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Insurance Section of American Bar Associatio

Occupational Disease Problems Aired

Preventive Measures Considered As Important As Compensation Benefits; H. D. Sayer Leads Off Discussion; Messrs. Waters, Bartlett, Caverly and Cronin Participants

Chief among the conclusions reached in the occupational disease symposium discussion of the insurance law section, American Bar Association, meeting this week in Boston, was that any legislation approaching a solution of the occupational disease problem should contemplate special legislation for prevention along with special legislation for compensation. This point was made by Thomas N. Bartlett, Maryland Casualty, one of the leading authorities on the subject, and his amplification of it was that when specific preventive and compensatory legislation is enacted and becomes effective, much of the present confusion, confliction and uncertainty with their resultant evils will be remedied. Mr. Bartlett is a member of the Maryland commission for study of occupational diseases.

Lead-off speaker in the symposium was Henry D. Sayer, one-time industrial commissioner of New York State who is now occupational disease consultant of the Association of Casualty & Surety Executives. Mr. Sayer considered the subject most appropriate for discussion at a meeting of insurance legal minds as "it is the most fertile field for legislation and court interpretation at the present time in the whole range of workmen's compensation and employers' liability." He was a proponent and one of the administrators of the first occupational disease law in this country, namely, that of New York, enacted in 1920, and therefore has had a first hand opportunity to observe the law and to evaluate some of the factors in it.

Other speakers, all of whom made constructive contributions to the symposium, included T. C. Waters of Baltimore, chairman of the Maryland commission; Dr. A. W. George, roentgenologist, and Dr. R. B. Hunt, occupational lung disease specialist, both of Boston; Raymond N. Caverly, vice-president, Fidelity & Casualty, and John W. Cronin, general counsel, Liberty Mutual.

H. D. Sayer on Model Provisions

In introducing the general subject Henry D. Sayer told about the study being made of the occupational disease situation by an advisory committee of the Association of Casualty & Surety Executives, which is headed by Charles Deckelman of the Travelers. This body recognizes and assents to the principle that the death or disability of a workman from a disease which is clearly and unmistakably the result of an industrial process in which he was employed, and not the result of a health hazard of the general population, should be deemed to be and treated as the happening of an injury by accident, subject, of course, to special rules and procedure applicable thereto, due to its different nature.

"It follows as a logical consequence," said Mr. Sayer, "that such diseases should be brought within the purview of compensation laws, where the employer and worker interests in any state accept the principle. The acceptance of such principle, of course, means the assumption of a certain, definite, though limited, liability on the part of the employers, and the renunciation by labor, in return therefor, of any right against the employer based upon negligence or fault at common law or under any statute.

"In recognition of this principle, our advisory committee has given intensive study to the provisions that, in their opinion, should be embodied in any statute providing compensation for occupational diseases. These provisions have been embodied in so-called model provisions that are available for adaptation to the conditions presented in any state.

"These so-called model provisions or suggestions were approved by the advisory committee more than two years ago. They have recently been revised in several particulars and now embody a number of departures from the earlier draft as the result of much recent experience, study and discussion."

Coming to the meat of his address the speaker then elaborated upon certain essentials that he felt should be kept in mind in the drafting and consideration of legislation having to do with occupational diseases. He discussed first the schedule vs. all-inclusive plan of coverage and said in part:

Schedule vs. All-Inclusive Plan

"Characteristic of the loose thinking that too often characterizes consideration of this subject is the contention frequently made that the law should provide compensation for 'any and all occupational diseases,' in just that language and without further specification. Thus we may have injected into the law a term 'occupational disease'—that is not defined and the exact definition of which is quite baffling. The same result is sometimes attempted by the simple expedient of striking out the words 'by accident,' wherever they are used to modify the term 'injury.' This is on the theory that compensation for the term 'injury' should include injury by accident or by disease, as distinguished from the more limited term 'injury by accident,' and without distinction.

