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Workmen's Compensation Denied: A Reply

Harold Ticktin*

A reader of the January 1968 Symposium on Workmen's Compensation in the Cleveland-Marshall Law Review would be badly misled if he took the titles of the two articles by Messrs. Krise and Keller at face value. While purportedly about appeals and recommended changes in the Ohio Workmen's Compensation law, these articles are in fact attacks on attorneys who represent claimants in workmen's compensation controversies.

Indeed, one may scan both articles and find little or no reference to any problems facing the injured worker who puts his claim to the Industrial Commission for decision. One might have expected, for example, discussion of the burden of proof, the nature of evidence required or at the very least some discussion of the jurisdictional problems involved in workmen's compensation claims. Instead, the reader is treated to what is in effect a class libel.

Mr. Krise, for his part, starts out by charging the attorney in workmen's compensation claims with having in the past deliberately prepared an inadequate case solely for the purpose of obtaining an appeal to court in order "increase the chargeable fee." Aside from the profound ethical implication raised by this statement, anyone in the practice of law knows that appeals to court are both long and hazardous. For years it has been a fact that only 1% of the amount of money disbursed by the Industrial Commission has been in the form of court settlements or judgments.²

Moreover, there have been periods in the past when no fee was chargeable to the losing party in court, yet there is no evidence that court appeals slackened to any degree during such periods.³ Such a charge casually stated by a man responsible for dealing impartially with the very group he is castigating, probably tells more about the man himself than about the victim of his venom. The trial of any case in court, especially industrial cases where the maximum fee for court work is $750,⁴ is simply uneconomic. It is done solely to achieve rights alleged

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3 Id., Reports, 1955-1959. In that period § 4123.519 of the Ohio Revised Code was amended in such a manner as to prevent payment of attorney's fees for court work. The docket remained the same.

4 Ohio Rev. Code, § 4123.519.
to exist on behalf of clients. Actually, it is as difficult to get lawyers to try these cases as it is to try any other type, because of the press of office work and administrative hearings.6

Throughout the Krise article there is a consistent studied bias against the claimant and his counsel. Sometimes, though unconsciously, this bias reaches the point of absurdity. We read:

It is of financial importance for the claimant to attempt to have his claim allowed and compensation awarded at any of the appeal steps, forcing the employer to perfect the appeal to court since the law provides for the payment of such compensation pending a final order on the appeal.6

Consider how perfectly ludicrous this is upon close examination. From this statement one concludes that the claimant’s interest in filing a claim is primarily to force his employer to appeal—of course, this is ridiculous.

It is of “financial importance” for the claimant to win his case for the very simple and obvious reason that his injury has caused him a financial loss. The purpose of his victory is not the negative result of forcing an appeal, but to restore his loss. This is indeed the stated purpose of the workmen’s compensation law, as Mr. Krise has apparently forgotten. In effect, this personnel department view holds that the workmen’s compensation law is about “employers’ appeals.” It is not. The law is about workers’ injuries and their benefits.

After disposing of the “presumed object” of the law—the injured workman—Mr. Krise presents a picture of the attorney in terms that only Charles Dicken with his obsessive hatred of lawyers could match. For Krise, the compensation attorney and his accomplices (that portion of the medical profession which does not testify for employers) are in a word, crooks. The attorney is rapacious and cunning; juries are composed of bumptish dolts easily led by his wily tactics.7 His sense of justice is clearly distorted because he insists on using only medical testimony favorable to his side.8 Counsel’s towering achievement appears to be the subversion of the American Board of Neurology and Psychiatry. With the latter, the claimant’s attorney succeeded in erecting malingering into a category of compensable disease.9

Mr. Krise by his views succeeds in reversing, for himself, the whole tide of modern medicine. He writes off mental illness as a mere figment of the attorney’s imagination. According to this cracker barrel approach,

5 Since 1955, § 4123.519 has provided for a de novo trial of all issues. Hence, the trial of a workmen’s compensation case in court is as formidable as at least the average personal injury case.
6 Krise, op. cit. supra note 1, at 118.
7 Id. at 119.
8 Id.
9 Id. at 120.
the whole science of psychiatry is just a fraud. This reminds one of a witch doctor watching a surgeon perform an appendectomy—he sees it before his eyes, but he is sure it cannot be so.

