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Current Status of Compensation for Pneumoconioses

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LEGAL SURVEY

BULLETIN NO. 4

CURRENT STATUS OF COMPENSATION FOR PNEUMOCONIOSES

Prepared For The Legal Committee

Of

THE INDUSTRIAL HYGIENE FOUNDATION OF AMERICA, INC.

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FOREWORD

Bulletin No. 1 of the Legal Series, presented to the members of Air Hygiene Foundation of America, Inc., a survey of existing statutes and court decisions relating to the rights of employees for compensation for injuries caused by occupational diseases suffered during the course of their employment. This survey analyzed the Workmen's Compensation Acts and Occupational Disease Acts of the various States, with respect to their provisions for compensation of occupational disease injuries and reviewed the State decisions dealing with the rights of employees to maintain actions at common law against their employers for such injuries so sustained in the course of employment. Bulletin No. 1 Supplement No. 1 of the Legal Series, was published March 1, 1937, for the purpose of supplementing and bringing down to date the original Bulletin No. 1.

Bulletin No. 2 of the Legal Series, presented "A Critical Study of Provisions For Occupational Disease Legislation", dealing with common law rights of action by an employee for occupational diseases injuries sustained, arising out of, or in the course of, employment and dealing with specific provisions to be the subject of consideration in occupational disease legislation. Bulletin No. 3 of the Legal Series, presented the subject of "Compensation Legislation, A Critical Review", dealing with specific matters that were the subject of existing legislation, with charts summarizing the occupational disease acts then effective.

The purpose of the present Bulletin is to analyze, in

summary form, the existing laws of the several States relating to the pneumoconioses and to discuss, in some detail, certain of the subjects and problems that are peculiar to these laws.

It will be noted that subsequent to the National Silicosis Conference, the proceedings of which have heretofore been published by the United States Department of Labor, Division of Labor Standards, there has been a great volume of legislation dealing with the matter of compensation for the pneumoconioses, particularly the disease of silicosis. This disease has become the most important of the pneumoconioses, from the standpoint of legislative activity, but it will be noted, in the enclosed Bulletin, that many States have increased their occupational disease coverage to provide compensation for the pneumoconioses.

The views herein expressed, do not purport to be the views of the Foundation, or the views of its members with respect to matters therein contained. Due to current interest in legislative developments, dealing with the pneumoconioses, the Board of Trustees has requested Mr. Waters, Chairman of the Legal Committee of the Foundation, to prepare the enclosed Bulletin to the end that member-companies may be properly advised of the status of the law in those States wherein they operate.

The name of the Foundation has now been changed to Industrial Hygiene Foundation of America, Inc., which the Board of Trustees believes is better descriptive of its activities.

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PREFACE

The purpose of the present Bulletin is to set forth legislative changes in the several States dealing with compensation for the pneumoconioses. During the past decade, there have been important legislative changes in the several States to which reference will be made. Attention is also called to the charts contained at the end of the present Bulletin, which may serve a useful purpose for reference with respect to the status of particular legislative provisions in the different States. The legislative picture has been consistently changing with respect to these provisions and the date of June 30, 1962, has been selected as a cut-off date to which the present Bulletin refers. Of necessity, there may be further legislative changes during the year 1962 and future years. Therefore, in order to procure the exact current information, with respect to the legislation in any given State, the reader must refer to the latest legislative amendments applicable in the State that is the subject of inquiry.

Of all of the pneumoconioses, the disease of silicosis has been the matter of greatest concern to legislative bodies. In 1936, Honorable Francis M. Perkins, United States Secretary of Labor called together a group representing Labor, Industry, the Public, Insurance Carriers and prominent members of the Medical Engineering and Legal Professions, to explore the subject in a preliminary manner and to determine the nature of the studies to be made with respect to what had become a national problem. Thereafter, the Secretary appointed four Committees as follows:

1. Committee On Prevention Of Silicosis Through Medical Control.

2. Committee On The Prevention Of Silicosis Through Engineering Control.

3. Committee On The Economic, Legal And Insurance Phases Of The Silicosis Problem.

4. Committee On The Regulatory And Administrative Phases Of The Silicosis Problem.

The reports of these Committees, together with a summary report to the Secretary of Labor by these Conference Committees, was submitted to the Secretary of Labor on February 3, 1937, and may be found in publications of the National Silicosis Conference, published by the United States Department of Labor.[1]

Pursuant to these reports, various State legislatures enacted amendments to their compensation laws which were originally directed to specific provisions for compensation of silicosis. Thereafter, as will be seen from the presentation of this Bulletin, numerous States enacted so-called "General Coverage Laws", which made all pneumoconioses compensable.

The problems presented to legislative committees and State administrative agencies dealing with compensation for the pneumoconioses are many and varied. These will be discussed in the course of this Bulletin. Practically all of the pneumoconioses are insidious, slow of development, difficult of medical determination, with varying sequalae insofar as disability is concerned. This reason has given rise to certain protective legislative provisions applicable to compensation for these diseases. It will be noted, as hereinafter set forth, that most of the industrial States of the United States, now provide compensation for the

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Bulletin No. 1, of the Legal Series, presented to members of the Air Hygiene Foundation of America, Inc., a corporate predecessor to the Industrial Hygiene Foundation of America, Inc., dealt with a survey of the then existing statutes, dealing with the pneumoconioses; this was published April 1, 1936. Bulletin No. 1, Supplement No. 1 of the Legal Series, was published March 1, 1937, for the purpose of supplementing and bringing down to date the original Bulletin No. 1. Bulletin No. 2 of the Legal Series, published January 2, 1937, presented "A Critical Study of Provisions For Occupational Disease Legislation". Bulletin No. 3 of the Legal Series, Published December 27, 1937, presented "Compensation Legislation, A Critical Review". The objective of the present Bulletin is to bring this information to date as of June 30, 1962, in the hope and expectation that it will be of interest and service to member-companies.

