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The Administration of Workers' Compensation

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Introduction

Too often comprehensive studies of workers' compensation programs conclude (as will this paper) with the recommendation that workers' compensation programs should be better administered. Certainly no one will quarrel with that, but just as certainly it is a relatively weak recommendation. I am as guilty as anyone, and in a study comparing programs in 10 states I came up with the remarkable conclusion that some states are better administered than others.¹ Yet there is hardly any way to account for the superior performance of the Wisconsin program other than to say that its program has been administered in an active or aggressive manner.

The National Commission on State Workmen's Compensation Laws has had a modicum of success in persuading states to increase benefits and broaden coverage. However, in areas where it is difficult to devise quantitative standards, its success has been less well documented. This is not surprising. In so many aspects of workers' compensation, I have the feeling that the problem is not the law, but the way the law is administered. Unfortunately, we do not have much of a clue as to what an appropriate and proper system of administra-
tion of the law ought to be, or any objective way in which to judge whether one law is better administered than another.

At the outset, I might point out that the problem is relatively simple in some states when there does not seem to be any administrative mechanism whatsoever. I am not thinking only of a state such as Louisiana which until recently had no administrative agency of any sort, or states such as Alabama or New Mexico where courts play a major role in the administration of the workers' compensation act. I am thinking of other states which have administrative agencies whose sole concern seems to be the adjudication of disputes.

In most jurisdictions, administration of the act is entrusted to a workers' compensation board or commission. The idea of the disinterested public-spirited commission to administer these laws was a popular idea in the progressive era when workers' compensation acts first were passed. Some 21 jurisdictions have a single administrator, sometimes in conjunction with an appeal board, sometimes housed within a Department of Labor and Industry or some other department within the state government.

I do not believe that the organizational structure of the workers' compensation program is the crucial item to be looked at when analyzing problems of administration. It is the functions which are discharged and the manner in which they are carried out.

**The National Commission's Recommendations**

Everyone who has looked at this problem agrees that administration is a crucial variable in judging the program. The National Commission on State Workmen's Compensation Laws stated that the basic objectives of the system, i.e., broad coverage, substantial protection against interruption of income, provision for sufficient medical care and
rehabilitation services, and the encouragement of safety, are dependent on an equally important fifth objective: "An effective system for the delivery of the benefits and services." The National Commission recognized that in the beginning the system was thought to be self-administering. It was expected that with the elimination of the fault concept and the prescription of benefits by statute, employees would be able to protect their interests without external assistance. We now know that hope for self-administration was overly optimistic. Few would argue with the National Commission's view that litigation might have been less frequent had state agencies provided enough positive assistance to workers who are unable by themselves to deal with the complexities of the law and that the void has been filled by an active plaintiffs' bar.

The Commission viewed the state agencies as having six primary administrative obligations:

1. The agency must take the initiative in administering the law.

2. It must continually review the performance of the program and request state legislatures amend the law to meet the changing needs of the program.

3. An agency must advise workers of their rights and obligations under the law and assure that they receive the benefits to which they are entitled.

4. Agencies should apprise employers and carriers of their obligations and rights under the law. Other parties in the delivery system, including physicians and attorneys, should also be informed of their obligations and privileges.

5. The agencies should assist in a voluntary and informal resolution of issues.
6. The agency must adjudicate claims which cannot be resolved voluntarily.

In the eyes of the Commission, the key to an effective delivery system is the agency's active pursuit of these administrative obligations. "The thrust of the system should be to create an ambience of protection and mediation rather than adjudication." The Commission delved into the processing of workers' compensation claims, making recommendations on reports, organizational structure, attorneys' fees, methods of closing cases, supervision of medical care, and security arrangements, among other aspects. I do not wish to dwell on administrative organization or structure or even the processing of cases. I believe that the crucial variable is the business of creating the ambience and persuading the agency to pursue an active role.

The Historical Neglect of Administration

It is confusing to discuss administration because of the lack of information, and frustrating because nothing seems to change in spite of continual detailed inquiries about the nature and quality of administration.

