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VIEWPOINTS ON COMPENSATION FOR PULMONARY AND OTHER OCCUPATIONAL DISEASES

Chairman, Hon. Mary Donlon.

The functions and Value of Medical Boards and Medical Examiners in Controverted Compensation Cases

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Discussion

The Presentation of Medical Evidence in Controverted Compensation Cases

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Ivan Sabourin

Discussion

BY MR. WATERS:

Will you gentlemen please come into the room and be seated? Will you please come into the room and be seated.

Appropos of the story that I told at the dinner last evening, we shall now hear the whole story as it relates to the legal aspects of the problem of the pneumoconioses. We are indeed most fortunate in having with us this morning, Miss Mary Donlon, who is Chairman of the New York

State Workmen's Compensation Board. I think it is fair to say that she has achieved not only a national but an international reputation in the discharge of the duties that have been assigned to her in that particular office. She does not have an easy job. No administrator of compensation laws has an easy job. She is beset, harassed and perplexed by members of my profession, the legal fraternity, and with respect to our brothers of the medical profession, again, she has her troubles concerning herself with the evaluation of medical testimony in controverted cases which she must decide.

Fortunately, she is a lawyer and I think that the training that she has had in that field, with the experience that she has had as a practicing attorney, has been exceedingly helpful to her in the discharge of her duties. After a distinguished legal career which I am sure is still continuing, Governor Dewey called her to the office that she now occupies with such distinction and in that job, she has done an excellent service, to the public, to industry and when I speak of industry, I include both management and labor.

She will serve as Chairman of the meeting this morning and I trust and hope that she rules with - the meeting with an iron hand. She not only knows what she's talking about but she knows how to talk. It is my pleasure

to introduce her to you, Honorable Mary Donlon. (Appluase).

BY MISS DONLON:

Ted Waters, Doctor Vorwald and Members of the Symposium: As I recall it, it was five years ago on just such a beautiful September morning as this, that we last met here in Saranac for the Sixth Saranac Symposium, and here we are at the Seventh, and Saranac is doing its best for us in the matter of a very pleasant situation in which to meet.

However, there is one important difference that I have been talking with some of the participants on our panel, about, that this is one of those even numbered years that comes once every four years and I somehow do not feel complete freedom to devote my attention to the subject of preparation of a paper, that I felt in the year 1947, so you'll have to bear with me if, as Chairman, my paper is not quite as well put together as my good friend Ted Waters, has led you to believe that it might be.

For one thing, I don't think the Chairman ought to read papers, but it seems the rubs of this particular occasion are otherwise. I think a Chairman is to see that the discussions stick to their direction, the discussants stick to their topics and don't wander too far off and wind up in more than the amount of time that was given to them, and here I am setting a bad example probably, by violating

all my own rules.

However, I have done what was supposed to be done, and I'm going to talk to you about my viewpoint, since this morning's program is devoted to viewpoints on compensation for pulmonary and other occupational diseases.

My viewpoint as to Workmen's Compensation for pulmonary and other occupational diseases is, of course, the viewpoint of the administrator. As such, I am grateful for the opportunity of participating in this discussion today. In the past, the contribution of Workmen's Compensation administrators to discussions of the occupational diseases, outside of their own organizations, has been much too small, I think.

In part, this is the fault of the administrators, because they have usually been too busy handling the details of cases to have time also to record and organize their experience. The viewpoints of lawyers and doctors, as to compensating occupational diseases have, therefore, often received more consideration, and I think this is especially true during legislative committee hearings, than have the viewpoints of administrators.

I shall, then, present my viewpoint in the light of the historical development of occupational disease coverage in the United States.

At the start of our natural developments in this

field, many looked upon occupational disease coverage and especially the full or general coverage of such diseases as a leap in the dark. The atmosphere in which discussion to ok place seemed to be that of fear, probably born of ignorance. Experts brought forth a portfolio of presedents from the experience of foreign countries and presented this material with an air of overwhelming erudition. Stunned audiences were convinced that the most complicated and restrictive schemes, so impressively described to them, embodied the last word of the world's existing wisdom upon the subject of occupational disease compensation.

