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Recommended Changes in Ohio Workmen's Compensation

*Elmer A. Keller**

WHILE EVENTS on the national and international scene have changed drastically in the past 5 years both as to our economy and our way of life, workmen's compensation benefits as they affect both of these matters have remained relatively static. Change is the order of the day. To keep pace with constantly changing conditions, it is just as necessary that we keep up and change our laws to meet the changing problems which are ever upon us. In a dissertation on such an all inclusive subject, it is not possible to elaborate in too much detail each suggested change and to but touch lightly upon a number of changes which should be given thorough study and consideration.

Our Ohio Constitution, Article II, Section 35 says "laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification and to collect, administer and distribute such fund and to determine all rights of claimants thereto." It is significant to note that Ohio had a valid Workmen's Compensation Act in operation a year prior to the adoption of the amendment to the constitution in 1912. That law was challenged as to its constitutionality and the Supreme Court of Ohio held that the Workmen's Compensation Act was a valid exercise of the police power of the state. Some years later the name of the "Board" was changed by law to read "Industrial Commission." In 1955 the Legislature created the Bureau of Workmen's Compensation and provided the position of Administrator of the Bureau. Sections 4121.12, 4121.121 and 4121.122 of the Revised Code spell out the duties and authority of the Administrator. At the same time there was also created a Workmen's Compensation Advisory Council together with five Regional Boards of Review who were to "determine disputed claims promptly and judiciously." Thus there are three distinct and separate political entities, each with specified authority that deal with matters affecting workmen's compensation, to which must be added two more separate political entities, namely the Attorney General of Ohio, whose sole duty it is to represent the Administrator of the Bureau of Workmen's Compensation and to defend his orders before regional boards of review and the Industrial Commission and in the event a contested claim is appealed, to defend the Administrator and the Industrial Commission in the law courts.

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Initial hearings on all claims, whether contested or uncontested are made before the Administrator. Perhaps 99% of all claims filed are disposed of without contest. Yet it is still incumbent upon the Administrator to examine each claim filed. Section 4123.515 of the Revised Code does provide, however, that:

“Before making or denying an award in a disputed claim the administrator of the bureau of workmen’s compensation or one of his deputies shall afford to the claimant and the employer an opportunity to be heard upon reasonable notice and to present testimony and facts pertinent to the claim.

The Administrator or his deputy in any hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure. Notes or memoranda of proceedings at such hearing need not be preserved.

The parties shall be required to proceed promptly and without continuances except in cases of hardship prejudicial to a party and due either to the lack of time afforded by the notice of the hearing or to other cause which the party could not be expected to foresee and provide against.”

After the hearing on such a disputed claim, it is the duty of the Administrator to concisely state his decision and the reasons therefor. Within 10 days of the date of the receipt of the decision of the Administrator, which must be mailed to the claimant and the employer, each of the parties may file an Application for Reconsideration of the decision. The Motion to grant such application is customarily granted and it affords both parties the right to be heard and to present testimony and facts which are pertinent to the claim. About one out of every six of such contested decisions are set for hearing on reconsideration.

Either of the parties who are dissatisfied with the decision of the Administrator may appeal to a regional board of review or the Industrial Commission. In Section 4123.516 R. C. a claimant may appeal a decision from the final order of the Administrator directly to the Court of Common Pleas. Whenever an appeal is made from a final decision of the Administrator to either a regional board of review or to the Industrial Commission the law (Sec. 4123.517 R. C.) permits a prehearing conference when requested, at which conference the claimant and the employer are required to confer with the appellate body in an endeavor to agree on uncontroverted facts, define the controverted issues and attempt to resolve disputes concerning them and to agree on documents, reports and records which shall be considered without further identification or proof and to make such agreements as may expedite the hearing and determination of the appeal.

If, however, the Board or Commission is of the opinion that the issues involved in the claim are such that a prehearing conference will serve no useful purpose, it may record such opinion in the file of the claim and thereupon may dispense with such conference.

