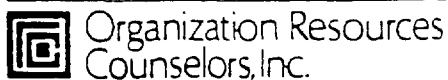


1625 I Street, N.W.
Washington, DC 20006
202-872-1080



Organization Resources
Counselors, Inc.

Memorandum

December 20, 1982

To: ORC Lawyers Group
ORC Physicians Group

From: W. William Ament *W. William Ament*
Darrell K. Mattheis *Darrell K. Mattheis*

Subject: Summary of the Combined Physicians and Lawyers
Groups Meeting, November 9 and 10, 1982

The recent combined Lawyers and Physicians Groups meeting on the issue of compensation for exposure to hazardous substances was stimulating and informative. Over 80 physicians, and lawyers were in attendance, leading to lively discussions throughout the course of the meeting. The issues raised at this meeting have provided the basis for a continuing in-depth examination of the entire compensation for exposure issue. The meeting was also notable, in that there was a successful melding of the legal and medical aspects of a particular problem -- a success that has not always occurred when examining other subjects. The importance of this issue, and its potential effect on employer/employee relationships as well as the medical and legal professions, has clearly broadened the interests of the medical and legal professions.

The meeting covered broad aspects of the toxic exposure compensation problem and showed how they are interrelated. Many speakers examined the basis of the "historic bargain" that was the origin of the Workers' Compensation system as we know it today. These discussions began with an overview by Craig Barrington, Associate Deputy Under Secretary for Labor Standards, who examined the legal problems concerned with the translation of Workers' Compensation into a vehicle that could handle compensation for exposures to toxic substances. It became clear that the Workers' Compensation System was not designed for handling toxic substance exposure problems and, because of that, cannot deal effectively with the problems of employees who as a result of such exposures, have suffered a reduced capacity to work. In developing an overview

LLA 000314

of the legal issues, Bill Veal of Exxon examined the corporate legal responsibilities in the compensation area. On the last day of the meeting, William Oldaker of Epstein, Becker, Borsodv & Green discussed claims resulting from the potential exposure of the fetus to toxic substances. Among the interesting and provocative points made by these speakers are the following:

- Prior to the development of the modern Workers' Compensation system, the law did not provide a realistic mechanism for the disposition of claims against employers by employees who are injured while on the job. The defenses of the employer -- contributory negligence, negligence of a fellow worker, assumption of risk, etc. -- were too difficult for employees to overcome in most instances. As a result, employees were unable to obtain compensation even though injured through no fault of their own.
- The Workers' Compensation System that developed in the early 1900s was designed to handle traumatic injuries and not illnesses with long latency periods. Even with state Workers' Compensation statutes that have provisions covering illnesses, the statute of limitation provisions in these laws are normally of such a short duration that many of the illnesses that we are concerned with today are not in actuality covered.
- The Workers' Compensation System is in danger of breaking down. We have seen a sharp rise in the efforts to obtain compensation in instances that should be covered by the Workers' Compensation system but either would result in no compensation or in an inadequate level of compensation. Because of those inadequacies, individuals often attempt to circumvent the Workers' Compensation prohibition against taking tort action against employers by suing other employers (or sometimes even fellow employees) or organizations on a third party basis. Several suits have also been brought on a theory that gross negligence overcomes the prohibition against suing one's employer.
- There are continuing attempts to develop a new approach in providing a fair compensation program. The Miller Bill which is concerned directly with asbestos

LLA 000315

and radiation and ultimately with almost any type of exposure, the Asbestos Coalition bill which is limited to asbestos, and other bills based on the model of the Black Lung Law are under consideration. The upcoming Congress may well become a battleground over this issue.

- A funding mechanism such as that presented in the Miller bill or in other bills has been supported in principle by much of business and organized labor. However, to say that their views on specifics are far apart at this time would be to repeat the one political certainty surrounding this subject.

The medical aspects of the compensation issue were ably addressed by Dr. Burford Culpepper of Dupont, Dr. Hans Weill of Tulane Medical Center and Dr. Edward Gaensler of the Boston University School of Medicine during the meeting first day and Dr. Harold Ivers of Health and Hygiene, Inc. during the second day. Although there was disagreement over specific issues, they did agree on the necessity for scientifically credible and medically reliable data as the basis for the resolution of compensation issues.