Theodore C. Waters,
Attorney-at-law

DEFINITION OF "PNEUMOCONIOSES" AND LEGAL REMEDIES

TO EMPLOYEES SUSTAINING SAME

The term "Pneumoconiosis" has been the subject of various definitions and the following definition expresses the most modern and medically accepted concept of that term:

"Pneumoconiosis is a broad generic term used to describe all forms of pulmonary reaction to dust lodging within the lungs, with no implication as to the character, severity or the effect on function."[2]

At the time of the presentation of the panel discussion on the subject of "Emphysema, Pneumoconioses and Compensation", on October 26, 1960, at a joint session of the Medical and Legal Committees of this Foundation, Drs. O. A. Sander, Arthur J. Vorwald and George W. Wright defined the term as follows:

"Pneumoconiosis simply means that inhaled particles of less than ten microns in size have been trapped in the lungs. There should be no implication in the term of fibrous tissue reaction to the retained particulate matter. As a matter of fact, we all have pneumoconiosis of varying degrees ever since the first dust particle was picked up by a phagocyte or dust cell and retained in the lungs. Residents living in highly polluted atmospheres of coal smoke, for example, always have blacker lungs than do those exposed to little air pollution. Even though such retention of carbon particles from coal smoke cannot be visualized by x-ray, it still is a pneumoconiosis pathologically. The radiologist, of course, cannot make a diagnosis of pneumoconiosis until he sees evidence of a sufficient retention of radiopague dusts or the development of small fibrous nodules due to fibrogenic dusts. The definition of pneumoconiosis, therefore, is quite different for the pathologist than it is for the radiologist."

"Pneumoconiosis is a generic term which connotes a pulmonary condition provided by the presence of inorganic dust in the lung. Accordingly the term is an all inclusive one and bears no reference to clinical manifestations in terms of health and disease.

"This definition is not in accord with all views throughout the world, as for example in Great Britain. The National Insurance

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Act of 1946 defines pneumoconiosis as a fibrosis of the lungs due to silica dust, asbestos dust or other dust and includes the condition known as dust reticulation."

"In recent years, as more and more individuals become interested in the general problem of environmental pulmonary disease, the term pneumoconiosis has become progressively less specific in meaning. As commonly used, it is obviously a term that embraces an extremely wide range of conditions in the lung which have only one thing in common, namely that they are attributed to the inhalation of particulate material of an inanimate or non-living character. Even in this regard, there is some question because some individuals appear to use the word to embrace all of those pulmonary conditions that conceivably might have an occupational or industrial origin even though a living particulate might be the cause of the disease as, for example, in bagassosis. * * * "[3]

Illustrative of the problems incident to the attempted definition of the term is the following statement appended to the resolution passed at the National Conference on the pneumoconioses at Sydney, Australia, 1950.

"The Conference deprecates further extension of terms beyond those already in common use and suggests that for the future the terminology of 'Pneumoconioses' should take the form of naming the dust to which the worker is exposed or alternatively the industry or process concerned."[4]

Bulletins Nos. 1, 2, 3, heretofore published by the Foundation, dealt with the right of employees having sustained the pneumoconioses to recover, either in legal actions or under compensation law actions. The common law actions were based upon the alleged negligence of the employer for injuries sustained by employees exposed to the hazards of various types of dust. In such actions, the employer retained his common law defenses; (1) the employees assumption of risk (2) employees contributory negligence (3) negligence of employees fellow servants. By the enactment of amendments to the compensation statute of the various States, making

pneumoconioses compensable, the employer became an insurer of the health of the employee against these diseases, the employers common law liability being abolished. Furthermore, an employee became limited to the benefits established by the Workmen's Compensation Law. The result accomplished prompt payment of benefits to the injured employee, the elimination of jury trials, the abolishment of technical legal procedure and the transfer of such actions to administrative agencies established by the Workmen's Compensation acts of the several States. All of the States of the United States have enacted Workmen's Compensation Laws and only the States of Mississippi and Wyoming have failed to extend the benefits of these laws for the payment of compensation for occupational diseases. However, twenty-eight States[5], the District of Columbia and all Federal jurisdictions, under the Longshoremen and Harbor Workers Compensation Act[6] provide so-called general coverage which makes compensable any and all occupational diseases, including the disease of pneumoconiosis.

Specifically the States of Alabama, Louisiana, Maine and New Hampshire scheduled pneumoconioses as being compensable. The diseases of silicosis and asbestosis are compensable in seven States.[7] The diseases of silicosis, asbestosis and anthracosis are compensable in Oklahoma; the disease of silicosis is scheduled to be compensable in Idaho, Iowa, Kansas, Maine and Montana; the diseases of silicosis and brucellosis are compensable in South Dakota. In summary, this means that some forms of the pneumoconioses are compensable in all States,[5] except Mississippi and Wyoming, the District of Columbia and all Federal jurisdictions under the Federal Employees' Compensation Act and the Longshoreman and Harbor Workers' Act. Specifically forms of the pneumoconioses limited to named diseases are compensable in

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eighteen States, as above set forth. In twenty-seven States[8] there are special legislative provisions applicable solely to the disease of silicosis, which will be the subject of explanation in the charts hereto annexed.

Concepts Of Injury

In order to determine the exact definition of the term "injury" in any given jurisdiction, reference should be made to the statute of the particular State in question or to judicial decisions defining that term. However, the following definitions of the term "injury" are available:

"Damage or hurt done or suffered; detriment to, or violation of, person, character, feelings, rights, property, or interests, or the value of a thing." (Webster's New Collegiate Dictionary).

"Any wrong or damage done to another, either in his person, rights, reputation, or property. An act which damages, harms, or hurts." (Black's Law Dictionary).