As an example, let me excerpt from a fine inquiry into the problem of administration. It was noted that of three recent investigations, all agreed that the system ought to have administrative hearings with informal procedures, and judicial review upon issues of law only. Two investigations urged control of attorneys' fees and that compensation boards be equipped with a competent medical staff to aid in the adjudication of compensation claims. One recommended impartial testimony with respect to the extent of disability. All made recommendations for a more adequate standardization of the disability schedules. The study concluded that there is substantial agreement as to many of the fundamental problems of workers' compensation. What is frustrating is that this excellent study by Walter Dodd was made in 1936.
These same kinds of recommendations have been cited in conferences, investigating reports, and academic discussions since then. But if things do not change in a half century, it may be that the present system meets the needs of the wider community that supports the system. We must be very humble about making any recommendations for changes in workers' compensation administration.

Yet when we look at the essence of the administrative problem and try to state it in the simplest possible way, it is that workers' compensation is fundamentally a social insurance program with compulsory coverage. Neither workers nor employers have choices in these matters. Although it may not be self-administering in the sense that the earliest proponents of the law believed, nonetheless, the principal rationale for the program is that it would minimize conflict. The concept of liability without fault was to substitute a swift, certain and assured remedy for litigation endemic to tort liability. To assure that objective requires some administrative functions.

_The Workers' Compensation Agency Does Not Pay Claims_

What are the essential functions that a workers' compensation administration ought to perform? Before we can answer that question it is well to recognize that the administrative agency usually is not responsible for the payment of claims. Common to all systems of cash disability transfers, be they tort cases, workers' compensation cases, or social security disability insurance cases, is the payment of claims. What is different in workers' compensation is that the administration of the claims management function is the responsibility of the insurer, whether it is a private insurance company, an exclusive state fund, a competitive state fund, or the firm itself if it is self-insured. Unlike the Social Security Administration, the workers' compensation agency does
not issue any benefit checks, does not pay any benefits, nor does it pay treating physicians or any other provider of services. Yet there comes a time, at different stages of the claims process, depending on the jurisdiction, when the workers' compensation agency is charged with responsibility for administering the claims procedure. At these times the agency's responsibilities are substantial.

**The Public Interest in Administration**

It is probably important to pin down why this is so. The patient suing his physician in a malpractice suit can settle for any amount that is agreeable to him, his doctor, and the insurance carrier. If dissatisfied with a proffered settlement, he can pursue his remedies through the court system. No state agency will interfere with a voluntary settlement on the grounds that it is not sufficient. At the opposite end of the administrative spectrum, a person seeking social security disability insurance benefits will receive a benefit amount determined in accordance with his wages as specified in the statute. Valid workers' compensation claims are paid by the insurance carrier in accordance with the statutes, but the exact amounts to be paid, especially in the case of permanent disabilities, is not certain. There is wide discretion in the system which impedes the objective of certainty, and unlike the tort settlement, the amount should not be left to the parties alone. The whole theory of workers' compensation argues that there is a direct public interest in the amount of compensation and the manner and method in which it is paid to those injured at work. It is the administrative obligation of the agency to provide guidance as to the type and amount of such payments, the conditions under which they are to be made, and the medical and rehabilitation services to be provided. It is the very nature of a compulsory social insurance program that such matters are not left to the parties.
The Basic Administrative Functions

Once we allocate the claims management function to the insurer, the functions performed by the agency in processing the workers' compensation cases can be grouped under four separate headings. These are:

1. Recordkeeping
2. Monitoring
3. Evaluation
4. Adjudication

The recordkeeping function is present in all agencies. Each workers' compensation case begins with a report of an injury or disease to the employer, a copy of which is sent to the carrier and eventually to the agency. Each state requires some subsequent reporting about the individual case and its eventual disposition. States will vary greatly as to the kinds of case records the agencies maintain and the diligence with which administrators will follow up requests for reports that do not come to them in the normal course of events. However logical it may be to proclaim a public interest in administrative matters, the total extent of some agencies' involvement may be in recording and filing what the parties themselves have done voluntarily.