"Not infrequently I have heard the suggestion made, in connection with the indefinite coverage provision, that we might well let the courts define what is an occupational disease. May I with due respect, suggest that that is not the function of the courts. Theirs is not the duty of making up the legislative mind nor of making the definitions that the legislature is unable or unwilling to make. The duty of the courts is interpretation—not legislation.

"As opposed to the vague indefinite plan of general coverage, I believe the fairer, more certain, and more scientific plan of occupational disease coverage is the so-called schedule plan, or listing in the law of the diseases that are deemed to be occupational. To such a schedule may be appended a listing of the processes or conditions under which such diseases occur industrially. This latter I do not regard as wholly essential, though desirable from many viewpoints.

"A list of the diseases covered and the processes in which they occur has the advantage of certainty and the avoidance of much expensive and disappointing litigation and it makes for efficiency of administration. Without such definiteness there is grave likelihood that in cases which excite sympathy, where death or lingering illness follows upon the contraction of some disease of ordinary life—such, for instance, as pneumonia, common colds, followed, perhaps, by tuberculosis, heart disease alleged as the result of long continued heavy work, the ordinary diseases of a contagious nature which may be epidemic in the community, and many others,—the employer may be held liable to compensate for such conditions, and his insurance carrier required to assume such unknown and unknowable liabilities. I should fear that such a per-

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L. T. ZEDLER IN NEW POST

Lorenz T. Zedler, formerly connected with Chris Schroeder & Son Co., Milwaukee, has joined Kells & Hall, Inc., Milwaukee, general agent of the Great American Indemnity and special agent of the Ohio Casualty and the Prudential.

Call Social Securit Act Unconstit

OPINION OF INSURANCE

Big Crowd at Two-Day Bost Five Round Table Conf Gleason and Hobbs

Insurance lawyers from the country were in Bostor attending the third annual the Insurance Law Section o ican Bar Association—eas thousand in attendance—ke the prospects of a fine two which included five round ences on major legal probl ous lines of insurance. As pated the report on social unemployment insurance, the opening morning's ses John Hancock Mutual Life provoked considerable inter jority report was adopted discussion. It held the so law unconstitutional in nine phases of the Federal Act matter, and held that it w whether it would be consti state matter, although decl should be considered as a ject to enactment only by states in their own severa minority report, submitted L. Ekern, Chicago, defend tutionality of the act and be supported.

Welcomed by De

In his address of welco Commissioner Francis J. Massachusetts pleaded for derstanding between the i yers and the insurance He outlined the position ance commissioners in ord ter understanding might

Mr. DeCelles argued aga of rates by the insurance holding that he should ha visory authority and the prove rates as "just, ade able and non-discriminato

Discussions Thoughtful

The round table dis marked by the thoughtf speakers and the timeli topics. The symposium Territorial Application Compensation Acts," for ified a number of legal pc been rather confusing. Employers' Liability, intro ject as follows:

"Prior to the passage compensation acts the ri ploye who sued his emplo injuries received were de law of the place of th place of hiring was in might be brought anyw could be obtained. Prac tions of conflict of laws

"However, workmen's acts, solely because of t torial provisions, have such questions.

"In 1913, in Gould's 480 which held that the workmen's compensation ply to injuries received monwealth, Chief Justice say that such acts are i ate on injuries received eral states enacting then to many difficult quest of laws.'

"The Massachusetts thus restricted. In 1927 to make it 'extra-terri plication. Today practic pensation acts have ext plication differing how spect as to the extent

"These laws of the s widely diverse as to juries or accidents comp cedure and in countles Largely they are admi missions. When as a

American Bar Ass'n Meeting

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version of the compensation principle, such an extension of the law to conditions never contemplated, would result in an eventual breakdown of the system or its conversion into purely paternalistic governmental relief system based on social need rather than on any rule of legal liability."