As a matter of practice, it is rare indeed that such prehearing conferences are asked for at any of the administrative levels. I believe that if it were mandatory to require such prehearing conferences, considerable time would be saved and that the definition of the issues would lead to speedier and more satisfactory decisions.

Whenever the claimant, the employer or the Administrator is dissatisfied with a decision of a regional board of review, either of these parties may appeal to the Industrial Commission for a review of the contested claim. Here again provision is made for a prehearing conference and for a hearing upon the issues.

A decision of the Industrial Commission may be appealed by the claimant or the employer (but not by the Administrator) to the Court of Common Pleas of the county wherein the claimant sustained his injury, or if the injury occurred outside of the state, in the county where the contract of employment was made.

The issue to be decided by the Court of Common Pleas is only one, namely the right of the claimant to participate or to continue to participate in the State Insurance Fund. The fixing of the percentage of disability is left with the Industrial Commission. The court does retain the power to determine whether or not there has been an abuse of discretion by the Commission.

In detailing the procedural steps which may be followed, it can readily be seen that there are a proliferation of pre-conference hearings, reconsiderations and trial procedures. A study of workmen's compensation made in 1964 by a Council for the Reorganization of State Government recommended that the agencies conducting hearings be reduced by one, namely that the law providing for Boards of Review be repealed and that specially trained hearing officers aid and assist the Industrial Commission in preparing contested cases for hearing, acting somewhat in the nature of referees as provided for by our court procedures. These recommendations should be adopted. The law very wisely provides that insofar as evidence to be adduced is concerned, that it should be liberally construed in favor of the claimant. As a matter of fact all of the hearings before the administrative bodies are conducted with an air of informality and the type of evidence often may be the kind that would be objectionable in a court proceeding. However, since there is no jury hearing such evidence, the credibility of witnesses and the sifting of what is good or bad can generally be determined by a good hearing officer. To this end the qualifications of a hearing officer should be spelled out in the law and his qualifications and standard of education and experience should be high so that substantial justice can be administered. At the administrative level, the questions of law and fact may well be argued. However, when a case is taken to the Court of Common Pleas that appeal should be confined solely to questions of

law and not of law and fact. Ohio is one of the very few jurisdictions in the country, in fact internationally, where law and fact may be considered by a court.

Another objection is that the cases are not speedily brought to trial even though the law specifically requires that such cases be given priority for hearings. It is not unusual to have several thousand compensation cases, some of which have lain dormant in the courts for as long as 5 years awaiting a trial. That being the case, a claimant depending upon compensation benefits is seriously inconvenienced by the neglect and delay to promptly hear his case. This certainly was not the intent or the spirit of the law.

Another area in which our state could re-examine an existing law is Section 4123.651 of the Revised Code which provides for the free choice by an injured or disabled employee to select such licensed physician as he may desire to have serve him as well as medical, surgical, nursing and hospital services and attention.

While it is admitted that every person inherently has the right under our system of government to choose such services, I think it must also equally be recognized that when the state provides these benefits to an injured or disabled workman, that the society which it represents has a right to see that such injured or disabled person be afforded the best possible service in this respect so that he may again become a useful member of that society and that it should at least have the power to see to it that the services he needs are adequate and proper. Medicine today is divided into a number of specialties and a man with a back injury may be better treated by a competent orthopedist than by one who specializes in pediatrics.

Our law should be amended to conform to the laws of other jurisdictions where the selection of physicians is limited to those physicians who specialize if a specialist is needed and who will permit the injured employee, if he does not have his own specialist who desires to serve him, to select someone from a list. The Medical Association of the county or state should be required to furnish such lists.