The following citation from Black's Law Dictionary (Fourth Edition) relates to the term "Personal injury" as used in compensation acts:

"In Workmen's Compensation Acts, 'personal injury' means any harm or damage to the health of an employee, however caused, whether by accident, disease, or otherwise, which arises in the course of and out of his employment, and incapacitates him in whole or in part.[9] A disease of mind or body which arises in the course of employment with nothing more, is not within the Massachusetts act, but it must come from or by an injury, although that injury need not be a single definite act, but may extend over a continuous period of time.[10] A 'personal injury' as that term is used in the Workmen's Compensation Act, refers not to some break in some part of the body, or some wound thereon, or the like, but rather to the consequence or disability that results therefrom." [11]

Concepts of Disability

The objective of the enactment of the workmen's compensation statutes of the various States was to award monetary benefits for

disability resulting from injuries arising out of and in the course of employment. It will be noted that the benefits so payable are for disabilities resulting from injuries and not from the diagnosis of a disease or condition. There is a distinction between the diagnosis of the disease of pneumoconiosis and disability arising therefrom.[12] One common feature of all compensation statutes is to provide for the payment of compensation based upon a percentage of the claimant's average weekly wage determined at the time the injury occurs. Generally, there is some monetary limitation of liability expressed in dollars payable per week, provision being made so that compensation is paid at the rate of 66-2/3% of the average weekly wage of the claimant, not to exceed a certain monetary figure. Therefore, the principle was established that compensation was to provide payment of monetary benefits in lieu of wages that the claimant was losing due to disability resulting from the given injury.

It is interesting to consider the various concepts of the term "disability". The common law theory was that the term represented "injury to the body". Reference is here made to the following definitions of the term "disability" that have assumed general popular usage:

"State of being disabled; absence of competent physical, intellectual or moral power, fitness or the like; also the instance of such lack." (Webster's New Collegiate Dictionary).

Without making reference to the concept of the term used in compensation statutes, Black's Law Dictionary (Fourth Edition) defines the term "disability" as follows:

"Absence of competent physical, intellectual or moral power; impairment of earning capacity; loss of physical functioning that reduces efficiency; inability to work."

Since we are dealing with the concept of the term as used in the occupational disease provisions of workmen's compensation statutes of the various States, examination of these statutes shows a variety of definitions. Where the term is not defined in the language of the statute itself, such definition is left to administrative or judicial interpretation, and to that end a review of the important decisions is necessary to define the term in any given State where it is not defined by statute. Occupational disease compensation statutes have adopted three distinct concepts of the term, as follows:

The first concept is found under the law of the State of New York:[13]

"Whenever used in this Article: ... 'Disability' means the state of being disabled from earning full wages at the work at which the employee was last employed."

This definition is followed substantially in the laws of the States of Iowa, Michigan, Minnesota, North Carolina and Rhode Island.[14] It is to be noted that this definition presupposes wage loss in order for the claimant to receive disability benefits. Assuming that an employee has the disease of pneumoconiosis but has sustained no wage loss under this theory the claimant would not have a basis for compensation. Definitions of this type apparently give effect to the purpose and objective of the enactment of compensation statutes, namely to substitute monetary benefits during the period when the injured employee has sustained a wage loss.

The second concept of the term "disability" is found in the law of the State of Arizona:[15]

" 'Disablement' means physical incapacity by reason of any occupational disease, as defined in this chapter, to perform any work for remuneration or profit."

This concept is followed substantially in the laws of the States of Georgia, Idaho, Montana, Nevada, New Mexico, South Carolina, and Utah.[16]

The third concept of the term is found in the law of the State of Kansas:[17]

"Except as hereinafter otherwise provided in this chapter 'disablement' means the event of an employee's becoming actually and totally incapacitated, because of an occupational disease, from performing his work in the last occupation in which injuriously exposed to the hazards of such disease."

This definition is substantially followed in the laws of the States of Maryland and South Dakota.[18]

Examination of the language set forth in the statutory references above indicates that the New York statute presents the fairest concept of this term to both the employer and the employee, providing that disability is dependent upon loss of wage. The second concept set forth in the Arizona statute seems to be too extreme and unfair to injured employees. Compensation would be dependent upon the fact that the employee was permanently and totally disabled and unable to do any work for profit in any other trade or occupation. The third concept, referred to in the statute of Kansas, will present problems for the administrative agencies. It is possible for an employee to be adjudged as permanently and totally disabled from pneumoconiosis on the theory that he should not be returned to work in a dusty trade. He may be able to procure some employment in other trades or occupations where he has not sustained any wage loss and where, as a matter of fact, he may

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procure wages in excess of those received in the employment where his injury occurred. In the event the claimant's pneumoconiosis is complicated by an active tuberculosis infection it would seem proper to provide that he should receive an award of permanent total disability. In such cases, it would be desirable to remove the employee from the continuing exposure to dust and also to eliminate the possibility of the exposure of fellow employees to tubercle bacilli.

The writer wishes to call attention to the fact that for the actual determination of the technical definition of the term reference should be made to compensation statutes or judicial decisions within the State that is the subject of inquiry. As indicated, there is lack of uniformity in this concept which will inevitably give rise to differentials in administration of the various State laws.

Methods Of Compensating The Pneumoconioses

In fourteen States[19] and the District of Columbia, together with Federal jurisdictions, the method of compensating the pneumoconioses does not differ from legislative provisions applicable to other occupational diseases. In thirty-four States[5] there are legislative provisions restrictive as to certain of the pneumoconioses respecting compensation payable for the pneumoconioses. With respect to this compensation, the following summary review will be of interest.

(1) Designation Of State Legislation To Provide Medical Boards Or Medical Examiners To Assist The Administrative Agencies In Their Determination Of The Claims.

Assuming that a given claim for pneumoconiosis is contested, the principal questions presented for decision by the administrative

agency are medical questions, namely, the determination of the following issues:

Whether or not the claimant has sustained an occupational disease compensable under the statute, and -- the nature and extent of disability.

