs, and an understanding that they are not being asked for elaborate, artistic opinions. What is needed is a crisp, concise statement of the case, which will enable a losing party to determine more intelligently than heretofore whether an appeal is justified, and which may serve in the event of an appeal as the basis for Board review. Furthermore, when the Board affirms the ALJ's decision without modification, it should be entitled to adopt the decision as its own. That would further conserve the Board's energies for the significant task of interpreting and applying the statute in the more novel and unprecedented cases.

In the comprehensive 1980 report on the results of the Workers' Compensation Adjudication Project (the "Lesinski Report"), it was similarly concluded that ALJs should be required to support their decisions with findings of fact and conclusions of law (pp. 155-158). The Lesinski Report would then have the ALJs' findings of fact be binding on the Appeal Board "unless they are contrary to the great weight of the evidence" (p. 157). My own suggested standard of "substantial...evidence on the whole record" is deliberately designed to allow the Appeal Board a bit more latitude; the wording is also more in accordance with existing language in the Administrative Procedures Act. Otherwise, I agree entirely with Judge Lesinski that fact findings are better made at the trial level where witness demeanor can be observed; that written ALJ decisions would inform losing parties why they lost, which alone might obviate one reason for appeals; that

eliminating de novo review should also reduce the number of appeals, especially those aimed at relitigating the facts; and that the Appeal Board ought to be able to act without a formal opinion in those cases where it can simply adopt the ALJs' findings.

The requirement of written findings of fact and conclusions of law should only be imposed for cases in which hearings have not begun when the amendatory legislation becomes effective. ALJs undoubtedly differ in the extent to which they take notes at a hearing. Since they will not have the transcript available when preparing their decisions, they should have due forewarning of the need for adequate material on which to base their findings and conclusions.

In perfecting an appeal, the appealing party should be required to specify those portions of the transcript on which it is relying in disputing the soundness of the ALJ's findings of fact. Theoretically, this might seem to place the appealing party in the awkward position of trying to "prove a negative"; the party might conceivably argue that the record is totally devoid of any supporting evidence. In practice, there will rarely be a problem. Both parties will have submitted opposing testimony and exhibits. At the same time, however, some reviewing courts, cognizant of the appellant's potential quandary, formally require the appellee to cite those portions of the record that arguably constitute the substantial evidence supporting the findings of the ALJ. That would seem a sensible way to proceed here. The practical consequence is that the parties, between them, will have narrowed the Appeal Board's inquiry and substantially reduced its work load. One might also hope that the very process of having to get the testimony transcribed and exceptions taken to the ALJ's findings through references to particular portions of the record, in the course of perfecting the appeal, will itself serve to discourage the less meritorious appeals.

An anticipated objection to the elimination of de novo review is that too much power will then be reposed in the hands of individual ALJs. Some ALJs are regarded in certain quarters as deficient in objectivity and impartiality of judgment. My own examination of the decisional records of the present group of ALJs suggests that the claims of bias are exaggerated. Naturally, there is a range of attitude reflected in ALJ awards granting or denying benefits, but human beings are not calculating machines and some inclination toward liberality on the one hand or strictness on the other must be expected in a certain number of any group of reasonable people. Since 1978, the overall performance of ALJs in Michigan in granting benefits has been as follows:

TABLE VII-5

ALJ Awards of Benefits, 1978-1984

	Total Decisions			% Granted		
	Detroit	Outstate	Total	Detroit	Outstate	Total
1978	661	1462	2092	71	72	72
1979	782	1606	2388	68	70	70
1980	1288	1598	2886	71	67	69
1981	837	1490	2327	66	64	65
1982	680	1949	2626	61	61	61
1983	759	2419	3178	61	60	60
1984	648	1495	2143	62	55	57
Totals	5660	11,983	17,643	66	64	65

As can be seen, **there has been a rather sharp decline in the rate at which benefits have been granted, especially in the years 1981 and 1982.** Altogether, 65 percent of the decisions of ALJs during the period of 1978-1984 granted benefits. I examined the "grant rate" of each individual ALJ who had more than three years' service. There were 26 such persons out of the then-total complement of 29. Fifteen of the 26 had a "grant rate" that did not deviate by more than ten percentage points from the "standard" of 65 percent. I then concentrated upon the remaining 11, to see how their decisions had fared on appeal. The results were as follows:

TABLE VII-6

ALJ Awards of Benefits and Affirmances

ALJ	% Granted, 1978-1984	% Affirmances, 1978-84
A	80	71
B	78	79
C	78	63
D	77	68
E	77	64
	* * *	
F	54	77
G	50	77
H	50	69
I	49	74
J	48	74
K	48	68

Note: The affirmance rate for all ALJ decisions in 1978-84 was 72 percent.