Mr. Sayer emphasized that no system of employers' liability can securely be based upon language so all-inclusive and vague that it may mean anything at all or practically nothing, depending on the administrative policy. Continuing further he said:

Occupational Diseases Defined

"Recognizing that local conditions may make it impracticable in some states to adopt the schedule plan, it may be unavoidable to resort to an attempt to define in general language what is meant by the term 'occupational disease.'

"We have given much thought to a satisfactory definition, but without entire success. It is easy to define 'disease' and to define 'occupational.' But conjoined they have vague implications and possibilities of endless extension and uncertainties. For those who must employ such a definition, I would recommend the following: 'An occupational disease is one arising from conditions that are characteristic of and peculiar to a particular trade, process, occupation or employment, in which the employe was employed or engaged.'

"This definition, I believe, will best stand scrutiny. If fairly applied, it will not include the diseases of ordinary life that are only incidentally or speculatively related to some condition of the employment, and it will include all those diseases that are truly occupational.

"While the recent New York amendment contains no definition, the industrial board has ruled for the instruction of the referees that the term occupational disease means a disease characteristic of and peculiar to the occupation. And the recent Rhode Island law on the subject contains the definition in the exact language quoted above."

Accrued Liabilities

Turning his attention to slow progression and accrued liabilities Mr. Sayer said: "Silicosis, for example, or any other pneumoconiosis, creates problems unique in compensation practice. It gives rise to the problem of so-called 'accrued liabilities.' This term, which has come into common use in connection with this problem, is really a misnomer, since the condition denominated is neither 'accrued', nor is it a present 'liability'. By it is really meant the accrual of a physiological condition, a fibrotic condition of the lungs, which is permanent but not necessarily presently disabling. We speak of it as 'accrued' because the condition already exists, which may progress until actual disability or death ensues. It is regarded as a 'liability' because, if and when it becomes actually disabling, the employer is going to have to pay for it.

"The accrued liabilities are what has made and is making compensation for silicosis so burdensome for the employer and such a spectre for the insurer. The present assumption of responsibility for a condition brought on by years of exposure,—perhaps almost entirely with another employer or employers,—is a liability that few can afford. It is thoroughly retroactive in this aspect."

Within the past year two notable methods of the problem have been tried, the so-called waiver provision of Illinois, and the transitory limited benefits in New York, and Mr. Sayer went into detail on them. He then discussed medical benefits, special medical boards and diagnosis and other essentials as follows:

Medical Benefits

"As a part of any program for limited compensation or waivers for silicosis, consideration should be had of the subject of medical treatment. Some states at present have provisions for unlimited medical benefits in cases of accident; many of them, however, now limit medical treatment in terms of week's allowance or of total cost. Unlimited medical benefits are only justifiable where medical treatment will be of avail. The weight of expert medical opinion, however, is that in simple uncomplicated silicosis or asbestosis, medical treatment avails nothing. The disease is incurable. The fibrosis of the lungs is permanent and no effective palliative or remedy has been developed.

"The case of the silicotic, however, presents an exceptionally fertile field for medical exploitation. Some effective and reasonable limitation, therefore, should be placed upon medical benefits to protect industry against exploitation or against expensive notions that the disabled worker or his physician may indulge in. A limitation of three months' medical treatment with a discretionary extension of three months when and if treatment is useful, seems logical.

Special Medical Boards and Diagnosis

"So many and so complex are the medical problems incident to the administration of an occupational disease law, and particularly those relating to dust diseases of the lungs, that the ultimate determination of medical questions should not be left entirely to non-medical administrative officials. The sure diagnosis of silicosis, its cause and its differentiation from some other non-industrial conditions, presents many points of difficulty. It has been said in England that the only certain diagnosis of silicosis is one made after death. We cannot wait until after death to make such determinations. They must be made during life. Many simple and uncomplicated cases of silicosis may be presented where the diagnosis is comparatively easy and fairly certain. Many other cases, however, will present the extremes of difficulty. It is suggested, therefore, that there should be set up under any occupational disease law a special medical board to be composed of physicians of recognized standing and attainments in the field of diagnosis of occupational diseases. Such a board need have no functions with regard to the determination and finding of non-medical facts, but after such facts have been established, such as the question of length of employment, degree of exposure, including both concentration and content of dust, the presence or use of poisonous material, and other facts in the occupational history of the individual. Then, if there be any controversy, the case should be referred to such medical board which shall have authority to make independent examinations, and it shall render its opinion on the condition that exists, the extent of disability, the date of disablement and the relationship between the employment and the condition found. Findings of such a medical board should be final and conclusive on the medical questions or, if subject to review, they should be disturbed only by the manifest weight of evidence.