The following States make provision for the appointment of medical boards, panels or consultants to resolve these questions or to serve in an advisory capacity to the industrial commission: Arizona, Colorado, Georgia, Idaho, Iowa, Maine, Maryland, Montana, Nevada, New York, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah and West Virginia. The use of medical boards or special medical examiners has been the subject of criticism on the theory that it is practically impossible to procure totally impartial, unprejudiced medical opinion; furthermore, that the litigants have the right to present their own medical testimony and that the use of medical boards and panels or medical examiners belittles the honest opinion expressed by medical witnesses that may differ from the decisions of such boards or examiners. The purpose of the enactment of compensation statutes was to avoid the express hazard and uncertainty of technical legal trials in the determination of the issues presented during the course of the hearing by the least expensive method that is possible. It may be that any qualified doctor assigned to a panel or as a consultant to the administrative agency for the purpose of resolving the medical issues in a given case may have a background of professional employment that tends to make him partial either to one side or the other. The fact remains that in a given case, his opinion would be independent of any allied interest in the litiga-

tion and would, therefore, serve the ends of justice for the determination of these issues. With respect to the appointment of medical consultants or boards, there is no uniformity as to the legislative provisions involving their appointments and reference should be made to the statute of any given State to ascertain the powers, duties and effect of the opinion of medical boards or consultants. From the standpoint of proper administration of justice, it would seem desirable that the panel or medical board should have available to it all of the germane medical testimony involved in the case, including all medical reports, x-ray examinations, history of the case, nature of exposure to dust, and the extent of such exposure, together with full details of the employment record. Independent of the opinion of the board, or panel, each party should have the privilege of offering such medical testimony as it deems necessary for the proper presentation of its case.

It must be further borne in mind that the use of boards or panels would vary from State to State, depending upon the industrial conditions in any given State and the location of industrial activity within that State. What might be suitable for the State of Utah would not necessarily be suitable for the State of New York. In those States that have employed the use of medical boards or panels their operations have generally been successful. Every effort should be made to avoid political appointments to boards or panels to the end that the best medical opinion with respect to the particular disease that is the subject of complaint could be made available to the administrative agency.

(2) Time Limitations For The Filing Of Claims.

This subject has presented one of the most troublesome legislative provisions incorporated in any of the State laws, and again there is no uniformity among State laws. All laws include a period of limitation within which claims must be filed. Examples of these provisions are:

A fixed period of time after injury.

A fixed time after disablement.

A fixed time after the employee knew or should have known of the existence of the disease or disability.

A fixed time after the first manifestation of the disease.

A fixed time after last exposure.

A fixed time after the last payment of compensation.

A fixed time after disablement which must occur within a fixed number of years after last exposure.

A fixed time after exposure within which disablement must occur.

With respect to the pneumoconioses, it must be remembered that a given claimant may have demonstrable evidence of the condition over an extended period of time with no attendant disability, discomfort in performing his normal duties, and without his having sustained a wage loss. Query: From what date should the time limitation run in cases of this type? It is known that frequently disability does not occur until many years after the termination of employment or exposure. On their part, the employer or insurance carrier desire to determine liability during the year when the injury occurs or within a limited time thereafter. From the standpoint of the employee who has sustained pneumoconiosis, he may not

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wish to terminate his employment or make claim for compensation until he is actually disabled or has sustained a loss of wages as the result of the disease. The answer to the question just propounded is among the imponderables of legislation dealing with the pneumoconioses. With enlightened labor leadership and cooperation, the use of physical examinations, including roentgenograms of the chest to demonstrate whether or not the claimant has pneumoconiosis should be extended to pre-employment, during employment, and upon termination of employment. Well planned medical programs would not only serve to protect the employer but enable the employee to be advised of his condition. After careful study of the time limitations of the various statutes above referred to, the writer recommends a provision with respect to the time limitation of filing claims similar to that contained in the laws of the State of New Jersey, to wit: Two years after last exposure or last payment of compensation, or one year after employee knew or should have known of the existence of the disease, with an overall limitation of five years after last exposure.[20] Assuming that a provision of this type were enacted in the State compensation law, the employer or insurance carrier would be able to terminate liability within a fixed period of time after last exposure which is a determinable fact. On their part, the employees engaged in a dusty trade would have the benefit of a roentgen examination upon the termination of exposure and be advised at that time as to whether or not they had pneumoconiosis, enabling them to file claims therefor, within the time fixed by the statute. The existence of pneumoconiosis is medically determinable upon the termination of

exposure to dust and it is submitted that no prejudice would arise by the application of this rule.

(3) Time Limitations Relating To Death Benefits.

With respect to legislative provisions dealing with this subject, there are again numerous differentials among the statutory provisions of the several States, but the basic problem is somewhat simpler because of the certainty of death and the fact that it is proper to require the filing of a claim within a reasonable period of time after death occurs. Examples of the provisions of the various statutes relating to time limitations for the filing of claim after death include the following:

A fixed period of time after death.

Death occurring within a fixed period of time after last exposure or following continuous disablement.

A fixed period of time after injury.

In all of the States, the requirements exist that pneumoconiosis must be the cause of death in order for death to be compensable.

Upon death, autopsies would disclose the existence of the disease of pneumoconiosis and whether or not it was a causative factor of death. In certain instances, however, an employee with pneumoconiosis may die years after the termination of employment. This frequently happens and in many instances employers and insurers are confronted with the problems of the loss of their records, inadequate records, or the change of insurance carrier. Furthermore, the older the individual becomes the more contributing

factors may enter into the cause of death, making it difficult to determine the relationship between the employee's pneumoconiosis and death.

Legislative provisions requiring that death must occur within a fixed period of time after last exposure or following continuous disablement, appear to be the fairest method to employee and employer. The date of last injurious exposure is a determinable date. Proof is available to show the nature of the employment, the evidence of dust in that employment, and whether or not it would be potentially hazardous. Assuming that the employee has suffered continuous, permanent disability as the result of pneumoconiosis, the employer or insurance carrier is apprised of that fact and pays compensation for that disablement. Therefore, it would seem to be proper to extend the time for filing a claim for death benefits until a fixed period after death following continuous disablement.

The provision relating to a fixed period of time after the date of injury opens the case to potential argument and disagreement about the time the injury occurred. Many of the pneumoconioses are benign, while others may progress over an extended period of years with complications of tuberculosis or other pulmonary diseases. A given employee may properly testify that he did not know that he had the disease because he experienced no disability in performing his normal duties nor did he suffer any wage loss. Our Commissions and Courts have tended to construe provisions of this type to give the employee the benefit of the doubt and to permit him to file a claim when he "knew or should have known he had the disease". This

presents an indeterminable time and is highly objectionable to employers or their carriers who wish to terminate their liability in a given case.