While there was a considerable range in the percentages of decisions granting benefits by the 11 ALJs at either end of the spectrum, the affirmance rate hardly suggests that this group was any more prone to error, as evidenced by Appeal Board reversals, than their colleagues who were closer to the average grant rate. The affirmance rate for all ALJ decisions since 1978 has been 72 percent. The affirmance rate for this particular group ranges from 63 percent to 79 percent, with the average of their affirmance rates being 71 percent, almost identical to their colleagues'.

Another way to test the soundness of ALJs' decisions is to compare their affirmance rate with that of federal district judges or federal administrative agencies in the federal courts of appeals. In 1980 the courts of appeals reversed district judges in 19 percent of all civil cases and reversed administrative agencies in 22.4 percent of their cases. **Annual Report of the Director of the Administrative Office of the United States Courts**, p. 212 (1980). **The reversal rate for Michigan ALJs in workers' compensation cases was a comparable 16-23 percent in 1970-77 and again a comparable 23 percent in 1983.** Even the overall reversal rate for ALJs of 28 percent in 1978-84 does not look bad, especially when one considers that their fact findings were subject to de novo review, while federal district courts are reversed on fact findings only if they are "clearly erroneous" and

federal administrative agencies are reversed on facts only if their findings are not supported by substantial evidence.

Although I do not find that the hard data provide significant support for accusations of bias against ALJs, I concede that a perception of bias or of political favoritism in their appointment can be almost as damaging to the acceptability of their awards. In view of the spotlight that has been focused upon this particular group, **I would strongly urge the Legislature or the Civil Service Commission to establish a bipartisan ALJ Qualifications Advisory Committee to interview and evaluate prospective candidates,** with ratings to be transmitted confidentially to the appointing authority. My model for this proposal is the Judicial Qualifications Committee of the State Bar, which has functioned effectively for a number of years in advising the Governor on the qualifications of candidates for appointment to fill vacancies in the State judiciary. Like the Governor, the appointing authority in the case of ALJs would not be bound by the Advisory Committee's evaluations, but experience has demonstrated that such assessments are given significant weight. I should add that I have not closely examined the question of whether the Bureau Director is the most appropriate person to appoint ALJs.

A further step that might be considered to enhance the independence of the ALJs would be to remove them physically from the rest of the Bureau's offices and to provide them with a Chief ALJ and a Deputy Chief to handle their assignments and to provide administrative support. But this would insert another layer of bureaucracy and could reduce efficiency. I myself have not seen evidence that such action is necessary.

3. Streamlining the Appeal Board. My last major recommendation for restructuring the administrative system is to create a new five-member, or possibly seven-member, Appeal Board to replace the current fifteen-member body. An enlarged membership does not necessarily lead to increased output, and it certainly does not contribute to unified decision-making, especially when the members operate in three-person panels. My belief is that a streamlined Appeal Board can be even more effective in providing a consistent interpretation of the law, and that a smaller body should be able to cope with a future case load where it has only limited responsibility for findings of fact. My preference would be to start with just five members and move to seven only if that proves necessary.

As shown in Table VII-1, contested case filings are now back down below 24,000 a year, in the range that prevailed from 1969 through 1971. Those years produced about 1200 to 1600 contested ALJ decisions annually. Even assuming that three-quarters of such a number would still be appealed, I am satisfied that 900-1200 cases a year are a manageable workload for a five- or seven-member Appeal Board, given substantially reduced record-reading and fact-finding responsibilities, the use of legal assistants, and the authority to adopt ALJs' decisions as the Board's. Although the seven-member Appeal Board of the early '70s was having trouble with the caseload of that period,

I envisage a markedly less onerous assignment for the Board in the future. (The five-member National Labor Relations Board, operating with a large legal staff but with considerably broader statutory responsibilities, decides about 2,000 contested cases a year.)

