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Discussion by Henry D. Sayer at the
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Mr. Waters opened his discourse by identifying himself as to his activities. So, I may also say that, while I am of the insurance industry, I am not speaking here as an insurance man or as voicing the views of any particular group of the industry. On the contrary, may I say that I have been identified for nearly forty years, in numerous capacities, in the administration or working out of problems in workmen's compensation. I was appointed by the Governor as a member of the Industrial Commission and entered upon the administration of that law in 1915, before the law had been a year on the statute books. Ever since that time, I have maintained a contact of some kind and an extreme interest in the system of workmen's compensation. What I say here today, therefore, is borne out of an intimate association with the compensation law and an extreme interest in it. Thus I speak for no particular group.

Mr. Waters referred to the two-fold liability of the employer to pay compensation for dust diseases: one, the liability imposed by the common law, and two, that imposed by workmen's compensation laws. That is entirely proper, for we should understand the nature of the differences in the two systems. I think in this discussion of the legal aspects of the problem, we should keep definitely in mind the liability imposed by workmen's compensation laws, first because some of those laws are compulsory, as for instance New York's, and the others are elective, but with such penalty for non-election that they may be regarded as practically compulsory. He has rightly pointed to the common law defences to any action under employer's liability, among which is the assumption of risk. Silicosis and asbestosis are characteristic

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risks of employment in dust of either substance, and with that risk it has been assumed, in the absence of express statutory provision to the contrary, that the employee under the common law in effect waived any right of recovery of damages due to such cause. That brings us right back to workmen's compensation laws, much of the argument for which was the hardship and injustice due to the archaic common law defences.

Damages were a characteristic of actions at law under the common law; compensation for loss of earnings or earning capacity is the outstanding fact of statutory workmen's compensation laws. When, therefore, we speak of partial disability resulting from dust, where no loss of earnings is yet involved, we are really speaking of damages as distinguished from compensation for disability. There are many implications involved in such thinking. Can we have a system based in largest part upon disability compensation and at the same time partly based upon damages, without the danger of breaking down the system we have so carefully erected over the years? If we yield to the arguments of those who would compensate for non-disabling silicosis, where will we stop in the matter of compensating for conditions not related to earnings or earning capacity? Be assured that once that point is yielded, you will experience great difficulty in preserving the compensation system.

The compensation system was arrived at clearly by the acceptance by employers of a liability limited by the terms of the law itself and based without regard to fault as a cause, while at the same time the employers in effect yielded to a liability as certain as daylight. But while assuming such a certain and limited liability, the employer yielded up his former right of having his negligence proved before there could be any recovery, and permitted the abrogation of his ancient common law defences of fellow-

servant's negligence, assumption of the inherent risks of the employment, and the defence of contributory negligence. While accepting the liability of the compensation law, he assumed, as he had a right, that the burden of cost of the compensation system would not be so great as to drive him out of business.

Mr. Waters very clearly set forth his conclusions relative to disability, since this present session is devoted to the consideration of that aspect. He cited the different concepts of disability, as set forth in the statutes of different states. It is important, I think, to keep in mind just what we mean by disability. I should like to point out that the early basis for all compensation was disability, that is, inability to work and earn wages. To be compensable, only those disabilities that were due to accident arising out of and in the course of employment were compensable in nearly all the states where compensation was the law. It had to have relationship to earnings. Consider for a moment, if you will, that all compensation was for a period of time. That period had relation to the inability to work and earn. Then, too, the measure of compensation was the wages of the injured man at the time of the accident or, as in New York, for one year prior to the accident. Why was wages the standard measure for compensation benefits? Solely because that was what he lost. The compensation rate measures the relation to the injured person; the length of time of the payment of benefits measures the seriousness of the injury, representing usually the period of time the man was unable to work.

Mr. Waters has told us of the law and its administration in the State of West Virginia. He tells you that the law works well and is commended by both the employees and the employers. I cannot believe that such a law as he refers to would meet the increasing demand in New York for compensation for

partial disability from silicosis. I doubt that it is any solution to the problem. He tells us that for first-stage silicosis, the State Fund pays \$1,000. Why? First stage is where the earliest detectable signs of the disease are found, but with no effect on the working capacity. Is \$1,000 needed for that man's relief? I doubt it. Is it any compensation for the man to be officially declared to be a silicotic? Is the certain knowledge that is brought home to this man worth \$1,000? Will it "tide him over the bump" till he gets established in some other occupation? If he is a coal miner in West Virginia, it is not going to be easy for him to get any other kind of remunerative work that will maintain him and his family - at least not in that mountainous and coal-producing State. Does he perhaps take his \$1,000 and travel to another State and get a job as a coal miner?

For the second stage, where capacity for work is or has been impaired, the Fund will pay \$2,000. I should expect that there would be few claims indeed for the first stage, the worker preferring to wait for the double rate, or try to make his case appear to be a \$2,000 case. Here again what, if any, economic advantage is it to the silicotic worker? I can see none; but I can see where it might be an advantage to the coal producer to have his liability to that man fully discharged by his acceptance of the meagre compensation for either first or second degree silicosis.