Other Essentials

"Other essential points that should be considered include the following:

1. "Effective means must be provided for full and truthful occupational histories wherever required by the employer. The most effective means, it seems to me, is to provide that no compensation shall be payable where there has been a false representation in writing as to previous disability from or exposure to the hazards of an occupational disease.

2. "The matter of time limitation should be given careful study. The usual provisions for time limitations as to notice, filing of claim, etc., in compensation laws for accidental injury, are not always applicable in laws for occupational diseases. Notice of an occupational disease is somewhat more essential than is the case with accidents, most of which are known or witnessed, and it should be more definite in its provisions. Possibly a longer time in which to give notice should be provided for than in the case of accident.

3. "Provision should also be made for those cases in which a pre-existing non-occupational disease may be aggravated or contributed to by an occupational disease."

Prevention Stressed by T. N. Bartlett

Thomas N. Bartlett, Maryland Casualty, approached the problem from the angle that prevention of accidents is just as important and should be urged as forcefully and effectively as preventive measures to safeguard the worker and to keep him from contracting occupational diseases. The speaker emphasized: "It is just as humane and economically as sound to prevent accidents as it is to prevent occupational diseases, yet we must not overlook at least one very important factor, to wit—that many accidents do occur from carelessness of the worker; that undue risks are knowingly assumed by the worker; that in some cases accidents occur because of violation of known instructions and rules. These accidents could have been prevented by the worker himself. Such accidents, however, are generally compensable. But in cases of exposure to occupational diseases there is more likelihood, because of intricate machinery, power driven tools, intensified chemical processes, with their attendant acute hazards, of the worker not having the least knowledge of the risk which he is assuming. He does not contribute to, nor is he knowingly a party to the results.

"I believe occupational diseases can be controlled and prevented generally with greater certainty than the control and prevention of accidents.

Limited Physical Examinations

"In addition to the preventive measures developed by engineers and doctors for safeguarding workers in all processes, where there is an occupational disease exposure, and especially in dusty occupations, there is one important phase of prevention which should be carefully considered. In the light of experience thus far developed there are some who deem it advisable that in a plan for compensation there should go hand in hand with all other safeguards to employes a provision for limited physical examinations of those employes who will be exposed to occupational diseases. These examinations to be made when first applying for employment. Then subsequently interim examinations at intervals of one year during employment unless otherwise required because of special circumstances in unusual cases, and examinations when leaving employment. If a plan for compensation should require such examinations then they should be conducted by impartial medical boards under the supervision and control of or in a bureau of industrial hygiene. * * *

"Any legislation in an approach to a solution of the occupational disease problem should contemplate special legislation for prevention along with special legislation for compensation. All statutes which may now be in force for protection of health, and which may be obsolete in the light of recent developments should be repealed. In order to be just and efficient and to comply with constitutional requirements all preventive legislation should be specific, definite and certain. Legislative powers should not be improperly and illegally delegated."

C. W. HOBBS CONVALESCING

Clarence W. Hobbs, special representative of the commissioners on the National Council staff, who was operated on August 14 in Massachusetts Memorial Hospital, Boston, is reported well along in his convalescence. He will be in the hospital another week. Mr. Hobbs was missed at the Insurance Law Section of the American Bar Association this week in Boston where he was on the program to discuss "Extra-territorial Application of Compensation Act." It was read for him.