(4) Provisions For Medical And Hospital Care.

The pneumoconioses assume an aspect separate and distinct from other types of occupational diseases, primarily because no medical cure for these diseases has been found and the basic protection of employees is dependent upon the installation of dust control and other engineering equipment that would prevent the incidence of disease rather than to effect its cure. The most numerous examples of the pneumoconioses are silicosis with its variations and asbestosis, which may produce disability or death.[21] There does not seem to be the need for extended medical care unless the pneumoconiosis progresses to the state where it is complicated by tuberculosis or cor pulmonale. Assuming that the claimant has compensable pneumoconiosis and needs medical care or hospital treatment these should be provided and the claimant should receive adequate medical attention.

Legislative provisions dealing with this subject differ from State to State. Examples of these provisions are the following:

Same provision for accidental injuries.

A monetary maximum.

Time limitation generally expressed in a number of months of treatment.

Twenty-six States[22] and Federal jurisdictions[6] provide full benefits with no limitation to the amount that is payable. Twenty-two States[23] have limited benefits which may be readily

ascertained by reference to the State statutes. Two States (Mississippi and Wyoming) make no allowance for medical or hospital benefits. The statutes of each State must be examined to determine the benefits for medical care and hospitalization.

Unfortunately, with respect to the pneumoconioses, we are dealing with what to date has been an insoluble medical problem in so far as hospital care and cure are concerned. It is to be hoped that medical science may ultimately provide a more satisfactory answer to this question.

(5) Compensation For Partial And Total Disability.

Upon statutory amendments making the pneumoconioses compensable in our various States, industry and insurance carriers were concerned with the impact of potential liability for compensation from exposure to dust that bad beenexperienced by employees prior to the enactment of the compensating statute. The phrase "accrued liability" entered into discussion of this problem. The liability was not accrued but potential, because upon the enactment of the compensation statute an employer became an insurer of the health of the employee from the diseases made compensable under the statute. An attempted answer was the enactment of legislative provisions denying compensation for partial disability and only awarding compensation for permanent total disability. There was legislative resistance in many States with respect to compensation for the pneumoconioses, with the migration of industries having dust hazards from the States where these diseases were made compensable to some other State. Allied to this phase of the problem was the fact that in most instances the extent of partial disability

was not medically determinable until a given employee was unable to continue his employment or had sustained some wage loss as the result of the disease. Assuming that the employee had disabling pneumoconiosis, frequently accompanied by active tuberculosis, the medical profession had no difficulty in determining this fact and recommended that such cases should be compensated for on the basis of permanent total disability. The medical profession was reluctant to recommend that a given employee should be removed from the hazards of exposure to dust in the employment where he had worked all his lifetime and seek employment in some other trade. This is certainly understandable. In some cases legislative provisions were enacted enabling a claimant to transfer from his employment where he would be exposed to the inhalation of injurious dust into other trades or occupations where dust hazards did not exist with compensation to be paid for the injury that he had sustained.[24] However, the number of cases in most of the States where this practice was followed has been somewhat limited, primarily because of the reluctance of long-term employees to give up the jobs with which they were familiar and seek employment in other trades. Again, there is no uniformity with respect to this legislation and reference must be made to the statutes of the different States to determine the exact status of the rights of the claimant or the liability of the employer or insurer. It is probable that in the event of an economic recession, claims may be filed for partial disability even though no actual disability exists, where x-ray evidence shows increased hilar markings as a result of some dust exposure. This

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factor is an incentive to retain legislative provisions denying compensation for partial disability. Twenty States[25] deny compensation for partial disability, whereas twenty-eight States[26] and Federal jurisdictions[6] pay some compensation for partial disability.

(6) Monetary Limitations For Liability.

It is practically impossible to be specific with respect to statutory provisions establishing monetary liability for the pneumoconioses and the laws of each State must be examined to determine the benefits that are payable thereunder. As stated above, industry and insurance carriers are concerned about the impact of the passage of laws making the pneumoconioses compensable due to the potential liability for injuries that had been incurred by the inhalation of dust prior to the effective date of the Act. To ease the impact of this burden there was enacted what became known as escalator clauses, whereby a fixed amount becomes payable the first month the Act becomes effective with progressive increases at a fixed rate per month until the whole benefit of the law is reached. Many of these laws have since been amended to eliminate the escalator clauses, although some have been retained. In a number of States maximum benefits are fixed by law while in some States a part of the burden of compensability is shared by special disability funds or by contributions from the State.

Undoubtedly, the escalator clauses above referred to served a useful purpose when first enacted because of the limitation of monetary liability imposed upon the employer. However, the number of claims of silicosis after the enactment of the statutes was not as great as had been anticipated and gradually State legislatures have

seen fit to dispense with this method of limitation of liability.

The law now effective in New York State[27] provides compensation for the pneumoconioses only in the event of total disability or death and further makes provision for the payment of compensation in the event that the claimant is totally disabled by dust disease and imposes responsibility for the payment of such compensation upon the employer for the first 260 weeks; the employer continues the payment of compensation thereafter during the claimant's permanent disability, but will have the right to be reimbursed from the Special Disability Fund created under this law. This method may well provide the answer to this most troublesome problem.

(7) Statutory Requirements For Exposure Within The State Where Compensation Is Sought.

Most of the State statutes contain legislative provisions of a specific term of residence and exposure to dust in the State wherein application for compensation is made. Again, there is no uniformity in provisions of this type. The purpose of the requirement is to avoid the possibility of a claimant having had exposure in one industrial State going to another State where the benefits under the compensation act were more liberal, or from procuring compensation in the second State unless he meets the statutory requirements with respect to exposure in that State. The term of years for exposure within a given State vary as well and reference must be made to individual State laws to ascertain the answer to the compensability of a claim in any given jurisdiction. The same rules are applicable to death benefits requiring an adequate term of exposure in the given State where compensation is sought before a claim would be compensable.