To promote stability and continuity on the Appeal Board, I believe the length of terms should be increased from the current four years to six or seven years. These of course should be staggered terms. The interest-group designations of Appeal Board members ought to be abolished. To ensure acceptability, the Board's membership should continue to be representative of business, labor, and other interests throughout the State. But to assign the actual label of "employer," "employee," or other such representative is too likely to convey the notion that each individual member has an ongoing obligation to promote the interests of a particular constituency in handling every individual case. That is unseemly, and detracts from the higher public role that each Board member should be entitled to feel he or she is playing. To enhance the stature of Appeal Board members still further, I would also urge that the Governor make use of a bipartisan Advisory Committee to assist in the evaluation of candidates. This could be either the same body as, or a body similar to, the ALJ Qualifications Advisory Committee I discussed earlier.

At present Appeal Board members need not be lawyers, and they are paid less than the ALJs whose decisions they review. (All new ALJs must be attorneys.) That is anomalous under any set of conditions, and it will be even more so if the Appeal Board becomes substantially less involved in factfinding and concentrates instead on legal rulings. I would therefore recommend that only attorneys at law be eligible for membership on the new Appeal Board, and that their rate of compensation be substantially increased. With an eventual reduction in the total membership of the Appeal Board from fifteen to five, or at most seven, a considerable raise could be granted without an addition to the total budget. It would also be considerably more economical to provide law clerks for each Board member to assist in legal research and decision drafting than to maintain the existing complement of fifteen members.

Streamlining the Appeal Board should produce some financial savings for the State directly. But I anticipate that the elimination of de novo review and the consequent reduction in the number and complexity of appeals will have the most pronounced and beneficial effect on the costs incurred by litigants.

There remains for discussion the appalling problem of the five-year backlog of cases at the Appeal Board. The maxim that justice delayed is justice denied is especially cruel in its application to disabled workers. There seems a consensus among labor, management, and other interested groups across the State that drastic measures must be taken if necessary to remedy the situation. One proposal has been to have ad hoc tripartite arbitration panels replace both the ALJs and the Appeal Board. Under this arrangement

the employer and the employee would each designate one arbitrator and the latter two would then select a third person as the impartial chair.

I see at least two major flaws in this suggestion. First, it would eliminate the element of administrative expertise from the decisional process, and prevent the systematic development of any coherent, unified body of law, except through costly and time-consuming court litigation. Second, as an occasional labor arbitrator myself, I am more than a little skeptical about the availability of an adequate number of persons capable of serving in the critical role of impartial chair. The law of workers' compensation is far more technical and complex, and takes far more time to master, than the sort of issue presented in the usual labor arbitration case. Experience under the Michigan Medical Arbitration Program is not at all comparable. From the inception of medical arbitration in 1976 through August 1984 there had been only 95 arbitral awards. By contrast, from 1978 (I start with 1978 for comparison purposes because that is the year the Medical Arbitration Program could fairly be said to have swung into full operation) through September 1984, ALJs issued 17,643 decisions granting or denying benefits. Needless to say, even if arbitration is not made a formal part of the workers' compensation system, it could always be encouraged for voluntary adoption by the parties in any given case as a final and binding method of resolving their dispute.

My recommendation is to retain the existing fifteen-member Appeal Board on a temporary basis, probably for three or four years, and have it devote its efforts solely to the elimination of the backlog. In other words, there should be a complete break with the past, and the new five- or seven-member Board should start with a clean slate. Its jurisdiction should attach only to those cases in which ALJs had not yet begun trials on the effective date of the amendatory legislation or on some specified subsequent date. That also means that the members of the new Board might not have to be appointed immediately, since presumably there would be some lapse of time before appeals from post-amendment ALJ decisions would reach the Board in any volume.

I would also suggest that the old Board consider establishing some type of expedited process for handling the more routine cases caught in the backlog. It would seem senseless to make the parties in such cases await their turn in the multiyear mass when a relatively short time spent with their file could result in a quick disposition. Perhaps one or two three-person panels could be given the special assignment of sifting through the entire backlog to identify and decide those cases susceptible of summary treatment.