It so happened that, in this country, schedules -- often those double-column schedules that you're familiar with -- were imported from abroad. It seemed irrelevant to know that the diseases listed in the schedules often were not prevalent in the particular state which, however, might be afflicted with cancers that were not mentioned at all in the schedules. It was sort of like buying a hat from Paris just because it was a hat from Paris and regardless of whether or not it suited the wearer's face.

It happened, however, that at this time, in one or two states, perhaps more, where the original injury coverage provisions had been left broad and simple, omitting the restrictive word 'accident', the courts held that the word 'injury' included occupational disease. Such states,

therefore, started almost by accident with the same compensation coverage of occupational diseases as of accidental injuries. Other states observed the result and some of them liked it.

The prevailing pattern in this country now, I think it is safe to say, is full or general coverage of occupational diseases, and in this respect, certainly America leads the world. With almost every session of the state legislatures, the column of the states with schadule or restricted coverage of occupational disease, shrinks while at the same time, the columns showing a list of full coverage states, lengthens.

In every stream, of course, there are main currents and counter-currents. Alarm as to compensation coverage for silicosis flared up during the depression that followed 1929, and this alarm started a tidal wave of restrictive bill-drafting in part, applicable to the dust diseases. In consequence, in consequence, many of the state compensation laws are now cluttered with restrictive and discriminatory provisions applicable either to occupational diseases in general or peculiar to the dust diseases.

Silicosis compensation sometimes is more a phenomenon of unemployment than a physical disability, and I think that's important for us to remember. Large scale unemployment of foundry men and miners brought on the silicosis

compensation scare during the 1930's. Men out of jobs turned to Workmen's Compensation as the last recourse from starvation. Some of these men received permanent total disability awards.

After the war boom in the early 40's, this created an almost insatiable demand for workers and cancelled the customary swing to compensation. Many men who had received permanent home disability awards returned to jobs at wages higher than they could earn before. You can not think straight as to workmen's compensation for partial disability from silicosis unless you remember that hiring practices made this issue a hot-spot in a good many places.

It has been noted that as to occupational disease coverage, some of the states started by copying a form pattern of schedule coverage. Other states developed a native or American pattern of full coverage, which is now the prevailing pattern in the states.

The trend toward simple and comprehensive coverage was, however, complicated by the economic counter currents flowing from the silicosis alarm during the 1930's. Some confusion has, of course, been created by these counter currents. The orderly and normal process of occupational disease coverage toward understandable and simple long administration was definitely interrupted.

To clarify our thinking further comment on the

historical background seems indicated. The history of occupational disease coverage in the states, even when that history is written, might almost be entitled "The Conquest of Fear". The first episodes have to do with fear of the monetary cost to industry, so that early pre-occupation was with the need for protecting industry from being ruined by supposedly unbearable costs.

The legislatures were told that looks - that loose practice on the part of administrators in compensating alleged occupational diseases would turn workmen's compensation into health insurance. Rare or exceptional instances in which questionable awards have been made, were seized upon, publicly - they were publicized and magnified out of proportion to their real significance.

Calm and well-informed discussion of the problem was sometimes impossible, bedause the opinions of many had been formed by vivid impressions of compensational cases rather than by statistical compilations from considerable aggregates of experience.

The cost estimates, not anchored to aggregates of mature experience, were sometimes fantastic. The product - the production of a statistical average is often the best, if not the only, cure for distorted thinking, both as to performance and cost.

In 1935, the private insurance carriers would not

provide coverage in New York State for silicosis. Insurance could be obtained only from the State Insurance Fund. The Fund set its insurance rates high and held its breath waiting for the case. It was soon discovered that the insurance risk had been exaggerated.

Mr. Muller, then Executive Director of the Fund, said and has been quoted as saying: "We were afraid of a wolf that was not there". Of course, in the absence of a dependable statistical basis for cases, insurance actuaries do feel compelled to make full size cost estimates. That is their business responsibility. When the actuaries had done their work, the lawyers were then called upon to draft legal restrictions and limitations upon compensation provided.