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(8) Legislation Applicable To Second Injury Funds or Special Disability Funds.

When careful consideration is given to compensation for the pneumoconioses, the natural question arises as to what method could be employed to answer the questions above presented. Potentially, the answer may be found in legislation creating Second Injury Funds or Special Disability Funds in the various States of the Union. These Funds are administered in connection with the Workmen's Compensation Laws of the several States and have as their objective the incentive to employ handicapped workers who sustained a previous injury and who later apply for employment and may sustain a subsequent injury on the job to which they are assigned. The objective of these Funds is to enable the disabled employees to receive full compensation for disability that may result from continuing employment, while the liability of the employer is limited to the benefits due to the second injury; the Second Injury Fund or Special Disability Fund being responsible for permanent total disability representing the differential between the second injury and previous injury. Employees who contract the disease of pneumoconiosis generally find it difficult to obtain employment in those trades where dust hazards exist and where they represent the potential of liability in the event their pneumoconiosis becomes permanently disabling. These laws were given impetus to insure returning war veterans the opportunity for employment if they had suffered some type of permanent injury, such as the loss of a leg, arm or other member of the body, as the result of war casualty. Why cannot this concept be extended to provide compensation for disabling pneumoconiosis progressing to disability after re-employment in a dusty trade wherein the employee is exposed to the continuing hazard

of harmful dust? With respect to legislation dealing with this matter, there is no uniformity in the statutes of the several States. Second injury laws are now effective in all but four States.[28] As of June 30, 1962, only sixteen States[29] and Federal jurisdictions[6] have broad coverage. In the remaining States the coverage is so narrow that the Funds apparently do not serve the purpose for which they were designed and would not provide compensation for disability from the pneumoconioses in the event of permanent disability. Why should not coverage afforded by this legislation be extended to prospective applicants for employment in dusty trades who have had previous exposure to dust with demonstrable evidence of pneumoconiosis? Should these people be relegated to the human scrap heap and be classed as unemployable? Would not the extension of the Second Injury Fund laws to cover this situation be the answer to what is perhaps one of the most troublesome problems in the field of occupational disease legislation?

It is a fact that today applicants for new employment who give a history of previous exposure to dust are generally submitted to x-ray examinations of their chests and if these examinations disclose potential pneumoconioses and a dust hazard exists in the particular plant or operation where they are to be assigned to work they will be denied employment in order to protect the prospective employer from a compensation claim for total disability, which may be exceedingly costly under the statute. By extending the Second Injury Fund legislation to cover the pneumoconioses, the prospective employer would have his liability limited to a fixed amount for the second injury and the Fund would pick up the liability for the difference between the second injury and total disability which had resulted from the accumulation of dust throughout the entire

period of the employee's employment. It is probably improper to designate these Funds as "Second Injury Funds" and the name should be changed to "Special Disability Laws"; New York State has so designated its Fund.[27] The difficulty presented is the actuarial determination of compensation costs. The question arises as to whether or not the administration of the law will lead to the imposition of excessive burdens upon the Fund after it has been created. With that in mind, it may be desirable to place some monetary limitation of liability upon the Fund in the first instance which may later be increased, dependent upon experience in the administration of the law. Such a method would be protective of the interests of the employers and insurers and assure the payment of reasonable compensation to the employee or his dependents in the event of death.

Consideration should be given to the legislative provisions of the compensation statutes of Arkansas, Minnesota, North Carolina, Ohio, South Dakota, Texas and Wisconsin,[30] which have endeavored to solve the problem of the replacement of employees who have demonstrable non-disabling pneumoconiosis in employment where they would not be subject to the continuing exposure to hazardous dust.

Under the Workmen's Compensation Law of Wisconsin,[31] in the event an employee has a non-disabling silicosis and is discharged from employment in which he is engaged or when he ceases his employment and it is in fact inadvisable for him to continue on account of the disease and he suffers a wage loss by reason of such discharge or cessation of employment, the Commission may allow such compensation on account thereof as it may deem just, not exceeding

$7,000. The statute provides for an examination by a physician or physicians to be appointed by the Industrial Commission and the employer and employee may have the opportunity of a hearing before the order is passed. Refusal of the employee to submit to examination would bar his right to compensation and the payment of compensation as ordered by the Commission estops the claimant from any further recovery.

These plans referred to may be beneficial or detrimental to the employee and to the employer. With respect to the employee, he is removed from the continuing hazard of exposure to dust. On the other hand, he may be deprived of continuing in a trade or occupation with which he is familiar and become expert and thereby required to change to some other occupation free from the exposure of dust where he may not be able to command the wage scale that had previously been his. From the standpoint of the employer, there is imposed upon him immediately the financial cost of compensation. On the other hand he is relieved of the potential of the claim becoming one of permanent total disability.

Neither of these methods seem to be as equitable as a system providing compensation by way of a Special Disability Fund.

Incident to legislation dealing with the Second Injury Funds or Special Disability Funds is the method by which these Funds should be financed. Two States, California and Pennsylvania, wholly finance their Funds with appropriations. Two other States, Kansas and Wyoming, originally financed their Funds in this manner but both now require payment to the Fund by carriers or self-insurers in death cases where there are no dependents. The State of Massachusetts provided a Second Injury Fund for war veterans, appropriating funds

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for that purpose and specifying that when the Fund became exhausted the State Treasurer should pay the benefits from a general fund without specific appropriation. As a practical political matter the accomplishment for the financing of these funds by public appropriation poses many difficulties. Legislatures generally would be reluctant to appropriate public funds for injuries that occur in industry. Therefore, it seems proper that the burden of financing these funds should rest upon contributions to be made by employers, self-insurers, or insurance carriers. The methods prescribed for such financing differ under the laws of many of the States, but generally speaking provide for contributions either in death cases where there are no dependents or a percentage of the premium paid to insurance carriers. The underlying difficulty is the lack of actuarial data that would provide a sound basis for determination of the cost. Assuming that the law provided for limitations of monetary liability for totally disabling pneumoconiosis, the impact of the cost upon employers and carriers would be eased; benefits could be increased dependent upon the cost of compensation as revealed by experience over a number of years.