It is probably inevitable that members of the old Appeal Board will begin to leave for other positions as the Board nears its termination date. Rather than have the process of cleaning up the last of the backlog slowed down, I would recommend that ALJs be made eligible to serve temporarily (perhaps for a maximum period of one year) on the old Board. There is precedent for such

an approach in the 1984 amendments to the Federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 921(b)(5). As another emergency measure, the Legislature may wish to authorize the appointment of retired Board members, members of the "new" Board during its expectably slow start-up period, ALJs, or similarly qualified personnel to serve on a temporarily enlarged Appeal Board to enable an even swifter liquidation of the backlog.

B. Miscellaneous

1. Evidence, including medical testimony. Several decisions of the Michigan Court of Appeals have indicated that the rules of evidence in workers' compensation cases are less rigorous than those applicable in courts of general jurisdiction. Specifically, for example, an ALJ is entitled to admit hearsay of the sort that would probably be excluded in a court of law. Nonetheless, workers' compensation hearings before an ALJ are relatively formal, and it is clear that the reviewing courts expect the proceedings to comply generally with the Michigan Rules of Evidence. See, e.g., Holford v. General Motors Corp., 116 Mich. App. 488 (1982).

As a practical matter, perhaps the most significant evidentiary problem in the processing of workers' compensation cases is the treatment of medical evidence. Once much emphasis was placed upon obtaining the personal testimony of medical witnesses for both the claimant and the defendant at the trial before the ALJ. That inevitably produced many frustrating postponements, since it required the simultaneous appearance of several extremely busy people. Gradually it became customary to take medical evidence by deposition, i.e., sworn testimony on the record outside the actual hearing. In Detroit, this is ordinarily done after the trial, while in the rest of the State, it is done before the trial. One can understand the Detroit procedure if the ALJ is essentially just a compiler of the official record, but the outstate approach makes much more sense if the ALJ is a true decision-maker.

One further step away from live testimony should be taken in the usual case. Although depositions mean that the physician or other medical witness does not have to appear before the ALJ, there will still be a need ordinarily for a joint session involving the doctor, the two lawyers, and a court reporter. It is surely time to ask whether a simple (perhaps notarized) medical report would not be adequate prima facie evidence, with the opposing party entitled (at its own expense) to seek a deposition or to submit interrogatories in clarification or rebuttal. My own experience as an arbitrator suggests that **a good, extensive medical report, which can be read over at leisure, will often serve as well as live testimony.**

With regard to occupational diseases, the National Commission on State Workmen's Compensation Laws declared (**Report** at 51):

> R2.15. We recommend that the etiology of a disease, being a medical question, be determined by a disability evaluation unit

under the control and supervision of the workmen's compensation agency.

R2.16. We further recommend for deaths and impairments apparently caused by a combination of work-related and nonwork-related sources, issues of causation be determined by the disability evaluation unit.

The Michigan workers' compensation system of course has nothing akin to a disability evaluation unit, and the functions envisaged for it by the National Commission are performed in this State by the ALJs. See, **e.g.**, Dation v. Ford Motor Co., 314 Mich. 152 (1946). The National Commission's proposals run counter to the American tradition of resolving medical questions, like other factual questions, through the adversarial process. There are strongly vested interests favoring the practice of letting imaginative lawyers and their supporting casts of paid medical witnesses fight out the issues of etiology and causation. Furthermore, it cannot be gainsaid that in some individual cases greater justice will be achieved by a hard-hitting, creative adversarial presentation. Nonetheless, for the system as a whole, it is all very costly and time-consuming. In light of the intrinsic imponderables of occupational diseases, as discussed earlier in this report, the adversarial approach to medical determinations is probably in net effect quite meaningless. The ALJ is ultimately going to have to make, for legal purposes, a medical judgment that in many cases will necessarily be an arbitrary one. **Much can be said in favor of substituting for this trial by contradictory medical testimony a single determination by an impartially selected medical panel.** The results would not necessarily be better, but there is little reason to think they would be worse, and they would almost surely be much cheaper and faster.