Above all, claimant's counsel is held responsible for the perversion of the procedural process. The author attacks the de novo procedure on the ground that the appeal to court allows for additional allegations not made before the Industrial Commission.

Without proof, without citation of authority or even a lone statistic, a whole class of cases is consigned to iniquity "through the amendment of the petition by claimant's lawyers after the proof has been submitted." Krise states categorically that "such cases are generally fraudulent and steps should be taken to eliminate this practice." Would the author dispense with the time honored pleadings procedure and simply prohibit such amendments? As any fledgling lawyer knows, pleading and proof are two quite different items; the general theory of the law is that a pleading is a mere allegation and cannot become a judicial fact until supported by probative evidence. Krise obviously subscribes to a kind of "devil" conspiratorial theory of law. Since the claimant's attorney is endowed with superhuman powers—in Mr. Krise's view—he need only allege a variant fact and it is perforce so.

This type of thinking is nothing less than applied paranoia. Obviously, such variances in pleading can be met by defendant's counsel (for the commission or the employer) via the traditional rules of evidence, i.e., prior allegations, inconsistent statements, business records. Mr. Krise is nothing less than McCarthyian. He might agree with what the claimant has to say, he would just deny him the right to say it.

Turning to the view of trial practice set forth in the same article, an attorney is almost at a loss to deal with the extreme views therein stated. After first complaining that blue ribbon juries are not used in workmen's compensation cases and that lawyers with large practices know many physicians, Krise says:

Little do the jurors know these physicians are sometimes used by claimants lawyers because of their favorable testimony.

Such a statement can be made only from extreme naivete or prejudice. The first tenet of trial practice in an advocacy system imposes upon the trial lawyer the obligation to present only that testimony favorable to his side. Anything else would be a violation of good sense, to say nothing of the canons of ethics.

One is entitled to ask, incidentally, what of the practice of counsel for the employer? Would any experienced corporate counsel deliberate-

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10 Id. at 119.
11 Id.
12 Id.
13 Id.
ly present the testimony of a physician whom he knew to be unfavorable to his cause? Indeed, there is no mention in the entire article of the notorious position of "company doctors," on the payroll of corporations and regularly presenting testimony inimical to the claimant.

To be perfectly candid, the testimony of physicians and for that matter of all experts tends to be favorable to the side employing them. This is a fact of court room life.\textsuperscript{14} It is invited by the nature of the advocacy process. Apparently Mr. Krise would deny the benefits of this procedure only to the claimant. For if the only problem of proof confronting the attorney is "the knowledge of the source" that knowledge is obviously available equally to both sides. It is true that medical testimony can always be found on both sides of any question. The proper test of such proof lies with the expertise of the advocate, not in morally anathematizing one side or the other.

There is one subject discussed in the Krise article with which the present writer agrees. He suggests that in Ohio there may be a conflict between the Bureau of Workmen's Compensation's role as an insurance depository and as the employer of the persons charged with ordering disbursements from the fund.\textsuperscript{15} That is to say the function of fact decider and bursar should not be lodged in the same individual or body of individuals. In most other states the party financially responsible is an insurance company. The deciders of facts are not employed by these companies but by the independent workmen's compensation board charged with the administration of the workmen's compensation law. When a referee in those states issues an order allowing compensation, this becomes an order to the insurance company to pay. This type of separation and independence is totally lacking in Ohio. The state fund is too often seen as a trust that must be kept safe from predators.\textsuperscript{16} As

\textsuperscript{14} That medical experts have disagreed violently was well known back in the 19th century. Herman Melville's \textit{Billy Budd} contains the following comment on the trial of that ill-fated foretopman.

\textbf{Lawyers, Experts, Clergy—An Episode}

By the way, can it be the phenomenon, disowned or at least concealed, that in some criminal cases puzzles the courts? For this cause have our juries at times not only to endure the prolonged contentions of lawyers with their fees, but also the yet more perplexing strife of the medical experts with theirs? —But why leave it to them? Why not subpoena as well the clerical proficients? Their vocation bringing them into peculiar contact with so many human beings, and sometimes in their least guarded hour, in interviews very much more confidential than those of physician and patient. This would seem to qualify them to know something about those intricacies involved in the question of moral responsibility; whether in a given case, say, the crime proceeded from mania in the brain or rabies of the heart. As to any differences among themselves these clerical proficients might develop on the stand, these could hardly be greater than the direct contradictions exchanged between the remunerated medical experts. Herman Melville, \textit{Billy Budd}, at 39-40.