It would seem desirable to have a Special Disability Fund entirely separate and distinct from the Second Injury Funds presently effective in the various States. The reason for this suggestion is that the problems of compensating for the pneumoconioses as above set forth differ from other types of injuries. Assuming that it would be desirable to place some limitation of liability upon the employer, the amount of compensation payable could be increased from time to time. The basic problem of the evaluation of disability from the pneumoconioses is one which must be resolved by medical research before a satisfactory legislative answer can be found

for compensation for partial disability. Much has been accomplished in the medical field with respect to the determination of disability but much remains to be accomplished. The problems presented by the pneumoconioses are unique and undoubtedly distinct from those of other occupational diseases.

(9) Waivers Of Compensation.

Another legislative provision occurring in the laws of a number of States relates to the permitting of waivers for disabled silicotics. In the original enactment of legislation making pneumoconiosis compensable, some of the States permitted handicapped workers, particularly those who had served in dusty trades, to waive their rights to benefits for an injury that had been caused or contributed to by a previous disability. The objective was to assure the continuance in employment of those who had demonstrable evidence of the disease of pneumoconiosis and to avoid their release from employment. Six States[32] permit waivers by affirmative legislative provisions. Sixteen States[33] permit waivers upon the approval of the workmen's compensation agencies. In twenty-six States[34] and Federal jurisdictions[6] waivers are not permitted. Assuming that a given applicant for employment has demonstrable evidence of the disease of pneumoconiosis, he may be unable to obtain employment in some other industry where he would be exposed to the continuing hazard of dust. Representatives of labor, most insurance carriers and most employers have refused to resort to the waiver system although it is available for legal use as above set forth. While there has not been uniform agreement among employers, employees, administrative agencies and insurance carriers with respect to the use of waivers, they certainly do not solve the

problem of the physically handicapped worker who has previously been employed in a dusty trade and seeks further employment with another employer in a trade similar to that in which he has been engaged. Therefore, it may be stated that the use of waivers defeats the basic purpose of the compensation law. Certainly, with respect to the pneumoconioses and the inability to evaluate the percentage of disability that the employee has sustained at the time of his change of employment, waiver provisions appear to be unfair to the employee although a modification of this rule may be found in the statutes of Arkansas, Minnesota, North Carolina, Ohio, South Dakota, Texas and Wisconsin.[30]

The above presentation indicates the problems incident to the compensation for the pneumoconioses. The law is being continually changed in an effort to solve these problems. Over the period of the next several years, there will undoubtedly be further legislative changes. A possible answer to the many problems that exist relates to the extension of the Second Injury Funds or the Special Disability Funds as above set forth. From the standpoint of the employer and the employee, this method seems to be the most equitable that is available.

Prospectively, the ultimate answer must be found in effective medical and engineering control of potential hazards that exist in industry. It may well be that the medical profession will find some method for the cure of these diseases. Until that happy event occurs, legislation must be adjusted to provide adequate compensation for those who are the victims of our industrial process.

CHART I

A. States Providing General Coverage Compensation For The Pneumoconioses.

Alaska, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Washington, West Virginia, Wisconsin.

B. Scheduled Compensation For The Pneumoconioses.

Alabama (permits an election for coverage), Idaho, Iowa, Kansas, Louisiana, Montana, Nevada, New Hampshire, New Mexico, Oklahoma, South Dakota, Texas.

C. States With Specific Provisions With Compensation Payable For The Diseases of Silicosis and Asbestosis.

Arizona, Colorado, Georgia, Maine, North Carolina, Tennessee (employer may elect general coverage), Vermont, Virginia (employer may elect scheduled coverage).

D. State With Specific Compensation For Coverage of the Diseases of Silicosis, Asbestosis and Brucellosis.

New Mexico.

E. State With Specific Provisions For the Compensation of Silicosis, Asbestosis and Anthracosis.

Oklahoma.

F. States With Specific Provisions For the Compensation of the Disease of Silicosis.

Idaho, Iowa, Kansas, Maine, Montana.

G. State With Specific Provision For the Compensation of Silicosis and Brucellosis.

South Dakota.

CHART II

States In Which There Are Special Legislative Provisions Of Compensation For The Disease Of Silicosis.

Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, South Dakota, Texas, Utah, Vermont, West Virginia, Wisconsin.

CHART III

The Following States Provide Compensation For Partial Disability For Silicosis.

Alabama, Alaska, Arkansas (compensated if 33-1/3% or more), California, Connecticut, Hawaii, Illinois, Indiana, Kentucky, Massachusetts, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin.

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CHART IV

A. States Providing Full Benefits For Medical Care.

Alaska	Nebraska
Arizona*	Nevada*
Arkansas*	New Hampshire
California	New Jersey
Connecticut	New York
Delaware	North Carolina*
Florida	North Dakota
Hawaii	Ohio
Idaho	Oklahoma
Illinois*	Oregon
Indiana	Pennsylvania
Maine*	Rhode Island
Maryland	South Carolina
Massachusetts	Texas*
Michigan	Utah*
Minnesota	Washington
Missouri	Wisconsin

*Full benefits are not payable for occupational diseases in Arizona or Utah, or for silicosis and asbestosis in Arkansas, Illinois, Maine, Nevada, North Carolina, or Texas.

In Colorado the 6 months limitation does not apply to occupational diseases. As to monetary benefits, the Industrial Commission may authorize up to $500. additional for occupational diseases if the worker's condition will be materially improved. Benefits for silicosis or asbestosis (up to $2,000.) are payable only if authorized by the Commission after determination that such care will materially improve the worker's condition.

Kansas: In extreme cases, the Commissioner may require the employer to furnish care for a longer period. In case of silicosis, such additional period is limited to 90 days.

Kentucky: The Board may order an additional $1,000. on application and showing of need.

Montana: In cases of total disability where the $2,500. is insufficient to meet all hospitalization expenses, additional benefits may be allowed.