Impartial medical panels or examiners have not proved popular, needless to say, in the workers' compensation systems of this country. Nonetheless, they exist in one form or another in about fifteen jurisdictions, sometimes concentrating on dust or other lung diseases. Professor Peter S. Barth, of the University of Connecticut, a leading authority on occupational diseases, is currently conducting a major study of medical panels in several states. In 1980 he produced a most thoughtful and balanced report on medical review panels in what he described as the "profoundly" different workers' compensation systems of British Columbia, Manitoba, and Saskatchewan. If his findings concerning the generally successful Canadian experience can only be given limited weight because of the differences in the two countries' systems, his forthcoming American study should definitely receive the closest attention.

2. Limitations. Employers have long sought a "tougher" or "more meaningful" statute of limitations in workers' compensation cases. There is an understandable resistance to the assertion of stale claims that may be based on forgotten events of long ago. On the other hand, the consequences of certain injuries, especially those involving occupational diseases with a

long period of latency, may not be known for many months or even years. The legislative effort to work out a reasonable balance between employer and employee interests is reflected in MCL §§ 418.381, 441, and 833. These statutory provisions, which were amended in 1980 and 1981, contain some drafting inconsistencies, but their general purport seems as follows. An employee must give the employer notice within 90 days after the employee knows or should have known of an injury, although failure to give notice is excused unless the employer can prove prejudice. Then, an oral or written claim for compensation must be made to the employer, or a written claim must be made to the Bureau, within two years after the injury, or the manifestation of disability, or the last date of employment. (That last phrase obviously introduces the possibility of a considerable extension of the time for filing a claim after the actual date of injury.) Despite the possibility that a claim may be filed many years after an injury occurs, the employee cannot receive compensation benefits for more than two years preceding the application for a hearing with the Bureau. Furthermore, if payment of compensation is begun and then stopped, and a worker later petitions for a resumption of the payment of benefits of the same type, compensation will not be ordered for more than one year prior to the filing date. Both these latter provisions protect an employer against liability for a large accumulation of benefits.

The 1980 and 1981 amendments on limitations have not yet received definitive interpretations. My impression is that they will probably not produce significant changes in the preexisting law. (One definite but relatively minor change is the reduction of the period for notice concerning occupational diseases from 120 days to 90 days, to coincide with the period for giving notice of personal injuries.) Limitations on claims for occupational diseases will continue to be the most troublesome area, but that a nationwide problem. However a statute is worded, agencies and courts are going to be sympathetic to the worker who ultimately succumbs to a disease with a recognized period of long latency. **Michigan's two-year limitation on claims is generally in line with other industrial states, and less generous than the three-year period of Illinois, Minnesota, Pennsylvania, and Recommendation 6.13 of the National Commission (Report** at 107-08).

3. Voluntary payments, petitions to stop, etc. Employee and employer counsel called to my attention two situations about which both groups felt grieved in different ways. The first is when an employer starts voluntary payments, and then terminates them for some reason, e.g., it discovers the employee has been working elsewhere or believes the employee is no longer disabled. The second situation is when the employer is under a final Bureau order to make payments, and wishes to stop for reasons similar to those just mentioned.

In the case of voluntary payments that are later cut off, the employee has to file a new application and wait a year or more for a hearing before an ALJ. On the other hand, if the employer's payments are pursuant to a final Bureau order, they must be continued until the employer is able to obtain an

ALJ hearing in accordance with a "petition to stop" compensation. Rule 10(2) of the Bureau's Administrative Rules provides that a hearing shall be scheduled within 30 days of the filing of the petition to stop, but the ALJs' backlog has usually prevented this. The results make all parties unhappy.

Employees and their representatives do not think it is fair that the employer gets priority treatment on its petition to stop, while the employee must ordinarily wait for a whole year to get a hearing before an ALJ concerning the employer's termination of voluntary payments. That is especially galling if the voluntary payments only began on the eve of a previously scheduled hearing, after the employee had already waited a year or so. For its part, the employer paying under an order feels that it is being denied its plain rights under the rules to a 30-day hearing, and in the meantime it must maintain payments to a worker whom it considers no longer eligible.