Some, and possibly most, states go further and are concerned with the monitoring function. The state agency is concerned with the equity and adequacy of the payments made voluntarily by the insurance carrier. The agency may also be concerned with the worker's rehabilitation in cases where his return to work is delayed. The agency may police the carrier's activities designed to maximize the probability of the worker's return to his job. The monitoring function may involve procedures for checking on the carrier's promptness of payment, or adequacy of general performance, advising or penalizing carriers if their performance falls short.
A third group of procedures has to do with what may be termed evaluation of the workers' permanent disability. Some agencies have prescribed procedures to evaluate, or to aid the parties in evaluating, the extent of the claimant's disability. In some states, the agency itself will take on the responsibility of determining the extent of disability. In other states, the agencies will do almost nothing in this area; the parties reach some agreement, and if they fail to do so, they resort to the contested procedures.

The fourth function is the adjudication function which is universally undertaken by the state agencies. Each agency has procedures to adjudicate disputes between the parties.

Diversity Among the Three States

What has remained a hallmark in workers' compensation has been the diversity among the various jurisdictions in how they go about any one of their tasks. Nowhere is this better illustrated than in the case of the administration of workers' compensation in the neighboring states of New Jersey, New York, and Connecticut.

As far as structure is concerned, in New Jersey we have no workers' compensation board or commission. A supervising judge has chief administrative responsibility for the administration of the law. The agency employs few, if any, professionals, other than the judges of compensation and persons who participate in one capacity or another in the adjudication process. There is no board of appeals within the state. Appeals from compensation judges' decisions are to the state courts. In contrast, the administration in New York is in the hands of a workers' compensation board whose chairman bears responsibility for administrative functions. In Connecticut, regionalism seems to be the key.

As noted in the Connecticut annual report, the workers' compensation law is administered by a nine-member com-
mission with exclusive jurisdiction to adjudicate disputes under that law. The chairman of the commission has statewide jurisdiction. Each of the seven district commissioners has responsibility over disputes in an area of the state, and the remaining commissioner-at-large is assigned by the chairman to act in any district where needed.

When it comes to recordkeeping functions, it is safe to say that no one of the states does a complete job. In all states, the case begins with a report of injury to the employer. A copy is sent to the carrier, and eventually to the agency. Each state does require subsequent reporting on the case. In New Jersey, however, very little is done with these records, other than to report annually on case activity. Almost nothing is done now in analyzing the first reports of injury. Few administrative statistics are kept on the agency activities. New York produces a rather complete set of information about closed cases and some analysis of the first reports of injury. In Connecticut, records as to the number of voluntary agreements, informal hearings, formal hearings and appeals processed by the Compensation Review Division are kept. No analysis of these case statistics is done.

The monitoring function also differs in each of these states. In New Jersey, from time to time, there has been some review of the so-called direct settlements where the worker and the employer reach voluntary agreement as to the amounts of compensation to be paid. If, however, some discrepancy was found in that type of settlement, the procedure was to advise the worker of his rights and have him file a formal complaint. In these instances, the matter becomes a contested case. In sharp contrast, New York, at least on a formal basis, has a hearing system in which all cases have the opportunity to have a hearing before the matter is closed out. In Connecticut, lack of administrative personnel prevents any significant monitoring activity. The information for recordkeeping and monitoring purposes may
be available in the future. Public Law 81-407 established a Statistical Division effective February 1, 1982, but only in the fiscal year ending June 30, 1983 were start-up funds provided to implement that legislation. Funds were also available beginning July 1, 1983 to implement provisions of the law creating a Division of Workers' Education. Presumably that division would undertake some monitoring functions.

As far as evaluation procedures are concerned, none of these states has prescribed procedures to evaluate, or to aid the parties in evaluating the extent of their obligations for payment for permanent disabilities. This can possibly best be seen in the area of permanent partial disability. As pointed out above, in some states the agency takes on the responsibility for determining the extent of the permanent partial disabilities. That is not the case in New Jersey. Nothing in the uncontested procedures aids the parties in determining the amounts that are due. Consequently, very few permanent partial disability cases are closed out in New Jersey, except at the formal level or at steps immediately preceding the formal level. In New York, hearings are held in most permanent partial cases whether scheduled or nonscheduled. Connecticut follows the New Jersey pattern with extensive use of informal and formal hearings to dispose of these matters.

