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COMPENSATION FOR DISABILITY AND DEATH FROM THE PNEUMOCONIOSES - SOME COMMENTS

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We have just heard some interesting papers on the subject of compensation for disability and death from the pneumoconioses. It seems to me most appropriate that at this meeting the legal aspects of the problem should be discussed as well as the medical. The two are so closely interwoven. Certainly in trying to find the answer to important legal questions, further light on some purely medical problems would be most helpful. At the same time, the physician today plays so vital a part in the administration of workmen's compensation and the other legal phases of industrial health, that legal problems, which he must help answer, are of definite interest to him also. It is only at meetings such as this that an exchange of views can be provided to mutual advantage.

This close relationship has been made particularly evident by the speakers this afternoon. Mr. Waters has discussed the meaning of "disability." He has indicated the legal difficulties which the use of this term has presented. Its proper meaning has proved one of the more troublesome problems which we have had to face with respect to the dust diseases. Both legislatures and the courts have attempted to define it, seldom if ever with complete success. While its importance from a legal viewpoint is apparent, it has very definite medical connotations. Some laws definitely place upon Medical Boards or, as in New York, Committees of Expert Consultants, the burden of determining disability and in some instances the date on which it occurs. Medical witnesses likewise might well be presented with this question. Before being able to determine whether disability exists, it would seem necessary that the physician should know what it is the existence of which he must determine.

I may be wrong but it seems to me that a physician might naturally be inclined to take, what may be termed, a pathological approach to the problem. He may have a tendency to determine the existence of disability solely by reference to physiological or anatomic changes. It is interesting to me, therefore, to note that both Mr. Waters and Mr. Hilfinger have emphasized the economic aspects of this question, the existence of wage loss. They have stated, or at least implied, that mere evidence of lung changes should not be sufficient to entitle a person to compensation. There should, in addition, be a wage loss, that is anatomical changes sufficient to affect the ability to work and earn wages. In making any medical findings concerning the existence or non-existence of disability, it might be well if this phase of the problem were kept in mind.

At this point, however, we come upon the difficult problems that have so ably been discussed by Doctor Wright - the difficulty of trying to translate lung changes into an estimate of the loss in ability to perform work. At the two extremes, one, little or no lung changes, and at the other, a far advanced case, the answer may be clear. It is in the more common in-between stages where the difficulties are mainly presented, both medically and legally.

A physician might well say that he cannot be expected to know whether or not a wage loss exists. He can, however, in expressing any opinion on the question of disability, make it clear that he does not have reference to the economic aspects of the question. If a physician or a Medical Board states that there is disability, the Industrial Commission might well feel bound to follow this finding even though no wage loss exists as may be required by the definition of disability in force in that state.

Emphasis, however, should not be placed too heavily on any one of the factors entering into the concept of "disability." Wage loss may occur for reasons unconnected with health. This was particularly evident during the depression.

It was then, most of us will recall, that the "silicosis problem" was most acute. Wage loss alone, of course, should not entitle one to compensation if there is little, if any, evidence of fibrosis and no interference with the capacity to work. Because of the high level of employment today, attempts have been made, sometimes successfully, to collect compensation even though there was no loss in earnings. At the same time, if too much stress is placed on the requirement of wage loss, attempts may be made again to receive compensation where there is wage loss, but such loss is not due to any pulmonary dust disease. This would be particularly true if there should be a period of economic recession.

That this is not mere idle conjecture is evidenced by an occurrence only some three years ago in Michigan. A small foundry suspended operations. In a very short time about 60 claims were filed and more were expected. This constituted a high percentage of the total personnel. Fortunately, the foundry soon reopened and the situation satisfactorily adjusted itself. However, for a time serious concern was felt. A similar situation could occur elsewhere, possibly even on a larger scale.

Mention has been made of two factors in the determination of disability, (1) incapacity to work due to the disease, and (2) a resulting wage loss. The further question presents itself concerning the nature of the work in relationship to which incapacity must occur. Is it incapacity to do any kind of work? Is it incapacity to perform the work in the last occupation in which exposed to the hazards of the disease, or is it incapacity with respect to the last employment? These alternatives all have been used in various statutory definitions. There are some arguments for and against using any one of these alternatives. If one relates incapacity to any specific occupation, there is the possibility that compensation may have to be paid even though the employee earns higher wages in another occupation.

Cases of this type have occurred. At the same time, requiring that the employee be unable to do work of any kind may, if too strictly interpreted produces harsh results. Possibly the definition found in Illinois[1] may be found to be a preferable alternative. There, reference is made to the disability from earning full wages in the employment in which last exposed to the hazards of the disease or "equal wages in other suitable employment." Here again, however, we come to a matter of interpretation. The courts or the Industrial Commission will have to determine just what work can be considered suitable. A practical rather than strictly legalistic approach is necessary. Some similar language has produced strange results. In one state, for example, it has been held that any work unless similar to that performed at the time of injury was not "work of any reasonable character."[2]

The meaning of disability, while related, is distinct from the question whether compensation can or should be granted for partial disability from the dust diseases, often and perhaps more appropriately referred to as non-disabling silicosis or asbestosis. Mr. Hilfinger has marshaled the arguments against doing so. Mr. Waters has presented the main arguments both for and against. His mention of the system in West Virginia and several other states of paying a specific sum which relieves the employer of further liability is of considerable interest.