In my view, both positions are sound. At the very least an employee subjected to an employer's unilateral termination of benefits should have to wait no longer for a new hearing than he would have had to wait for the originally scheduled hearing at the time when the employer began voluntary payments. Furthermore, after voluntary payments have been continued for some substantial length of time, regardless of when they started, any subsequent cessation should entitle the employee to priority processing of the application for a new hearing. The same 30-day period should be applicable to both employee and employer petitions, and every effort should be made to comply with those deadlines. Strong equities are at stake in these cases, feelings run high, and special measures may be warranted. With a decline in claims filings and an increase in the number of ALJs, as discussed in Part VII-A-1, **supra, implementation of a priority hearing calendar may soon become practicable.**

VIII. BUREAU ADMINISTRATION

A. In general

In the past the administrative apparatus of the Michigan workers' compensation system was sadly underfunded. For example, Wisconsin, which is approximately half the size of Michigan, spent just about as much as this State on its system, while California, about two and a half times the size of Michigan, spent over five times as much. Probably the major reason for its inadequate funding was that the Michigan system had to rely exclusively on general appropriations from the State Legislature. Workers' compensation agencies in over thirty other states are funded in whole or in part by special assessments against insurance carriers and self-insured employers.

The differences in the levels of state funding can be detected simply by walking into the offices of the various workers' compensation agencies in St. Paul, Madison, Columbus, and Detroit. The offices in the first three cities are brightly painted, cheerful, and inviting. Clients have comfortable surroundings in which to wait until their case is reached. In stark contrast the Detroit facilities are bleak and dreary. Claimants must await their turn in a large, spare room that exudes all the cordiality of a prison's visitation center.

Modern equipment and support staff have similarly been lacking in the Bureau. Until recently many ALJs had to type their own decisions on manual machines. No dictating equipment was available. Bureau records were not computerized, and data essential for efficient administration and intelligent assessment of proposed reforms were simply unobtainable.

Hopes that much of this depressing situation might be changed were raised by the 1983 amendment requiring each party to an approved redemption to pay a $100 fee to help defray the costs of the Bureau and the Appeal Board in administering the statute. On the basis of the estimate that there would continue to be about 16,500 redemptions a year, it was calculated that this new fee would produce an annual income of about $3.3 million. The Bureau is now in the process of implementing a highly commendable plan, spread over the next five fiscal years, to add additional staff (including new ALJs), fully automate all Bureau programs, establish a management services unit, improve the monitoring of employers' insurance arrangements, expedite claims processing, and provide enhanced public information and education. In view of my own limited acquaintance with the Bureau's management and administrative problems, I am willing to defer to its judgment on most of the steps necessary to remedy existing deficiencies. There are two particular points, however, that individual injured workers have brought to my attention, which I believe deserve a special word.

B. Public Information and Consultants

As the Bureau itself recognizes, there is a serious lack of knowledge concerning the workers' compensation system on the part of employers, employees, and the public generally. As just mentioned, that is one of the areas the Bureau intends to cover in its five-year program. I only wish to underscore my endorsement of this initiative, and to urge the Bureau to review periodically whether it is actually spending enough in this endeavor. I am convinced from my own conversations with a few intelligent, articulate disabled workers that, despite their full capacity to understand a simple explanation of the law, they found it excruciatingly difficult to secure the necessary information about their rights. The Bureau staff is well intentioned but overburdened and harassed by the numbers seeking their assistance. More good literature of the "plain English" variety is an imperative.

Beyond that, from all I can gather the Bureau could use more persons to deal directly with the public, especially disabled workers, both at the informal inquiry stage and at the mediating stage, after a hearing has been sought. Effective intervention by consultants may often avoid more formal proceedings before an ALJ, with increased outlays of time and litigation fees. According to my latest information, there are only a couple of consultants or mediators in the Detroit office, and I think the Bureau should consider the advisability of adding several more.

IX. ADVISORY COUNCIL

A large message emerging from this study is that, apart from some fundamental structural changes in the decision-making process itself, the time is probably not yet ripe for major revisions in the substantive law of workers' compensation in Michigan. As yet we have had far too little experience with the 1980 and 1981 amendments in actual operation. We cannot assess their impact except in the most tentative terms. Yet before we can even determine what we have already accomplished, proposals for still further changes are being pressed upon us. Workers' compensation has been a political football in Michigan for over two decades, and it bids fair to continue as such for the foreseeable future.