\textsuperscript{15} Krise, op. cit. \textit{supra} note 1, at 121.

\textsuperscript{16} This attitude has also characterized the Ohio judiciary almost from the inception of workmen's compensation. Indeed, if Marshall McCluhan is correct in attributing

\begin{quote}
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Mr. Krise indicates, true independence of judgment is not produced by such a system. To duplicate the quasi-judicial attitude which obtains elsewhere, it is probably necessary to provide a totally separate source at least for the salaries of hearing officers.\(^\text{17}\)

The subject of the independence of the decider of facts and law is also discussed and recommendations are made in Mr. Keller's article. He would have specially trained hearing officers replace the present Boards of Review, thus repeating the 1964 recommendation of the Council for the reorganization of State Government that the workmen's compensation Boards of Review be abolished. Before discussing the unique place of the Board of Review (BOR), the legislative scheme of appeals should be set out in full.

Basically, there are three steps in workmen's compensation appeals prior to court. Upon the filing of the claim a file is made up and the first hearing must be before a deputy administrator of the Bureau of Workmen's Compensation. This hearing usually takes place in the claimant's county of residence. Either the claimant or the employer may appeal the decision to the local regional board of review which, with some exceptions, covers a multi county area.\(^\text{18}\) Again, these hearings take place at or near the claimant's place of residence. If either party is dissatisfied with the board's decision, an appeal may be made to the Industrial Commission in Columbus. The commission, however, is not required to grant a hearing in every appeal.\(^\text{19}\)

At each level of hearing the decisions differ in small but decidedly important ways. Probably because of the onerous caseload, the administrator's decisions tend to be narrow in scope. That is, the administrator is conservative by the very nature of its structure. Hence, appeals on serious issues are often taken to the BOR by both sides.

Where the hearing before the administrator is conducted by a single deputy, at the Board of Review level the case comes before a three man board, one of whose members must be an attorney. The board is chosen specifically with regard to weighting it evenly among labor, management and the public. Each member represents one of these three interests.\(^\text{20}\)

Paradoxically, though the board's appointments are political in origin and deputy administrators are under civil service, the boards have

\(^\text{17}\) Op. cit. supra note 1, at 121.
\(^\text{18}\) § 4123.14, O.R.C.
\(^\text{19}\) Id., § 4123.516.
\(^\text{20}\) Id., § 4123.14.
consistently shown a greater degree of independence in their decisions. This is probably so because the education and experience of the board members is broader and more closely related to the local community than is the administrator which often seems tied hand and foot by the bureaucracy. Whatever the reason, the boards are able to exercise a more flexible and objective judgment than either the administrator or the commission.

In this sense the Board of Review is a kind of hybrid organization between the administrator and the industrial commission, belonging to neither financially, or one might say, spiritually. Perhaps this is the reason why the boards of review have regularly come under such fire before the legislature by both the administrator and the industrial commission. These latter probably see the boards as encroaching upon their power.

No Lawyer well acquainted with workmen’s compensation procedure could deny that the only place where witnesses may be heard, expert testimony offered and legal argument presented to a listening ear is before the board of review. Because of the broader nature of the hearing, more and better evidence is usually presented to the board. Often one refrains from presenting his best evidence to an administrator whose decision is a foregone conclusion regardless of the facts presented. The board also seems less responsive to political vagaries. One can say that without these independent boards the claimant would be faced with a veritable monolith because there is little to choose in terms of scope and opportunity for hearing between the administrator and the commission.

The Industrial Commission tends to function as a purely appellate body, if only for the reason that usually two hearings on the same issues have already been held when the claim arrives before it. Few facts are investigated and generally only the application of the law is considered. This necessarily narrows the ambit of the commission’s decision. There is probably no way around this because the hearings are held in the state capitol and it is difficult to transport witnesses and doctors for such occasions.