Dr. Culpepper discussed the role that a responsible corporation must play in the issue of compensation for toxic substance exposure. The fragmented nature of the compensation problem, Dr. Culpepper noted, makes it difficult to address this problem in the corporate setting. He urged that physicians stay out of an advocacy role, particularly if a compensation question goes to trial.

Drs. Weill and Gaensler discussed the issue of medical determination and the relationship between organ impairment and disability. It was pointed out that with organ impairment an accurate decision can usually be made concerning how well a particular organ functions. With disability, however, there is less concern with the actual degree of organ impairment than with his/her ability to earn a living. Earning ability depends on the educational and socio-economic level of the individual which determines the type of job the worker may hold. It was also noted that the psychological elements of the whole issue are extremely important. Other issues raised during the discussions were:

- The existence of a plaque on the pleura does not necessarily mean that impairment or disability is certain to follow
- Plaques on the pleura are actually fossil markers of past asbestos exposure

- The important point is what the lung looks like between the nodules, not the presence of nodules.
- X-rays may give false confidence that one really has a good picture of what is happening to the lungs.
- Many radiologists call all asbestos related problems asbestosis -- this is not accurate.
- Pleural plaques are not cancer and cannot become cancerous because they are acellular.
- There is no doubt that asbestos exposure is dose related.

If any consensus was reached by the speakers, it was that the issues raised by both the physicians and the lawyers during the first day of the meeting were so intertwined as to make it impossible to discuss compensation for exposure without including both the relevant medical and legal issues.

Problems raised during the first day were skillfully addressed, but certainly not resolved during the meeting's second day.

Ken Feinberg, of Kaye, Scholer, Fierman, discussed the so-called Asbestos Coalition Bill. Mike Goldberg discussed the Miller Bill and compared the two approaches. These speakers, in addition to Frank Petramalo of Bredhoff and Kaiser (a firm which represents labor unions), brought a wide range of views as to how the subject should be addressed.

They also indicated, however, that there was some basis for agreement in the development of a multi-company or multi-industry fund mechanism from which payments would be made to appropriate claimants. Almost without exception, however, the finger was pointed at the Black Lung Bill as an example not to be followed.

Ken Feinberg pointed out two major differences between the Asbestos Coalition Bill and the Miller Bill. The Asbestos Coalition Bill would preserve state apparatus for the determination of an appropriate claimant. It also does not include "presumptions". The Miller Bill, on the other hand, provides that the decision for claim payments be federally determined. The Miller Bill includes "presumptions". In addition, the Miller Bill, provides for the possibility of creating new funds for exposure to other substances. Both bills provide for exclusive remedies.

The AFL-CIO position as presented by Frank Petramalo was for an election of remedies with the funding mechanism only handling "run of the mill" type claims. There was scant support for this type of approach by the meeting attendees.

Dave Pullen of Manville Corp., discussed the reasoning behind the Manville bankruptcy. He argued that the decision to go into bankruptcy involved a simple examination of the numbers concerned. Manville could see that the potential liabilities it faced from payment of all potential claims exceeded its net worth and that without the bankruptcy there could not be an orderly payment of future claims.

The combined meeting brought to the attendees attention the complexity of the compensation for exposure issue and the way in which the elements of the problem are intertwined with each other. The excellent attendance and interest at the meeting has convinced ORC that this is a major issue that cannot be ignored. As a result ORC is exploring ways to work with interested companies in this area including:

- A series of seminars, for groups of companies or individual companies, that will address the issues concerning the potential scope of liability that companies may face, how to recognize these problems, and how to take steps within the company to resolve these problems.
- A meeting group that would concentrate on the compensation for exposure issue.
- We have invited representative George Miller (D-Cal.) to speak at the ORC meeting on February 2, 1983. He intends to discuss his legislative proposal on the compensation to exposure issue. This should be a very lively session!

We would appreciate your comments on this subject and look forward to seeing you at future ORC meetings.

WWA/vv/1

LLA 000318