It is time to defuse the situation. Instead of the periodic legislative crisis we have endured in recent years, we should seek to create an institutional framework for dealing with the issues of workers' compensation in a cooler and more reasoned manner. Other states have managed this. Over half a century ago, for example, Wisconsin established a workers' compensation council, consisting of leading figures from labor and management, to which insurance representatives have since been added as nonvoting members. Wisconsin officials inform me that only once in the last fifty years has this council failed to place an "agreed bill" on the desks of the state's legislators at the beginning of each biennial session. States having had success with similar if less long-lived institutions include Minnesota, Ohio, Iowa, Colorado, and Texas.

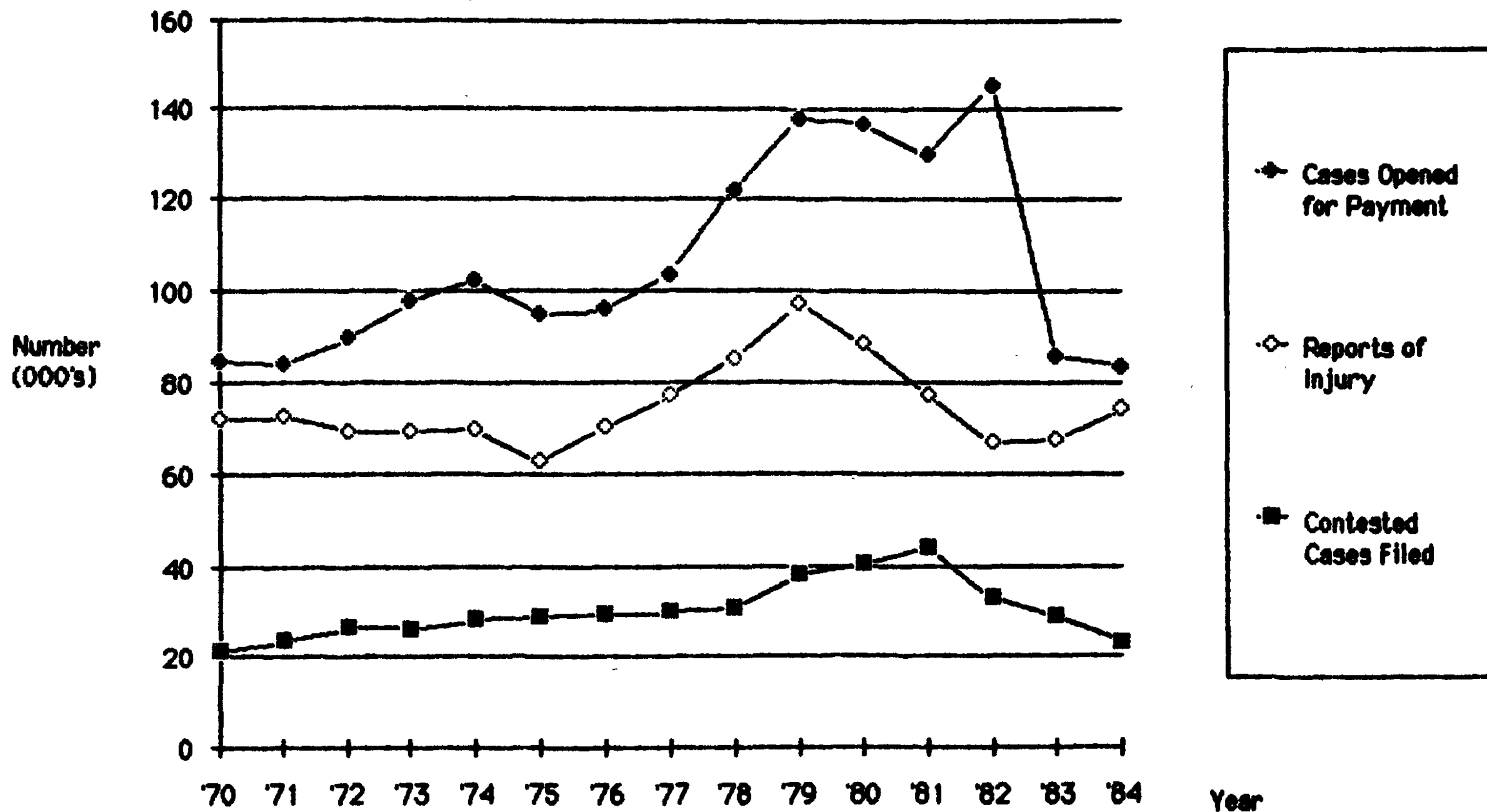
From my own personal experience, I know that there is enough good will, dedication, and common sense in the business and labor communities of Michigan -- if only it can be tapped -- to make such a body work here. In 1974-75 I had the good fortune to work with six outstanding representatives of labor and management on the Governor's Workmen's Compensation Advisory Commission, which had the assignment of coming up with an "agreed bill" on this same subject. We failed, probably in large part because of pressures generated from outside our group regarding one overarching issue. That issue may now be behind us. More important for present purposes, I can attest that substantial progress was made during our deliberations, and, most heartening of all, genuine understanding of, and respect for, each other's views became the characteristic attitude of the entire group.