In view of the statutory scheme, Mr. Keller’s call for specially trained hearing officers to replace the board is highly dubious. Unless some method could be found to absolutely assure the removal of such a hearing officer from political influence, the present system of informal, wide ranging hearings before a three man board that is both local and relatively independent should be retained. A very real danger exists that Keller’s stricture on impartiality would apply to a single hearing officer as opposed to a politically weighted and therefore neutral board. Speaking as a claimant’s lawyer, I would fear greatly that the suggested hearing officer would simply be the administrator in another form.
With reference to certain other specific changes recommended by Mr. Keller, it should be noted that these correspond precisely to the defeated amendments to the workmen's compensation law offered in the 1967 legislative session. While some of these suggestions may be beneficial, others lay bare a callous indifference to human suffering all too often evinced by those charged with the amelioration of this suffering.

For example, Keller proposes that a claimant be paid for loss of vision only when such loss cannot be corrected with glasses. Whatever else this implies, it at least means that the injured worker rises no higher than the machine which he operates. This might be called the "body shop" theory of compensation. A man sustains a severe laceration of his cornea for which he is hospitalized and which causes him to lose work for a period for 4 to 6 months. During this time his bills continue, but he is compensated only to the extent of 50 or 60 dollars per week regardless of what he was earning prior to the injury. He is then to be placed in the body shop so that his headlights can be repaired; from there he is sent back to work without a dollar of compensation for his perhaps 70 to 80 per cent loss of vision. His permanent disability would not be compensated simply because, while at work, that loss can be compensated by glasses.

Whether viewed from a financial or humanistic standpoint this proposal is shocking. It represents the extreme application of the premise that workmen's compensation is purely to restore some part of the wage loss due to the injury. The idea that a man's eye should be treated like a defective headlight belongs more properly in a "1984" approach to social problems than in modern social legislation which ought to at least try to strike a balance between financial considerations and human suffering.

Additionally, Mr. Keller would dispose of one of the most hard won benefits achieved by injured workmen—that is, the right to choose his own doctor. Keller justifies this suppression with the bland abstraction of "the best medical care possible," whether the claimant likes it or not. If medicine were a true science and human beings were not touchy about who lays hands upon them this would be a very fine suggestion. However, the very essence of the physician-patient relationship is its intimacy and rapport. To be told that the only consideration of treatment is the judgment of a bureaucrat is again to treat a man like a machine.

As does his colleague in the article previously discussed, Mr. Keller gets himself into some difficult contradictions. He suggests that the present statute allowing the claim to remain open for at least 10 years be

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21 Keller, op. cit. supra note 1 at 127.
22 Id. at 125.
23 Id. at 128.
amended to provide for half that time, or five years.\textsuperscript{24} He says: "Any increase of disability would certainly show up after the lapse of five years. . . ." \textsuperscript{25} This may well be so, however, Mr. Keller would not allow payment for any such increase because he has previously suggested that there should only be \textit{one} determination of permanent disability.\textsuperscript{26} It is extremely important to note that the industrial commission decision on the extent of permanent partial disability is not appealable to court.\textsuperscript{27} This means that any decision, whether good, bad, or indifferent, would then become res judicata, unappealable and unmodifiable. Mr. Keller must be reading his \textit{Kaffka}. Given the potentially narrow scope possible in every area of the workmen's compensation law, it is entirely possible for an erroneous decision to be made on the decisively important issue of the extent of disability. Though admitting that disability may increase, the writer would hold the commission powerless to either correct its error or recognize the new increment of disability. This is nothing less than an appeal for omnipotence. The sovereign, in the shape of the Administrator of the Bureau of Workmen's Compensation, would be legally deemed incapable of error. No official in a democratic society can ask or deserve such power.

It is lamentable that two men with such long experience in this field should have no other recommendations to make than those set forth in these articles.

\textsuperscript{24} The statute involved, § 4123.52, was amended by the 1967 session of the legislation to provide for a reduced time period during which claims may remain open, but not so drastic a change as suggested by Mr. Keller.

\textsuperscript{25} Keller, \textit{op. cit. supra} note 1, at 128.

\textsuperscript{26} \textit{Id.} at 127.

\textsuperscript{27} § 4123.519 specifically excludes from the right to appeal to the courts in cases involving: (1) Extent of permanent partial disability; and (2) Occupational disease claims. Szekely v. Young, 174 Ohio St. 213 (1963).