I believe that no one today can validly question the desirability of paying compensation to an individual actually incapacitated from working because of silicosis or asbestosis. What may be feared, however, is the unknown but very large potential liability, if compensation were payable for anatomic changes without apparent interference with the ability to work and without a causally connected wage loss. This possibility is not likely to manifest itself during periods of high

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1. Illinois "Workmen's Occupational Diseases Act," sec. 1(e), Illinois Revised Statutes (1951) Chapter 48, §172.36(e).

2. Ramatza v. Higgins Industries, Inc., La. (1944) 18 So. (2d) 202, aff'd 23 So. (2d) 45.

wages and employment but may well do so at a time when industry is least able to stand the cost.

The definition of disability is of importance also in another respect. Usually under workmen's compensation laws there are time limits within which claim must be made. These usually run from the date of disability. If disability is defined otherwise than with respect to actual incapacity to work, an employee may well find his claim barred when he presents it. Such a case actually occurred in Missouri but the court rejected the contention and held that actual incapacity to work was necessary.[3] However, in another case in the same state the court reached a different conclusion where it was a matter of computing average wages. The court in that case took the higher wage period even though it did not coincide with the date of actual incapacity to work.[4] Neither of these cases happens to involve dust diseases but the principle is the same.

There is another important aspect of non-disabling silicosis which should not be forgotten. That is the psychological effect on the employee himself. Once labeled a silicotic, once deemed entitled to compensation for this disease, it is most likely that one will have created an invalid well before an invalid actually exists. In fact, in one specific case an employee continued his regular work for 24 years after he first noticed symptoms of some ailment.[5] He had completed a full normal working lifetime of 49 years and did not make a claim until he had reached the age of 72. It seems to me most doubtful whether he, his employer or society, would have in any wise benefited if he had received his compensation some 24 years prior to that time probably ending his useful lifetime of work well prior to the age he actually did. While this case arose on a question of time limitations the facts seem to me most interesting.

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3. Smith v. Federated Metals Corp., Mo., (1939) 133 S.W. (2d) 1112.
4. Renfro v. Pittsburgh Plate Glass Co., Mo. (1939) 130 S.W. (2d) 165.
5. Consolidation Coal Co. v. Dugan, Md. (1951) 83 A. (2d) 863.

We have dealt at length on the question of disability. This subject is no doubt of great importance with respect to the dust diseases. Our topic this afternoon, however, is broader. It relates to compensation for the pneumoconioses generally. In this connection, I would like to comment on the tendency which has become manifest in some states in recent years, notably New York and New Jersey, to repeal special provisions and safeguards relating to such diseases. Of course some of these provisions were admittedly transitory in nature. One can mention, for example, the graduated scale of benefits or escalator clauses. Others, however, provided more permanent safeguards. These include provisions relating to partial disability, time limitations, exposure, etc. In New York, care was exercised to retain at least some of the major of these. In New Jersey a more drastic change was made. The full effects of this change we are yet to feel. Already some of the more difficult medical questions concerning estimates of disability have come up. It may be well to give careful consideration to all phases of the problem before too drastic legal surgery is performed. It should be noted that these provisions were inserted into the laws when the need for them became manifest. Satisfactory experience under the operation of a law should not be ground for change. Safeguards should not be discarded without carefully weighing the effect of such action during times of low as well as high employment.

If special provisions are to be retained, some thought should be given as to the scope of their application. I believe earlier this week some discussion was had as to the meaning of the word "pneumoconiosis." It might be well to give some thought to the conditions which should because of the nature of the disease come within these special provisions. If long exposure is usually necessary before disability manifests itself, if there is question as to the existence of partial disability, if the disability is due to some type of dust, should not the term dust disease be applicable? There have, for example, been a number of cases of

emphysema and other lung conditions in the Buffalo area allegedly due to exposure to grain dust. Should these provisions be applicable to cases of this type regardless of whether such condition can or cannot, strictly speaking, be labeled pneumoconiosis?

It is a great deal easier to ask questions with respect to the pneumoconioses than to answer them. There is need for wisdom and technical information before adequate solutions to many problems can be found. I cannot help thinking of a recent court decision. Here compensation was denied for failure to show exposure to silicon dioxide dust. There was only exposure to silica, the court said in effect. This error was readily remedied on rehearing.[6] Where legislation is concerned, remedy is more difficult. It must be based on sound principles founded on a firm factual background. The assistance of the medical profession is essential to this end.

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6. Orosco v. Pearch, Ariz., (1950) 218 Pac. (2d) 875, reversed on rehearing Oct. 9, 1950, 222 Pac. (2d) 805.