The resulting patterns of occupational disease legislation in some of the states can best be described as barbed wire entanglements. Fantastic restrictions were put on the way of compensability, especially as to silicosis, and sometimes benefits for occupational disease were put on a lower level than for accidental injuries, either as to cash payments or medical care or both.

The laws insome states are still cluttered with these discriminatory details that are hard to get rid of. Such harrassing restrictions are a liability to insurance carriers, and employers, because they arouse hostility in the

ranks of labor, the consequences of which are all out of proportion to the pinch-penny savings effected by the restrictive p ovisions.

This is beginning to be apparent in the conflict as to compensability of partial disability from silicosis. Such things keep workmen's compensation laws in politics and they should be above political considerations.

In New York and also in some of the states where the law administrations are, as we like to think, well advanced, the second stage of thinking about occupational disease and especially silicosis, coverage, has now been reached.

This second stage of thinking on the mubject of occupational disease coverage is marked by the pre-occupation with an effort to deal justly and without discrimination with all the victims of occupational diseases. The question arises, can we do this, and if so, how. It becomes necessary, therefore, to try to see the problem in human terms.

When occupational disease problems are seen in human terms, appropriate action may be expected. Some of the difficulties of coverage may be obscure, because the flood light of research has not yet been turned upon them. On the other hand, some of the remaining tasks for legislatures can be approached through demonstration, and because I'm taking a little more time, I'm going to skip a demonstra-

tion that I was going to give you by way of illustration, and get on with my paper.

One of the most perplexing of the still unsolved problems in many states, that of compensating partial disability from silicosis. That is certainly the case here in New York. There is a dirth of information based upon comprehensive administrative research.

Two hypotheses are encountered. One is that there is no such thing as partial disability from silicosis. Another is that the administrative problem of handling partial disability is insuperable.

In the face of such conflicting opinions, information is needed as to what happens to the victims of silicosis before they reach the stage of total disability from work. We know that in the quarries of Vermont, and Massachusetts, there are men who have worked in stone all their lives, who are getting along with the vital capacity of their lungs reduced to a fraction of normal capacity. If you do not rush them, they can do a day's work. However, they have no reserves, but their disability is not reflected in their earning capacity, because their skill and experience offsets satisfactorily to the employer, their lack of physical speed. These men usually have a strong sense of family responsibility, and with greater determination, they go on with their accustomed work, often with undiminished

earnings.

Those who base their generalizations upon this segment of experience, may argue that there is no such thing as partial disability from silicosis, so far as workmen's compensation laws are concerned, because there is no wage loss attributable to such disability.

This contention, of course, comes more easily from a person who does not himself have silicosis, than from those who have to struggle for breath. In short, one segment of experience as to silicosis is commonly disposed of in workmen's compensation administration by the contention that there is no such thing as industrial disability, partial in degree, from uncomplicated silicosis. On the other hand, some spokesmen for organized labor insist that the prevailing practice of not compensating partial disability for silicosis is unjust, and some of them are becoming somewhat militant in respect to their grievance.

While some states do not provide compensation for partial disability for silicosis, some jurisdictions have had considerable experience with taking care of such cases in one way or another. The main needs seem to be for maintenance, with or without medical aid, and for rehabilitation and for jobs.

Under varying types of law, the maintenance payments may be on the basis of wage loss when the worker has

to change to work that is less exacting physically, or there may be payment based upon estimated degrees of nodulation, for rehabilitation, provision may be with or without a special award to cover the roughly estimated cost to the worker of changing -- pardon me -- from one kind of employment to another.

These varying provisions can, of course, either be used well or abused. The rehabilitation type of provision for the silicotic, at first glance, looks ideal, especially if the attempted change of employment is accompanied by a lump sum payment. However, it should be remembered that in Wisconsin, the provision for a hardship payment is used by the administration to discourage employers from discharging their workers when an X-ray shows nodulation.

Some types of rehabilitation provisions can be used primarily to close out the employers' future liability rather than improve the health and status of the worker, which is the true purpose of rehabilitation. If there is an allergy, certainly an effort should be made to arrange a satisfactory change of employment. However, the circumstance that a worker gets a new job does not necessarily mean that he will either keep it or be able to get in continuous employment at other jobs.