All three states devote major portions of their administrative energies to the adjudication function. Each of these states has a type of substitute court system where workers may have their cases heard and decided with the active participation of the plaintiffs' and defense bar.

Are the systems as they exist in these three states optimal? Are they the most efficient and equitable systems that could be devised? Do those clients who seek out representation from the plaintiffs' bar do better than they would otherwise? Is the fact that the normal procedure is to resort to an at-
torney in the event of permanent partial or permanent total disability the wisest use of scarce resources?

**Using the Tri-State Conference to Improve Administration**

This is the first of what I hope will be a series of annual conferences in which interested persons in these three states convene to discuss workers' compensation problems to their mutual benefit. I am a realist. I do not expect quick results. I know that these administrative problems have existed since the inception of the program, and I do not expect that improvements will be made overnight.

One possible purpose of these meetings is to initiate dialogue and to begin discussions about matters of common concern. Perhaps this first conference might be thought of as a consciousness-raising session. I would raise the question of whether it makes any sense for each of these states to begin to think of improving their recordkeeping, monitoring, and evaluation functions. If I were to plead for improvements in the administrative area, I would first plead for improvements in the data and information systems. I believe data systems are useful. As an example, I would like to be able to compare the litigiousness of New York, Connecticut and New Jersey on some valid basis. Yet I find myself defeated by the fact that the data systems are not complete in any of the states, and they are certainly not comparable.

Take another example: states are presumed to be laboratories of experiment. In these states we have three different ways of administering different laws. Which is more efficacious in the prevention of accidents and diseases at the workplace? I submit that the data systems currently in place do not come close to providing an answer.

But something more than data systems is involved. We need better evaluation and monitoring to decrease the pro-
portion of contested cases. Nothing I have said, nor anything I wish to say, is meant to denigrate the contributions of the plaintiffs' bar. In the same vein as saying "Some of my best friends are members of a particular religion," I say that were I injured at work today, I would find myself a good lawyer before I would move one inch in the State of New Jersey. But as I say it, I resent the fact that it is necessary to resort to representation. In the majority of cases where compensability is admitted, why cannot the state devise an evaluation system such that a claimant would know in a particular case what the obligations of the carrier were? Several states have done this, other states are doing it, and although I cannot point to the exemplary state lest my recommendations be misconstrued, I can say that some states do better than New Jersey, New York, or Connecticut.

Although it is difficult to change the administration of state workers' compensation systems, why not start in this part of the country, in these three states which have a high proportion of the workers' compensation cases? Why cannot the responsible administrative and political officials collaborate to seek ways and means of improving their systems? These three states have the unique opportunity of utilizing the services of three universities, each of which has personnel and units vitally interested in the area of workers' compensation.

Administrative reforms might well begin with the matter of data systems, since it is the least controversial and least threatening to the parties involved. It would be equally possible to begin to think about monitoring and evaluation functions, and about doing simple checks of what workers have received in voluntary settlements, and of devising ways and means by which adequate settlements might be forthcoming without litigation.
In similar fashion, it should be possible to think about sets of evaluation standards which could be widely promulgated, or at least to ask the question of whether it is possible to deal with this issue. I raise only one caution. It is necessary for each of the jurisdictions to accept the fact that administrative personnel are necessary if administrative tasks are to be accomplished. I do not think that these matters can be left solely to chairmen, supervising judges or commission members. It should be possible for these responsible officials to get together to think about these matters and perhaps to go further and devise ways and means whereby desirable objectives can be met.

On July 4, 1983, we celebrated the 72nd birthday of the oldest of these three compensation statutes. But in workers’ compensation programs, there is no compulsory retirement age. There may be life left in this program which may not yet be ready for the geriatric scrap heap. Survival depends on evidence of change and vitality, and nowhere can that better be shown than in administrative reform. It is the most difficult of areas to change, but even small improvements can yield great social benefits.

NOTES