I am confident the labor-management community of Michigan need take no back seat to Wisconsin's, Minnesota's, or Ohio's. In that spirit, I **strongly urge the creation of a permanent Workers' Compensation Advisory Council in this State, composed at least of major representatives of employers and employees, but probably including also representatives of other interested groups, such as insurance and perhaps medicine.** The continuing charge to this body should be the formulation and transmission to the Governor and the Legislature of recommendations for changes in the workers' compensation law

on which the group has reached consensus. The Council could also consult with the Bureau on administrative and procedural matters.

Several significant benefits would flow from such an institution. Over time a mutual trust will develop among the members of the Advisory Council, which should promote a frank exchange of facts and opinions. Everyone agrees even today on the dual goals of fair compensation to workers disabled by work-related injuries and the maintenance of a competitive economy in this State. There is enormous suspicion (in my view, quite unwarranted) in many quarters that those goals are not universally shared. Much of that suspicion will be dissipated, I firmly believe, by a fuller disclosure of just what is needed by a disabled worker and his or her family for a decent standard of living, and just what it costs an employer in a particular industry to meet its legal obligations. Compromises on benefit increases and cost cutting ought to take place, partly reflecting a balancing of the equities and partly reflecting straight political trade-offs. There are any number of issues previously identified in this report that lend themselves to comprehensive fact-finding, dispassionate analysis, and ultimately some hardheaded, sensible give-and-take. Perhaps most important, the solutions eventually devised through such a process by the parties themselves will invariably prove more enduring, and certainly more acceptable to all concerned, than anything that could be conceived by an outsider.

Workers' Compensation Bureau: Annual Caseload Statistics 1970-84*



* 1984 totals are projections based on actual data for first nine months

X. SUMMARY

1. Preliminary figures indicate that **open** competition **in insurance** for workers' compensation in Michigan **may be saving the State's employers about 30 percent a year** in net costs.

2. **Restrictions on eligibility** for workers' compensation resulting from the 1980 and 1981 amendments **may have reduced employer payouts approximately 6.2 percent,** even though **maximum weekly benefits** for many disabled workers **have been substantially increased.**

3. **The combination of open competition and reduced compensation payments** appears to have saved Michigan business well over **a half billion dollars in the past two years.**

4. The 1980 and 1981 amendments to the workers compensation law dealing with the definition of "disability," liability for occupational diseases, the eligibility of retired persons for benefits, etc., have not yet been definitively interpreted. But a dramatic drop in claims filings, especially by retirees, attests to the likely impact of the recent changes. **It is premature to consider further major substantive revisions in the statute at this time.** Technical amendments are needed, however, to clarify ambiguities in the existing legislation.

5. Much more emphasis should be placed on **medical and vocational rehabilitation** to get injured workers back on the job. At the same time strong measures must be adopted to **contain medical care costs.**

6. The backlog of cases at the Workers Compensation Appeal Board has reached almost 7,000, about a five-year caseload. Fundamental procedural changes are necessary. **Short-form findings of fact and conclusions of law should be made at the trial stage; duplicative "de novo" review of the facts should be eliminated at the appeal level; and the Appeal Board should be streamlined by a reduction in size to a more manageable five or seven members.**

7. Bureau administration should be automated and otherwise improved.

8. **A permanent workers compensation labor-management advisory council should be established to engage in an ongoing review of the system and to recommend appropriate statutory and administrative changes to the Governor, the Legislature, and the Bureau.**