New Mexico: Additional monetary benefits up to $15,000. (including the first $1,500.) may be authorized in cases of accidental injuries.

CHART IV continued -

South Dakota: The Industrial Commission may order an additional $1,000. for medical, surgical, and hospital service upon proof of necessity therefor.

Vermont: Maximum for silicosis and asbestosis set at $500. payable during a 3 year period.

Virginia: May be extended for 2 years, including the first 60 days.

West Virginia: An additional $800. may be authorized by the Commissioner with the approval of the employer. No medical benefits in case of silicosis.

B. States Providing Limited Benefits For Medical Care.

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2. "The Pneumoconiosis Problem", pg. 13, by Dr. Eugene P. Pendergrass, published by Charles C. Thomas, 1958. From an article by Dr. L. U. Gardner on the "Etiology of Pneumoconiosis" appearing in a Journal of the A.M.A., 111:1925-1936, 1938.

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4. Industrial Medicine and Hygiene, Vol. 3, page 6, 1956, E.R.A. Merewether, published by Butterworth and Co.

5. See Chart I.

6. U. S. Code Annotated, Title 33, Chapter 18.

7. Arizona, Colorado, Georgia, North Carolina, Tennessee, Texas, Vermont.

8. See Chart II.

9. Hines v. Norwalk Lock Co., 100 Conn. 533, 124 A. 17, 20; Lane v. Horn & Hardart Baking Co., 281 Pa. 329, 104 A., 615, 616, 13 A.L.R. 963; Hanson v. Dickinson, 188 Iowa, 728, 176 N.W. 823, 824.

10. In re Magelet, 228 Mass. 57, 116 N.E. 972, 973, L.R.A. 1918F, 864; Taylor v. Swift & Co., 114 Kan. 431, 219, p. 516, 519.

11. Indian Creek Coal & Mining Co. v. Calvert, 68 Ind. App. 474, 119 N.E. 519, 525.

12. See Chapter I "Pneumoconioses" by Dr. A. J. Lanza, published by Grune-Stratton Inc., 1962.

13. Compensation Laws of New York, Chapter 67, as amended, Article 3, §37.

14. Iowa, Code of 1958, as amended, §85A.4 Michigan, Compiled Laws of 1948, as amended to date, Part VII, 417.1, §1(a); Minnesota, Statutes of 1957, as amended to date, §176.66(1); North Carolina, General Statutes of 1943, Chapter 97, as amended, §97-54; Rhode Island, General Laws of 1956, as amended, §28-34-1(a).

15. Arizona, Rev. Statutes of 1956, Chapter 7, as amended to date, §23-11-1, Subsection 5.

16. Georgia Code, 1933, as amended, §114-802; Idaho Code, 1947, as amended to date, §72-1205; Montana General Statutes, as amended (Occupational Disease Act), §92-1303(5); Nevada Revised Statutes, 1956, §617.060; New Mexico Statutes Annotated, 1953, as amended, §59-11-4(a); South Carolina Code of Laws, 1952, §72-252; Title 35, Chapter 2, Utah Code Annotated, as amended, §35-2-12(a).

17. General Statutes of Kansas, as amended, §44-5a04.

18. Maryland, Article 101, Annotated Code, as amended, §67(15); South Dakota, Chapter 64.08, Title 64, Code 1939, as amended, §64.0804(b).

19. Alaska, California, Connecticut, Delaware, Hawaii, Louisiana, Massachusetts, Missouri, Nebraska, North Dakota, Ohio, Rhode Island, Virginia, Washington.

20. New Jersey, Rev. Statutes, 1937, Title 34, Chapter 15, 1940, Annotated Supplement, with amendments to date, §34:15-34.

21. The Pneumoconiosis Problem, By Eugene P. Pendergrass, M.D., Published by Charles C. Thomas, 1958, Page 13.

22. Alaska, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Indiana, Maryland, Massachusetts; Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Washington, Wisconsin.

23. Alabama, Arizona, Arkansas, Colorado, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Montana, Nevada, New Mexico, North Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia.

24. North Carolina, General Statutes of 1943, Chapter 97, as amended, §61.1-61.6; Minnesota General Statutes, 1957, as amended,

§176.662; Wisconsin, Statutes, 1957, as amended, §102.525(1)-(5).

25. Arizona, Colorado, Florida, Georgia, Idaho, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Montana, Nevada, New Hampshire, New York, Oklahoma, Pennsylvania, South Carolina, South Dakota, Vermont (None for employees who began employment in stone or mineral industry prior to January 1, 1959).

26. Alabama, Alaska, Arkansas (if 33-1/3% more), California, Connecticut, Delaware, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, Tennessee (permitted upon election of employer), Texas, Utah, Virginia, Washington, West Virginia, Wisconsin.

27. Chapter 816 of the Laws of New York, 1913, as amended and re-enacted by Chapter 41 of the Laws of 1914, constituting Chapter 67 of the Consolidated Laws as amended, Article 2, §15, Subdivision 8, Paragraph ee.

    Article 3, Section 39, provides "That compensation shall not be payable for partial disability due to silicosis or other dust disease".

28. Georgia, Louisiana, Nevada, Virginia.

29. Alaska, California, Connecticut, Delaware, Florida, Hawaii, Minnesota, Missouri, New Jersey, New Mexico, New York, Oregon, Utah, Washington, West Virginia, Wisconsin.

30. See revised Statutes, as amended, of the following States: Arkansas, §14-(5); Minnesota, §176.662; North Carolina, Chapter 97, as amended, §97.616; Ohio, §4123.57; South Dakota, Chapter 426, as amended, §64.0818; Texas, §8(e); Wisconsin Statutes, 1957, as amended, §102.525(1)-(5).

31. Wisconsin, Statutes, 1957, as amended, §102.525(1)-(5).

32. Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts.

33. Arkansas, Colorado, Georgia, Idaho, Indiana, Kansas, Minnesota, Nevada, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia.

34. Alabama, Alaska, Arizona, California, Delaware, Florida, Hawaii, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Utah, Washington, West Virginia, Wyoming.