Obviously no pension benefits or medical, etc. benefits can be paid unless there is a fund available out of which such payments can be made. Rate making is a highly complex matter involving the assembling of considerable information. Every employer is assigned one or more manual numbers which identify the degree of risk or hazard to which his employees are subjected. Ohio has had more than 50 years of experience available to it in evaluating the basis upon which its rates for premiums are predicated. Section 4123.34, sub-section (B) bases this experience upon the accident record of each employer on the experience he has had during the last 5 calendar years. To arrive at a more realistic rate making basis, this section of the law, 4123.34 sub-sec-

tion (B) of the Revised Code, should be amended to read from the first day of July to the first day of January and should eliminate the most recent calendar year from the latest 5 for the purpose of rate making.

The rapid strides made in our industrial development have made the electronic data computer a virtual necessity. The wealth of data which is necessary to effectively administer a system of workmen's compensation means either a resort to a computer which operation admittedly is expensive, or the more costly operation of adding hundreds and hundreds more clerical employees to compile the information and this results in unwarranted delays which are unjustified. In contrast to private insurance companies, the premiums which are assessed under our Ohio law and the monies collected are put into a State Insurance Fund which is a trust fund and cannot be used for any other purpose except the paying of benefits. For the purpose of defraying administrative costs, an annual assessment based on the amount of payroll of each contributing employer is levied but such a basis is neither fair nor equitable for the simple reason that to keep the records required by law and by good business practice costs considerable effort in time, labor, material, housing, etc. not only to process a claim but to record the payrolls of employers, the experience of such employers and the accounting necessary. If an employer has only a very limited payroll of only a few hundred or a few thousand dollars and an equally low premium rate, then the cost of the record keeping involved not infrequently exceeds the amount that such employer pays in premium. Accordingly, Legislation should be enacted to provide for a minimum premium fee as well as a minimum administrative cost assessment fee.

Our compensation laws encourage the employment of handicapped persons. (Sec. 4123.343 R. C.) This encouragement is both wise and humane. However, as the law is presently written the benefits inure not so much to the employee as to the employer. Its weakness is that it has permitted an exploitation that allows some employers to reap an undue and unjust return of premium payments. Practically all of the laws relating to filings of applications contain a statutory time limitation. Thus the actuarial section under the present law may well find it necessary to adjust employers premium payments for 10 years or more. The amount of work necessary to effect such adjustments is staggering. It involves research and review, evaluation of medical testimony which because of the time lag becomes highly unreliable. It intrudes another factor entered into the rating for premiums for these retroactive premium adjustments. What is recommended is that instead of all of the benefits that are to be paid out of the surplus fund, only such portion not to exceed 50% be paid out of the surplus fund; that in all cases of injury or death, applications for a determination of what shall be paid out of the surplus fund to the employers shall be forever barred unless filed

within one year after injury or death; and in all occupational disease cases the same shall be barred unless filed within one year after the disability arose from the disease or within such longer period as does not exceed six months after diagnosis of occupational disease by a licensed physician.

Section 4123.411 of the Revised Code provides for an assessment on the full payrolls of every amenable employer of 3¢ per hundred dollars for providing additional compensation benefits to that class of permanent total disability cases whose incomes at the time of injury were below that provided for by sections 4123.412 to 4123.418 inclusive. This section should be amended to provide that this assessment be levied at the same time the premiums are due, namely twice a year, instead of once, and that the assessment be predicated upon the same payroll that the premium charge is based. Such a change would not only save the bureau a great deal of clerical and postage expense, but would save the employers who must make the returns infinitely more. There is also proposed an amendment to Section 4123.413 of the Revised Code that would deny a permanent total disability claimant the right to receive compensation out of the Disabled Workmen's Relief Fund if he had other income from other sources that would total more than \$40.25 per week when added to his workmen's compensation benefits. Too, when such a claimant moves out of the state, such supplemental benefits should be denied him.