When the shop housekeeping has been cleaned upand the dust removed from the air, it seems preferable not to

interrupt the accustomed employment of a worker who has silicosis, because in many areas when he has been thrown on the employment market, it is very hard for him to get another job; in part, because of the way some compensation provisions are written in some states, employers will not hire a man who has an unfavorable chest X-ray. Faulty compensation bill drafting, together with the present hiring practices, shunt too many truly employable persons toward the permanent total disability classification, or toward the public welfare rolls.

So far as New York is concerned, compensation for partial disability from silicosis is still a problem for the legislature. If compensation is provided by law for this category of disability, the New York Workmen's Compensation Board, of course, will face another disability rating problem.

At this point, it should be set forth that, in compensating occupational disease cases, administration is hampered by the lack of early and correct diagnosis of disease. Inexpert diagnosis and the lack of wide experience with industrial processes sometimes gives a false start in the investigation of cases. Without competent and prompt diagnosis, maximum benefits do not flow for treatment.

At present, so far as the Workmen's Compensation authority is concerned, the two stages of handling occupational

disease cases are almost completely separated. The first stage is diagnosis and treatment. The second stage, is disability rating and adjudication.

In many states today, there is a hue and cry about the high cost of workmen's compensation. Of course, the public should be concerned about all excessive costs. However, in discussions of the cost of workmen's compensation, the public is frequently misled into supposing that the legal benefit rates are too high or that the workmen's compensation administration is excessively liberal in its interpretations and awards. A properly worded statement might that - be that probably in all states, the workmen's compensation costs are too high in relation to what is delivered in payments and services.

What the public has not been told and does not now understand is that the major source of unnecessary loss is not the administrative processing of claims, which, of course, is not perfect, but rather faulty diagnosis and treatment. At the present stage of administrative development in the states, the workmen's compensation authority often has the sad task when settling or adjudicating both disease and accidental injury cases, of mopping up the results of prolonged unsatisfactory medical care. How much longer this situation will be tolerated, especially bh the more advanced administrations, remains to be seen.

I have mentioned too the historical stages of development of occupational disease coverage in the states. In the first, the main pre-occupation was that of shielding industry from allegedly unbearable costs. The second, the main pre-occupation was on compensating without discrimination all victims of occupational disease.

We are now in a third stage of historical development of workmen's compensation, with emphasis upon prompt and complete restoration of injured workers to theirfullest work capacity. Because of an obsession with the legal problems, many of them excessively technical, we have been late waking up to the possibilities for reducing both human losses and monetary costs in the field of workmen's compensation, both through obtaining the right type of specialized medical care and by supplementary team work in medical care, what you and I call rehabilitation.

The advent of this new stage of development calls for an integration of the supervision of medical care which, of course, eventuates in disability rating and adjudication. At the present time, administration deals chiefly with what is really only a fragment of the total medical problem. A report by the late Doctor Howard M. Prince of medical examining facilities of the New York State Workmen's Compensation Board several years ago, contains this statement: The Chief Medical Examiner should institute an integrated medical

program for workmen's compensation. Such a thing has not yet been done in any state. This failure is responsible, in my opinion, not alone for huge monetary losses, but also for tragic and unnecessary human loss.

As you know, the monetary cost of workmen's compensation arises from and is augmented or diminished by the extent of human loss. We worry about monetary loss. Perhaps we ought to worry more about it, but our paramount concern should be with the human loss. If we reduce the human loss, the monetary loss will dwindle as well.

Our effort in New York is to protect injuried workers in - to the fullest possible extent. The program of prevention, the programs of prevention and restoration are fully developed. The cost of adequate payments and services for injured workers should not be oppressive to industry. At present, the program of prompt and full restoration of injured workers in New York and elsewhere, is the most undeveloped segment of workmen's compensation administration.

The resulting loss, both in human and monetary terms, may well be appalling. We shall study how best we can serve the injured worker and the new light upon the task will confidently come upon the cooperation of our people in perfecting the New York Courts' performance so far as may be humanly possible. (Applause).

Due to the festivities of last evening, We've got