No claimant should be permitted to have more than one determination as to percentage of permanent partial disability. It is presently a fruitful source of litigation to continually attempt to secure additional percentage awards. This is a form of harassment which in many cases is the motivation for laying the background or foundation for a lump sum settlement. It is indeed rare that a lump sum settlement inures to the benefit of a claimant. Greater good would result if this power were taken out of the law, since experience shows that a claimant receiving a bi-weekly check is far better off than if he receives a lump sum based upon an award, which is always substantially discounted. It is not just pension payments that are wiped out, but the other benefits, such as medical, hospital and drug services which become the burden of the claimant and which he can usually ill afford to pay. No lump sum payments should be permitted, which proportionately reduce the pension payments and generally go to pay counsel fees.

Then, too, payments for loss of vision should be based upon the corrected rather than the uncorrected loss. In a great number of cases visual loss can be corrected with glasses or contact lenses.

More emphasis should be placed upon rehabilitation. Either the Commission or the Administrator should have the power to order an injured worker to be referred to an accredited rehabilitation center. If the

rehabilitation process, psychiatrists tell us, is long delayed, that is as much as 6 months after injury, the possibility of retraining is only 50% successful and if it is deferred as much as 18 months there is little or no chance that it will be possible to restore an injured workman as a useful member of society. There is something debilitating to the will to achieve that sets in with the receipt of "rocking chair money."

The present law, Section 4123.52 of the Revised Code, rests in the Industrial Commission continuing jurisdiction over each case and empowers the commission to make such modification in respect to former findings or orders as in its opinion it deems justified. This is a sound and wise provision, however, the law does provide a limitation in that it prohibits such modification, change or finding with respect to disability, compensation, dependency, or benefits, after ten years from the last payment made of compensation or benefits awarded on account of injury or death, or ten years after the injury occurred in those cases where no compensation was awarded. This is entirely too great a time lag and the time period for making such orders should be reduced from ten years to five years. Any increase of disability would certainly show up after the lapse of five years as well as ten after a last payment was made. The added benefit would, of course, be the opportunity for the Bureau of Workmen's Compensation to destroy thousands and thousands of files which are taking up valuable space.

The state insurance fund which is presently valued at approximately two-thirds of a billion dollars may be invested in those securities provided for by Sections 4123.44 and 4123.442 of the Revised Code. Today these funds are invested mainly in United States government bonds, and of federal agencies guaranteed by the federal government short term government certificates and corporate obligations that meet the requirements of the statutes. The fund, not to exceed 5% of the total value of all its investments, may be invested in "productive real estate within the state." By all means since the business of administering workmen's compensation is so vast, the Bureau of Workmen's Compensation, the Industrial Commission and the Columbus District Office and the Regional Board of Review should be housed in a separate facility in Columbus and such funds to purchase a site, erect a building or buildings and equip the same should be taken from the fund. Presently the units are poorly housed, in as many as six different buildings. The rents which these units pay out would more than pay an adequate return on the amounts taken from the fund, insure operating efficiencies and in general provide a far better atmosphere and working conditions contrasted with the cramped quarters in which the bureau and commission are endeavoring to carry on. The present law on investments should be amended so that the administrator with the approval of the industrial commission could invest such monies out of the state insurance fund as

are needed to provide these quarters and to put the land, building, equipment, maintenance and operation thereof under the control of the administrator.

While these are just a partial list of changes that should be made in the acts relating to workmen's compensation, perhaps the most significant thing that should be done is the making of a thorough study of section by section of each law to determine where there is overlapping authority, and where there is confusion as to the duties of each of the separate political entities which deal with the subject. Too often we see in the statutes "the commission shall" whereas by the establishment of the bureau, it is meant "the administrator shall." The boards of review, if they are to be retained and there is no valid reason for their retention, as well as the industrial commission should be appellate bodies. They should rule on facts and law, certainly with finality on facts, and courts should rule on questions of law only. In this way speedier determinations will be made. Since the common law defenses of contributory negligence, assumption of risk and the fellow servant rule are done away with in workmen's compensation cases and no awards are made for pain and suffering, it seems perfectly clear that the administrative bodies, provided the memberships thereon are carefully made, should be able to fairly and honestly and speedily determine whether benefits should be bestowed.